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Larry R. Soward, *Commissioner*  
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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2008 AUG -4 PM 4: 22

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

CHIEF CLERKS OFFICE

August 4, 2008

LaDonna Castañuela  
Office of Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Flagship Hotel v. City of Galveston; SOAH Docket No. 582-07-3473;  
TCEQ Docket No. 2007-0879-UCR

Dear Ms. Castañuela:

Enclosed please find the Executive Director's Brief on the Certified Question. Should you have any questions or concerns, please do not hesitate to contact me at (512) 239-0750.

Sincerely,

A handwritten signature in black ink, appearing to read "B MacLeod".

Brian MacLeod  
Staff Attorney  
Environmental Law Division

Enclosure

cc: Mailing list



SOAH Docket No. 582-07-3473  
TCEQ Docket No. 2007-0879-UCR

2008 AUG -4 PM 4: 22

PETITION OF THE FLAGSHIP HOTEL,  
LTD., TO REVIEW CITY OF  
GALVESTON'S DENIAL OF A REQUEST  
TO REFUND PAST DUE WATER BILLS

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BEFORE THE TEXAS COMMISSION  
ON

CHIEF CLERKS OFFICE

ENVIRONMENTAL QUALITY

**THE EXECUTIVE DIRECTOR'S BRIEF ON THE CERTIFIED QUESTION**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality (TCEQ) and files The Executive Director's Brief on the Certified Question. Specifically, the ALJ certified and the Commission accepted the following question:

Whether the Commission, pursuant to § 13.042(d) has exclusive appellate jurisdiction to review orders of a governing municipality, including those orders pertaining to the municipality's own water and sewer customers.

**I. Overview**

This case is extremely important because of incorrect appellate court decisions that attempt to give to the TCEQ jurisdiction it does not have. Two ALJs and the Commission have all stated that the appellate court decisions are wrong and that the Commission need not follow them. Still, in this case, the ALJ has asked the Commission to revisit the decision of the two ALJs and the Commission itself. The ED believes that the Commission has already spoken on the issue and that ultimately the case should be dismissed for lack of jurisdiction. After briefing the ALJ on the previous Commission decision<sup>1</sup> and the two ALJs PFDs<sup>2</sup>, the ALJ in this case requested that the question be certified rather than dismissing the case.

The key to understanding why the Commission and two ALJs have found these appellate decision to be wrong is simple, regardless of the hundreds of pages of briefing this case has engendered. That key is the definition of water and sewer utilities found in section 13.002(23) of the Texas Water Code. That statute provides the definition as follows:

"Water and sewer utility," "public utility," or "utility" means any person, corporation, cooperative corporation, affected county, or any combination of

<sup>1</sup> Attached as exhibit 4

<sup>2</sup> Attached as exhibits 3 and 7



these persons or entities, **other than a municipal corporation**, water supply or sewer service corporation, **or a political subdivision of the state....**”

Based primarily on the appellate courts’ failure to apply the definition, the TCEQ has already held that it will not follow those cases in the *Victoria Palms Resort v. City of Donna* case<sup>3</sup>. In *Victoria Palms*, ALJ William Newchurch specifically stated in his PFD that the Commission is not bound by the *Flagship Texas v. Galveston* case that incorrectly held the TCEQ had exclusive appellate jurisdiction over rate decisions made by a city for customers of a municipally-owned utility who reside inside the City. The Commission unanimously adopted the PFD. The case at bar is the very case that the Commission stated it did not need to follow. Therefore, the ED believes that if the Commission accepts the certified question, the answer should read as follows:

Section 13.042(d) of the Texas Water Code has no application to appeals from rate decisions made by municipalities regarding municipally-owned utilities. Section 13.042(d) specifically limits itself to “those municipalities” identified in 13.042. In 13.042(a) “those municipalities” are described as follows: “the governing body of each municipality has exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within its corporate limits.” Because municipally-owned utilities are specifically excluded from the definition of “water and sewer utility,” 13.042(d) has no application to municipally-owned utilities. Therefore, the Commission has no appellate jurisdiction over appeals made by customers who reside within a municipality’s boundaries of rate decisions pertaining to a municipally-owned utility.”

## **II. Detailed Discussion**

Before the forest is obscured by the trees, the Executive Director (ED) wants to make it abundantly clear that the TCEQ does not have jurisdiction over the rates set by a municipally owned utility for customers within its city limits. Attached as Exhibit 1 is a copy of the TCEQ Regulatory Guidance Document entitled “TCEQ Jurisdiction over Utility Rates and Service Policies.” The very first page of this Regulatory Guidance Document has a chart which illustrates the various jurisdictional powers of the TCEQ. The very first line of that chart shows

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<sup>3</sup> See Exhibit 4



that the TCEQ has no original or appellate jurisdiction over a municipally owned utility for customers inside the city limits.<sup>4</sup>

The source of the appellate error discussed above flows from a failure to consider the definitions section to the statute these courts claim gives the TCEQ jurisdiction. In particular, the court in *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422 (Tex. App.—Houston [1st Dist.] 2002), (hereinafter *Flagship I*)<sup>5</sup> planted the seed of this jurisdictional misconception when it turned to section 13.042 of the Texas Water Code as the controlling statute in this matter. Specifically, the court emphasized the following statutory language as controlling: “[T]he governing body of each municipality has exclusive original jurisdiction over all water and sewer utility rates, operations, and services. . . . The commission shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in this chapter.”<sup>6</sup> The key phrase whose definition the Court of Appeals ignored is “water and sewer utility.” Section 13.002(23) defines “water and sewer utility” as “any person, corporation, cooperative corporation, affected county, or any combination of these persons and entities, ***other than a municipal corporation***, water supply or sewer service corporation, or a political subdivision of the state.”<sup>7</sup> In his proposal for decision (PFD) for *Victoria Palms Resort, Inc., vs. City of Donna*, Judge William Newchurch explains clearly and concisely that the section of law that the appellate court relied on concerns the jurisdiction over entities other than the city itself that operate within the city limits.<sup>8</sup>

The only arguments the ALJ and the City of Galveston put forth for refusing to follow the plain words of the statute, the policy underlying the statute, two PFDs, and one Commission order is that we must follow what the appellate courts say. Neither discuss the reasoning of the decision. Neither address the plain words of the definition. Unfortunately, this easy but unreasoned approach to deciding cases that effect the long-standing Commission policy and millions of citizens living in dozens of cities across the state has been utilized by other appellate

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<sup>4</sup> The Texas Supreme Court has held that an agency’s interpretation of a statute it is charged with enforcing is to be given great weight. *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998) (citing *State v. Pub. Util. Comm’n*, 883 S.W.2d 190, 196 (Tex. 1994); *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994)).

<sup>5</sup> Attached as Exhibit 2

<sup>6</sup> *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422, 426 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

<sup>7</sup> TEXAS WATER CODE ANN. § 13.002(23) (Vernon 2000 & Supp. 2006) (emphasis added).

<sup>8</sup> Judge Newchurch’s PFD is attached hereto as Exhibit 3, and the Order of the Commission based on that PFD is attached as Exhibit 4.



courts, which gives momentum to a decision that is clearly wrong. Nowhere does the ALJ or the City explain how the plain definition of “water and sewer utilities” can be ignored<sup>9</sup>, or how the plain words of the statute outlining the Commission’s appellate jurisdiction that state that the Commission has NO appellate jurisdiction over rates set by a city-owned retail public utility unless the appealing ratepayers reside outside the city<sup>10</sup>.

Instead, they offer as analysis that is not necessary to look to the words of the statute or long standing agency practice, but use the idea that if appellate courts have told us something, that we should not discuss the statute and policies underlying it and simply follow the appellate court’s mistake without really ever looking at it. Additionally, they seem to argue that the fact that more and more appellate courts are parroting the mistake gives even more reason to follow that mistake. The ED does not agree with this approach, but instead believes that the fact that more appellate courts are following this mistake makes it even more important that the Commission take a stand to end compounding this inaccurate and policy-undermining trend. To do otherwise would be to get in line with those authorities that have ignored the words of the statute and the policies that underlie it.

### **III. Discussion of the ALJ’s legal analysis**

The ALJ in this case disagrees with the analysis that ALJ Newchurch used in his PFD that the Commission adopted. In the request the ALJ lays out the law showing the core of why 13.042(d) does not apply to municipally owned utilities: municipally owned utilities are excluded from the definition of water and sewer utilities. However, the ALJ then finds that the clear wording of the statute should be ignored because one Court of Appeals did so and then several others followed the same mistake. No matter how many times a mistake is made, the mistake is not transformed into being correct by repetition.

While the Commission is to give deference to courts, it is only bound to follow decisions of courts that have direct jurisdiction over it, and its first duty is to implement the statutes passed by the legislature. When a statute and the policy framework in the statutory scheme are clear, the Commission has a duty to protect the legislature’s intent and that policy framework. The

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<sup>9</sup> Texas Water Code § 13.002(23)

<sup>10</sup> Texas Water Code § 13.043(a) and (b)



framework collapses if section 13.042(d) is found to give the Commission exclusive appellate jurisdiction over rate decisions concerning municipally owned utilities and customers who reside within the municipality. While section 13.043 of the Water Code (which specifically states that it does not apply to in-city customers of municipally owned utilities) lays out the threshold for appeals by customers (10%) and time limits for such appeals (90 days from the effective date), there is no such framework laid out in section 13.042. The result is that one customer of a city owned utility could bring a rate appeal from any city decision on rates at any time. The resulting chaos would not serve the public very well and would overwhelm the Commission as well as cities throughout the state. Nearly every city will have at least one person who is unhappy about a rate increase.

The ALJ asserts that the Commission must follow appellate decisions of any court in the state because that is the “rule of law.” If such were true, that “rule of law” would also apply to different Courts of Appeals. No Court of Appeals could ever disagree with another Court of Appeals, because, even though the Supreme Court has not spoken on the issue, once an appellate court has spoken, the rule of law is established for all to follow regardless of whether that entity is within that supreme judicial district’s jurisdiction. Article 5 Section 6 of the Texas Constitution provides that a “Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts....” The TCEQ is within the district of the Austin Court of Appeals and section 2001.176 of the Government Code also places a jurisdictional, mandatory requirement that appeals from administrative orders be held in Travis County. Therefore, the fact that the Austin Court of Appeals and the Texas Supreme Court have not ruled on the issue of this case is of moment. It means that the only courts that can have direct jurisdiction over the TCEQ have not ruled on the issue. Therefore, the TCEQ is not inescapably bound by any previous court decisions on the case.

The application of the rule of *stare decisis* to the TCEQ that the ALJ suggests would not be consistent with the basis underlying all appellate court decisions and, most basically, what courts are supposed to do when determining controversies over legal disputes. Specifically, courts (and the Commission) should do their best to apply the law as the legislature meant it to be applied. As a corollary to Justice Holmes famous observation that the constitution is not a



suicide pact, the Texas Court of Criminal Appeals has explained the limits of *stare decisis* as follows:

We follow the doctrine of *stare decisis* to promote judicial efficiency and consistency, encourage reliance on judicial decisions, and contribute to the integrity of the judicial process.<sup>12</sup> But if we conclude that one of our previous decisions was poorly reasoned or is unworkable, we do not achieve these goals by continuing to follow it.<sup>13</sup>

*Paulson v. State*, 28 S.W.3d 570, 571-72 (Tex. Crim. App. 2000).

Justice Clinton, in his dissent to another Court of Criminal Appeals case explains this reasoning with panache by stringing together the following quotations:

"But **stare decisis** is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . ."

Helvering v. Hallock, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444 (1940).

"The principle of **stare decisis** does not demand that we follow precedents which shipwreck justice."

Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A.2d 193, 205 (Pa. 1965).<sup>1</sup>

#### FOOTNOTES

<sup>1</sup> The full metaphoric passage crafted by Justice Musmanno for the Pennsylvania Supreme Court reads:

"**Stare Decisis** channels the law. It erects lighthouses and flies the signals of safety. The ship of jurisprudence must follow that well-defined channel which over the years, has been proved to be secure and trustworthy. But it would not comport with wisdom to insist that, should shoals rise in a heretofore safe course and rocks emerge to encumber the passage, the ship should nonetheless



pursue the original course, merely because it presented no hazard in the past. The principle of **stare decisis** does not demand that we follow precedents which shipwreck justice."

Id., 208 A.2d at 205. Later, changing the metaphor, he added:

"There is nothing in the records of the courts, the biographies of great jurists, or the writings of eminent legal authorities which offers the slightest encouragement to the notion that time petrifies into unchanging jurisprudence a palpable fallacy. As years can give no sturdiness to a decayed tree, so the passing of decades can add no convincing flavor to the withered apple of sophistry clinging to the limb of demonstrated wrong."

Id., 208 A.2d at 206. (All emphasis throughout is mine unless otherwise noted.)

*Ex Parte Bower*, 823 S.W.2d 284, 288 (Tex. Crim. App. 1991)(Clinton, J., dissenting)

Legal encyclopedias have documented this nationwide policy. Corpus Juris Secundum provides in section 139 of its *Courts* Section (found in Volume 21) that "[i]n the absence of a decision by a court whose judgment is authoritative on a court trying a case, a judge must exercise his best judgment on legal questions submitted to him in accordance with his own views, although other courts have reached a contrary decision."<sup>11</sup> Section 146 of C.J.S. also provides interesting analysis. "Previous decisions should not be followed to the extent that grievous wrong may result; and, accordingly, the courts will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous."<sup>12</sup>

Judge Newchurch on page 13 of his PFD cited the case of *General American Life Ins. v. Rios* and wrote, "If a court of appeals reexamines a question decided by another court of appeals

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<sup>11</sup> 21 C.J.S. Courts § 139 (1990) Previous decisions as controlling or as precedent – General Rules

<sup>12</sup> 21 C.J.S. Courts § 146 (1990) Rule Not Applied to Perpetuate Error



and disagrees with that decision, the second court of appeals' duty is to announce its disagreement with the prior decision by the other court."

The doctrine of *stare decisis* is based on the concept that citizens should be able to rely on prior decisions made by adjudicatory bodies and expect them to be consistent. Because the TCEQ has already decided that it will not follow the erroneous Court of Appeals decisions, citizens should be able to rely on consistency when applications are taken to the Commission. Therefore, if the principles of *stare decisis* are applied, the Commission should take action consistent with its earlier decision.

The ALJ also states that, while exclusive jurisdiction for appeals from the TCEQ is in the District Courts of Travis County, that it is possible that the Supreme Court could transfer a TCEQ case from the Austin Court of Appeals under the authority found in section 73 of the Government Code. This argument would have application if a case had been decided by a Court of Appeals that had a TCEQ case transferred to it. Since this has not happened, there is no authority from a court that has jurisdiction of TCEQ appeals on the issue. Furthermore, if the ALJ is suggesting that the fact that a case could be transferred from one Court of Appeals to another means that all Court of Appeals decision should be binding on all other Courts of Appeals, then Courts of Appeals could never make contrary decisions. Such is not the case.

Additionally, the transfer of cases between Courts of Appeals is to promote judicial efficiency and help Courts with overloaded dockets.<sup>13</sup> The purpose is not to create a new *stare decisis* policy for Texas.

The transfers that occur under section 73 of the Government Code have created interesting academic arguments regarding what law the receiving court should apply, what occurs on remand, and more. Should the receiving court follow its precedent or the precedent of the transferring court? Furthermore, on remand, should the district court follow the law as pronounced by the receiving court, or should it follow the law as pronounced by the transferring court, which is the court that the district court normally is bound by? If further appeal is taken in the same case and the further appeal is not transferred, is an appellate court bound by previous decisions of a receiving court even if the transferring court has a precedent disagreeing with the holding of the receiving court?

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<sup>13</sup> Attached as Exhibit 5



The consensus seems to be that the law belongs to no intermediate appellate court and that each authority has a duty to apply and interpret the law using its best analysis of how the law ought to be interpreted and applied. Wisely, the courts have determined that common sense should trump arcane discussions of *stare decisis*. Below is a short discussion of how the courts have dealt with the collision of *stare decisis* and docket equalizing transfers.

The Texas Supreme Court is charged with the administration of the courts of appeals.<sup>14</sup> In administering the courts of appeals, the Supreme Court has transferred cases on appeal to appellate districts throughout the state to equalize the dockets between the appellate courts.<sup>15</sup> When a case on appeal has been transferred from one appellate district to another, the receiving appellate district has full jurisdiction as if the case had originated from its own district and county courts.<sup>16</sup> The powers of a receiving appellate court over transferred cases are explicitly outlined by statute.<sup>17</sup>

When appellate courts receive cases transferred to them, those courts are charged to apply the laws of Texas as promulgated by the Legislature.<sup>18</sup> Receiving appellate courts should not be concerned with its own *stare decisis* or even that of its sister-courts.<sup>19</sup> The exercise of appellate power throughout the state has resulted in splits of authority interpreting how certain laws are to be applied among the courts.<sup>20</sup> Splits of authority among the appellate courts are resolvable only by the Supreme Court.<sup>21</sup> Where the Court has denied review of a case on appeal, the appellate decision is binding on the parties and the case will remain precedent within the appellate court's

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<sup>14</sup> Tex. Const. Art. V, § 6 (a) (stating the appellate courts have jurisdiction over the courts within their jurisdiction and as provided by law); see Bond v. Carter, 96 Tex. 359, 359 (Tex. 1903); Tex. Gov't Code Ann. § 73.001 (Vernon 2007) (stating the Supreme Court may order the transfer of cases from one appellate district to another); Kim v. State, 181 S.W.3d 448, 449 (Tex. App. Waco 2005) (holding that appellants cannot seek to transfer their cases to other appellate districts, only the Supreme Court can transfer cases).

<sup>15</sup> Tex. Gov't Code Ann. § 73.001 (Vernon 2007); Miles v. Ford Motor Co., 914 S.W.2d 135, 137-38 (Tex. 1995) (stating that good cause does not limit the Court's authority to transfer cases and that it typically transfers cases to equalize the dockets); Willis v. North Dallas Bank & Trust Co., 552 S.W.2d 518, 519 (Tex. Civ. App. Dallas 1977, no writ) (finding the Supreme Court has the authority to can transfer cases on appeal from one appellate court to another when in the discretion of the court there is good cause).

<sup>16</sup> Tex. Gov't Code § 73.002 (a) (stating the appellate court that receives a transferred case has jurisdiction without regard to the district where the case is returnable on appeal);

<sup>17</sup> In re Davis, 87 S.W.3d 794, 794 (Tex. App. Texarkana 2002, no pet.) quoting Tex. Gov't Code § 73.002 (b) which states that receiving appellate courts shall deliver, enter and render the opinions, decisions, and orders.

<sup>18</sup> American Nat'l Ins. Co. v. IBM, 933 S.W.2d 685, 688 (Tex. App. San Antonio 1996, writ denied).

<sup>19</sup> American Nat'l Ins. Co. v. IBM, 933 S.W.2d at 688.)

<sup>20</sup> American Nat'l Ins. Co. v. IBM, 933 S.W.2d at 688.); Tex. Gov't Code Ann. § 22.001 (a) (2) (6) (Vernon 2007).

<sup>21</sup> *Id.*



district.<sup>22</sup> By denying review of an appellate case, the Court may elect not to resolve splits of authority among the Courts of Appeals, if any exist. It is critical to note that denial of review of an appellate opinion by the Court does not indicate that the appellate court has correctly declared the law in all aspects of the case which has been denied for review.<sup>23</sup>

Regardless of whether the Court has resolved a split of authority between several sister appellate courts, receiving appellate court decisions containing valid orders and opinions on remand to district courts should be fully complied with just as if the appellate district in which the district court is situated had heard the appeal.<sup>24</sup> This is called the law of the case doctrine, and both district courts and appellate courts (who originally had its case transferred) are bound by the law of the case decided by the receiving appellate court.<sup>25</sup> Appeals subsequent to the disposition by the receiving appellate court should be made to the appellate court in which the district court sits, and are governed in the framework of the law of the case.<sup>26</sup> In short, the law of the case always applies, except in limited circumstances.<sup>27</sup> However, as will be shown below, the law of the case is inapplicable to the case at bar.

Therefore, if the Commission is to follow the principles of *stare decisis* and apply them to this case it should follow its own precedent from *Victoria Palms* to allow parties to rely on their previous decisions. Furthermore, the Commission should interpret the law as it believes it should be interpreted, even if such application doesn't follow appellate court decision, when such decisions are clearly wrong. The only limiting factor would be the law of the case, which is inapplicable to the present situation as will be explained below.

The ALJ also implies on page 10 of the PFD that the fact that the Supreme Court denied further appeal would add force to the value of the case as precedent. The ALJ correctly states that the law of the case is inapplicable because the Commission was not a party to the prior case

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<sup>22</sup> *Id.*; Tex. R. App. P. § 56.1 (b) (1) (stating that where the Court decides the petition contains no reviewable error that requires reversal or the issue is greatly important to the jurisprudence of the state, the Court will deny or dismissed a petition).

<sup>23</sup> Tex. R. App. P. § 56.1 (b) (1).

<sup>24</sup> *In re Davis*, 87 S.W.3d at 794. (where appellate court held it did not have jurisdiction to issue a writ of mandamus effective in another appellate jurisdiction finding the powers of appellate courts are explicitly defined by statute).

<sup>25</sup> *Barrows v. Ezer*, 624 S.W.2d 613, 616 (Tex. Civ. App. Houston 14th Dist. 1981, no writ).

<sup>26</sup> *Barrows v. Ezer*, 624 S.W.2d 613 at 616. (holding the law of the case applies to the case on retrial and on subsequent appeal); *Smith v. City Nat'l Bank of Wichita Falls*, 132 S.W. 527, 528 (Tex. Civ. App.—Texarkana 1910, no writ) (holding the jurisdiction that was transferred is the power to hear only the issues transferred, not subsequent issues).

<sup>27</sup> *Connecticut General Life Insurance Co. v. Bryson*, 219 S.W.2d 799, 799 (Tex. 1949) (the law of the case will not apply where the decision on former appeal was clearly erroneous);



(additionally, the case was not decided by the highest court in the state). However, the ALJ is incorrect in stating that denying the writ adds to the power of the precedent to the incorrectly decided cases. The Texas Supreme Court has addressed the value such a denial in 2006. The Court wrote:

The 'law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *Hudson*, 711 S.W.2d at 630. [\*\*6] We have held that declining to review a case is not evidence that the Court agrees with the law as decided by the court of appeals. See *Trevino v. Turcotte*, 564 S.W.2d 682, 685, 21 Tex. Sup. Ct. J. 263 (Tex. 1978) (holding that a court of appeals' conclusion was not binding under the "law of the case" doctrine when the petitioner's first writ of error was denied by this Court as "writ refused, no reversible error"); *City of Houston v. Jackson*, 192 S.W.3d 764, 774, 49 Tex. Sup. Ct. J. 492, 2006 Tex. LEXIS 258 at \*12 (Tex. 2006) (holding that even though a previous petition for review on the matter was dismissed by this Court, the Court could review the issue in a later petition to this Court after remand). The denial or dismissal of a petition does not give any indication of this Court's decision on the merits of the issue. See TEX. R. APP. P. 56.1(b)(1); *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 n. 2, 33 Tex. Sup. Ct. J. 723 (Tex. 1990). Since the "law of the case" doctrine is inapplicable, we will address **Loram's** complaint that it owed no duty.

*Loram Maintenance of Way, Inc., v. Ianni*, 210 S.W. 3d 593, 596 (Tex. 2006).

**IV. The Commission has already determined that section 13.042(d) does not give it jurisdiction over appeals of customers of a city owned utility who reside within the city**

The controversy in the *Victoria Palms Resort* case is very similar to the case at hand. Judge Newchurch described the case as follows: "Victoria contends that [the City of] Donna overcharged it for water and sewer service in the past, over-collecting approximately \$200,000 due to a faulty water meter, and is wrongfully demanding \$97,500 in additional overcharges . . . ."<sup>28</sup> In that case, the City of Donna owned the utility and relied on the decision in the *Flagship I* case to get *Victoria Palms'* district court case dismissed. Judge Newchurch found that the TCEQ had no jurisdiction over the case.

Judge Newchurch was fully aware of the appellate cases that held that the TCEQ did have jurisdiction over these types of cases. He noted, however, that no Austin Court of Appeals

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<sup>28</sup> Ex. 3 at 3.



or Texas Supreme Court case has ever held that such jurisdiction exists. At the time he wrote the PFD, there were two cases that held the TCEQ had jurisdiction over these matters, *Flagship I* and *Flagship Hotel, Ltd. vs. City of Galveston*, 117 S.W.3d 552 9Tex. App.—Texarkana 2003) (hereinafter *Flagship II*)<sup>29</sup>. (The differences between the two *Flagship* cases are primarily procedural and an extended discussion of such differences is immaterial for the purposes of this brief). Judge Newchurch properly determined that even though great deference should be given to the Texarkana and First District, Houston Courts of Appeals, when their opinions are so contrary to law, their decision should not be followed because they are not binding on the Commission.

In *Victoria Palms Resort*, Judge Newchurch explained that the doctrine of *res judicata* did not apply to the case because there was no complete identity of parties.<sup>30</sup> Similarly, in the present case, there is no complete identity of parties. Neither the State of Texas nor the TCEQ were parties to the *Flagship* cases.<sup>31</sup> Judge Newchurch also illustrates that the doctrine of *stare decisis* is inapplicable because the decision is not one of the Texas Supreme Court or the Austin Court of Appeals.

The *Victoria Palms Resort* PFD also explains that section 13.042 of the Texas Water Code doesn't give the TCEQ jurisdiction over rates charged by a city owned utility for customers residing within the city limits. Section 13.042(d) is the statute relied on in both *Flagship* cases. As explained above, section 13.042(d) describes the original and appellate jurisdiction over "water and sewer utilities." The definition of "water and sewer utilities" explicitly excludes municipally owned utilities. As the PFD points out, the fact that 13.042(d) doesn't apply to municipally owned utilities is driven home by section 13.042(f). That section provides as follows:

[Water Code, chapter 13, subchapter C, regarding jurisdiction over water rates and services] does not give the commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned corporation, within its corporate limits . . . except as provided by this code.<sup>32</sup>

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<sup>29</sup> Attached as Exhibit 6

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.*

<sup>32</sup> TEXAS WATER CODE ANN. § 13.042(f) (Vernon 2000).



*Flagship I* held that the phrase “except as otherwise provided by this code,” bootstrapped up to incorporate subsection (d) of that same section. Such an interpretation is untenable, because it would render subsection (f) a nullity.

Making it even clearer that section 13.042 doesn’t establish the Commission’s jurisdiction over the present case are Texas Water Code sections 13.043(a) and (b). To begin with, section 13.043 is the appropriate location to find grants of appellate jurisdiction to the TCEQ. Section 13.042 is aimed primarily at describing the jurisdiction of municipalities with references to how the TCEQ’s appellate jurisdiction relates to that municipal jurisdiction. By contrast, section 13.043 relates directly to the TCEQ’s appellate jurisdiction. Section 13.043(a) specifically provides that “[a]ny party to a rate proceeding before the governing body of a municipality may appeal the decision of that governing body to the commission. **This section does not apply to a municipally owned utility.**”<sup>33</sup> Section 13.043(b) makes what is already crystal clear even clearer. It provides that ratepayers of certain entities may appeal the rate decisions of governing bodies such as a municipality. Section 13.043(b)(3) describes the agency’s appellate power over municipal decisions on the rates of a municipally owned utility. Specifically, the section provides that ratepayers may appeal a decision regarding a “municipally owned utility, if the ratepayers reside outside the corporate limits of the municipality.”<sup>34</sup> If the interpretation of the *Flagship* cases is allowed to stand, these portions of section 13.043 become nullities.

Judge Newchurch’s PFD concludes as follows: “The ALJ concludes that the Commission has no jurisdiction over disputes concerning a municipally owned utility’s rates within the municipality’s corporate limits.”<sup>35</sup> After the Commission considered the PFD at the April 28, 2004, agenda, the Commission adopted the proposed order verbatim. That Commission order, dated May 14, 2004, is attached hereto as Exhibit 4. It provided, in finding of fact 18, that “[a]bsent a specific exception in the Water Code the Commission has no jurisdiction of any kind over a municipally owned utilities rates or services within the municipality’s corporate limits.” In Conclusion of Law No. 24, the Commission further stated “[r]ead in context and considering all

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<sup>33</sup> *Id.* § 13.043(a) (emphasis added).

<sup>34</sup> *Id.* § 13.043(b)(3).

<sup>35</sup> Ex. 3 at 23



of Water Code Chapter 13, Water Code § 13.042(d) does not give the Commission appellate jurisdiction to review the rates, operations, or services of a municipality when it acts as a municipally owned utility because such a municipality, by statutory definition is not a “water or sewer service utility.” This previous decision of the Commission has already directly answered the question certified by the ALJ.

Another ALJ’s PFD supports the ED’s position in this case.<sup>36</sup> ALJ Gary W. Elkins has also issued a PFD on this issue in a second attempt by Victoria Palms Resort, Inc. to assert that the TCEQ has jurisdiction when it does not. ALJ Elkins found that the Thirteenth Court of Appeals decision could no more force the Commission to take jurisdiction of the case than the First Court of Appeals decision did.<sup>37</sup> He also rejected the argument that the “law of the case” applied.<sup>38</sup> The parties settled the case before it reached the Commission’s agenda.

Because the Commission has already decided that the *Flagship* cases do not give it jurisdiction over in-city customers’ appeals from city decisions on a rate of a municipally owned utility, and because the statutes make it abundantly clear that the *Flagship* Texas cases were decided incorrectly, the ALJ could have dismissed the case at bar on the grounds that the Commission does not have jurisdiction over the matter. Instead, the ALJ has asked the Commission to revisit its decision.

#### **IV Conclusion and Prayer**

WHEREFORE, PREMISES CONSIDERED, the ED respectfully requests the Commission to make it abundantly clear that it has no jurisdiction of any kind over a municipally owned utilities rates or services within the municipality’s corporate limits.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Robert Martinez, Director

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<sup>36</sup> Attached as Exhibit 7

<sup>37</sup> Ex. 7 at 3

<sup>38</sup> Ex. 7 at 8



Environmental Law Division

By 

Brian D. MacLeod

Staff Attorney

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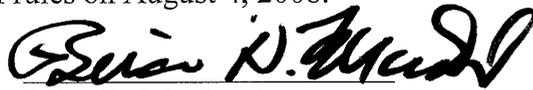
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CERTIFICATE OF SERVICE

This is to certify that all parties on the attached Mailing List have been sent a copy of the foregoing document in accordance with TCEQ and SOAH rules on August 4, 2008.



Brian D. MacLeod  
Staff Attorney  
Environmental Law Division

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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CHIEF CLERKS OFFICE

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**Mailing List**  
**Flagship Hotel v. City of Galveston**  
**SOAH Docket No. 582-07-3473**  
**TCEQ Docket No. 2007-0879-UCR**

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## TCEQ Jurisdiction over Utility Rates and Service Policies

The tables in this publication summarize the Texas Commission on Environmental Quality's (TCEQ) jurisdiction over the rates charged, areas served, and customer service policies followed by retail public utilities owned by cities, counties, districts, water supply or sewer service corporations, and investors. For definitions of the terms and abbreviations used in this publication, look below the table on page 2.

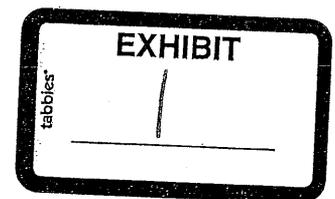
### What jurisdiction does TCEQ have over retail rates charged by a water or sewer utility?

If the utility is owned by a(n) ...		What type of jurisdiction does the TCEQ have over its retail rates? (Note: the TCEQ has appellate jurisdiction over wholesale rates charged by one utility to another.)		Is customer notice of a retail rate change required?
		Original	Appellate	
City	with customers inside city limits	No	No	No
	with customers outside city limits	No	Yes, if 10% of customers outside the city limits protest	Yes*
County (other than an "affected county")		No	No	No
Affected County (within 50 miles of the US-Mexico border)		No	Yes, if 10% of customers protest	Yes*
District	with customers inside district	No	Yes, if 10% of customers protest	No
	with customers outside district	No	Yes, if 10% of customers protest	Yes*
Water Supply Corporation (WSC) (if not exempt)		No	Yes, if 10% of customers protest	No
Exempt WSC		No	No	No
Investor-Owned Utility (IOU) (if not exempt)	Inside a city	No, unless the city surrenders its jurisdiction to the TCEQ	Yes, if 10% of customers protest or if a party to a rate case before the city files an appeal to the city's ruling	Yes
	Outside a city	Yes	Not applicable.	Yes
Exempt IOU		No	Yes, if 50% of customers protest	No

\* This notice must tell the old rates, the new rates, and the date the new rates take effect. The TCEQ recommends that customers be told of their right to appeal.

### On page 2, find information on these topics:

- When must utilities obtain a CCN and observe TCEQ tariff and service policies?
- Terms used in this publication
- How to learn more



## When must utilities obtain a CCN and observe TCEQ tariff and service policies?

If the utility is owned by a(n) ...		Is a CCN Required?	Do TCEQ Tariff and Customer Service Policies Apply?
City		No*	No
County	within 50 miles of the US-Mexico border	Yes	Yes
	elsewhere in Texas	No*	No
District		No*	No
WSC (if not exempt)		Yes	No, but must file tariff with TCEQ
Exempt WSC		Water, No*; Sewer, Yes	No, but must file tariff with TCEQ
IOU (if not exempt)	Inside a city	Yes	Yes, if city does not adopt its own
	Outside a city	Yes	Yes
Exempt IOU		Water, No*; Sewer, Yes	Yes

\* Yes, if retail service is provided within another retail public utility's lawful service area.

### Terms used in this publication:

**Affected County.** Counties within 50 miles of the US-Mexico border. Chapter 13 of the Texas Water Code gives these counties specific authority to provide water or sewer utility service.

**Appellate Jurisdiction.** Circumstances where the TCEQ has the authority to review and either approve or modify the decision of another authority after receiving an appeal from affected customers or parties.

**CCN—Certificate of Convenience and Necessity.** Issued by the TCEQ, authorizes a utility to provide water or sewer utility service to a specific area and obligates the utility to provide continuous and adequate service to every customer who requests service in that area.

**District.** A "district" created by the Legislature or under the Texas Water Code. There are various types, such as MUD (municipal utility district), FWSD (fresh water supply district), WCID (water control and improvement district), or SUD (special utility district).

**Exempt IOU or Exempt WSC.** A water utility or water supply corporation with fewer than 15 potential service connections. The exemption (from the requirement to obtain a CCN) does not apply to sewer utilities.

**IOU, Investor-Owned Utility.** A retail public utility owned by an individual, partnership, corporation or homeowners association.

**Original Jurisdiction.** Circumstances where the TCEQ has the authority to review and approve or modify the rates charged by an individual or corporation for water or sewer services.

**Potable Water.** Water that meets state standards for drinking water, whether consumed or not.

**Retail Public Utility.** Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision, or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

**Retail water or sewer utility service.** Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

**Tariff.** A document listing the rates charged by and related service policies practiced by a utility providing retail service.

**WSC—Water Supply Corporation.** A nonprofit water supply or sewer service corporation owned and controlled by its members.

**Wholesale Utility.** A utility that sells potable water service or sewer service to a retail public utility that is not the ultimate consumer of the service.

### How to learn more:

- See Chapter 13 of the Texas Water Code, titled *Water Rates and Services*
- Call our Utilities & Districts Section at 512/239-4691
- Send us a fax at 512/239-6972
- Or visit our Web site at [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

LEXSEE 73 S.W.3D 422

THE CITY OF GALVESTON, Appellant v. FLAGSHIP HOTEL, LTD., Appellee

NO. 01-01-00448-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

73 S.W.3d 422; 2002 Tex. App. LEXIS 1936

March 14, 2002, Opinion Issued

**SUBSEQUENT HISTORY:** Subsequent appeal at, *Remanded by Flagship Hotel v. City of Galveston, 2003 Tex. App. LEXIS 8488 (Tex. App. Texarkana, Oct. 2, 2003)*

**PRIOR HISTORY:** [\*\*1] On Appeal from the 405th District Court. Galveston County, Texas. Trial Court Cause No. 98CV0795.

*City of Galveston v. Flagship Hotel, 2000 Tex. App. LEXIS 8188 (Tex. App. Houston 14th Dist., Dec. 7, 2000)*

**DISPOSITION:** Temporary injunction vacated.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** The 405th District Court, Galveston County, Texas, granted a temporary injunction in favor of appellee hotel and against appellant city. The appeal followed.

**OVERVIEW:** The city raised the issues: (1) whether the trial court lacked jurisdiction to grant the instant injunction; and (2) whether the hotel met its burden of proof sufficient to justify the trial court's grant of a temporary injunction. It also contended the hotel owed payment for water provided and failed to comply with the procedures in disputes for water disconnection based on nonpayment. The water code vested the city with exclusive original jurisdiction over the dispute, and the Texas Natural Resource Conservation Commission (TNRCC) with exclusive appellate jurisdiction. Thus, the doctrine of primary jurisdiction did not apply. Under *Tex. Water Code Ann. § 13.042(f)*, the TNRCC had no power to reverse a decision by the City to shut off its water. That section merely limited TNRCC's power to enforce the legislative purpose of the water code to assure rates, operations, and services are just and reasonable and to the retail public utilities. The code provided TNRCC with the authority to issue emergency orders. Thus, instead of

seeking emergency relief through the courts, a municipal water customer could seek similar relief from TNRCC, after exhausting its administrative remedies.

**OUTCOME:** The appeals court vacated the injunction.

**LexisNexis(R) Headnotes**

***Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions***

[HN1] An applicant for a temporary injunction must establish it has a probable right to the relief sought and it will suffer a probable injury in the interim pending trial on the merits.

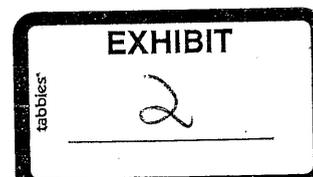
***Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions***

***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

[HN2] The decision to grant or deny a temporary injunction lies within the sound discretion of the trial court, and an appellate court will not reverse that decision absent an abuse of discretion. An erroneous application of the law to undisputed facts will constitute an abuse of discretion.

***Governments > Legislation > Interpretation***

[HN3] Matters of statutory construction are questions of law for the courts to decide. An appellate court's objective in construing a statute is to determine and give effect to the intent of the lawmaking body. In so doing, the court looks first to the plain and common meaning of the statute's words. It also construes the statute in the light of the entire body of law existing at the time of its enactment. Further, the court considers the entire statute, not simply the disputed portions. Each provision must be construed in the context of the entire statute of which it is



a part. The court also should not adopt a construction that would render a law or provision absurd or meaningless.

**Governments > Legislation > Interpretation**

[HN4] In construing a statute, a court may consider the (1) object sought to be obtained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision. *Tex. Gov't Code Ann. § 311.023* (Vernon 1998).

**Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview**

**Administrative Law > Separation of Powers > Primary Jurisdiction**

**Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**

[HN5] Primary jurisdiction is an administrative law doctrine that arises when a court and an agency have concurrent original jurisdiction over a dispute. The theory is that when the legislature delegates the power to an administrative body to regulate a particular industry or business, the courts may not or will not interfere until the board or bureau has had an opportunity to pass upon the matter and has remedied, or attempted to remedy, the situation. Two of the main arguments supporting this theory are: (1) that the commission, board or bureau is staffed with experts trained in the handling of the complex problems presented, and (2) great benefit is to be derived from a uniform interpretation of laws, rules and regulations by an administrative body whereas different results might be reached under similar fact situations by various courts or juries.

**Administrative Law > Separation of Powers > Jurisdiction**

**Administrative Law > Separation of Powers > Primary Jurisdiction**

**Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**

[HN6] The purpose of the primary jurisdiction doctrine is to assure that the agency will not be bypassed on what is especially committed to it. However, where an issue is inherently judicial in nature, the courts are not ousted from jurisdiction unless the legislature, by a valid statute, has explicitly granted exclusive jurisdiction to an administrative body.

**Energy & Utilities Law > Utility Companies > Rates > General Overview**

[HN7] See *Tex. Water Code Ann. § 13.001* (Vernon 2000).

**Energy & Utilities Law > Utility Companies > Contracts for Service**

**Energy & Utilities Law > Utility Companies > Service Terminations**

[HN8] A municipality may discontinue a customer's water service for nonpayment of charges for services provided. *Tex. Water Code Ann. § 13.250(b)(1)* (Vernon 2000).

**Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue**

**Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**

**Energy & Utilities Law > Utility Companies > Rates > General Overview**

[HN9] See *Tex. Water Code Ann. § 13.042* (Vernon 2000).

**Energy & Utilities Law > Utility Companies > Contracts for Service**

[HN10] *Tex. Water Code Ann. § 13.002(21)* (Vernon 2000) defines "services," in part, as any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to the public.

**Administrative Law > Agency Rulemaking > General Overview**

**Energy & Utilities Law > Utility Companies > General Overview**

**Governments > Public Improvements > General Overview**

[HN11] An "order" of a municipality is the whole or part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of the regulatory authority in a matter other than rulemaking. *Tex. Water Code Ann. § 13.002(14)* (Vernon 2000).

**Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies**

**Administrative Law > Separation of Powers > Primary Jurisdiction**

**Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview**

[HN12] When the legislature vests exclusive jurisdiction in an agency, exhaustion of administrative remedies is required before a party may seek judicial review of an agency's action.

*Governments > Local Governments > Administrative Boards*

*Governments > Public Improvements > General Overview*

*Real Property Law > Ownership & Transfer > Public Entities*

[HN13] See *Tex. Water Code Ann. § 13.042(f)* (Vernon 2000).

*Energy & Utilities Law > Utility Companies > Contracts for Service*

*Energy & Utilities Law > Utility Companies > Service Terminations*

[HN14] See *Tex. Water Code Ann. § 13.041(d)(1)* (Vernon 2000).

**COUNSEL:** For Appellant: William S. Helfand, Magenheimer, Bateman, Robinson, Wrotenbery, Helfand, Houston, TX. Kevin D. Jewell, Magenheimer, Bateman & Helfand, Houston, TX.

For Appellee: J. Michael Fieglein, Law Office of J. Michael Fieglein, Galveston, TX. Lee M. Larkin, Debrowski & Associates, L.L.P., Houston, TX.

**JUDGES:** Terry Jennings, Justice. Panel consists of Justices Wilson, Jennings, and Duggan. <sup>4</sup>

4 The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

**OPINION BY:** Terry Jennings

## OPINION

[\*423] In this accelerated case, the City of Galveston appeals from the trial court's grant of a temporary injunction in favor of Flagship Hotel, Ltd. ("Flagship"). The City raises two issues on appeal: (1) whether the trial court lacked jurisdiction to grant an injunction on this matter; and (2) whether the hotel met its burden of proof sufficient to justify the trial court's grant of a temporary injunction.

We vacate the temporary injunction granted by the trial court.

### Factual and Procedural Background

The City of [\*2] Galveston owns the premises known as the Galveston Marine Park and Pier, which includes the Flagship Hotel. In September 1998, Flagship, the lessee of the premises and operator of the hotel, sued the City for breach of the parties' lease agreement. One of several claims raised by Flagship is that the City improperly made demand for payment of \$ 196,291.15 for municipal water service provided to the hotel between May 1990 and November 1995. Flagship argues the disputed amount was never billed to it in the form of a municipal water bill at any time from 1990 to 1995. It claims that all water bills it received from the City were paid in full. As part of its lawsuit, Flagship also sought a declaratory judgment that the City's demand for the disputed arrearage was in violation of a 1990 agreement it had with the former Galveston city manager, Douglas W. Matthews, to adjust its water bills. The City contends its former city manager made the adjustments without the approval of the Galveston City Council.

Upon request by Flagship, the trial court granted a temporary restraining order enjoining the City from discontinuing water service to the hotel. At a hearing before the trial court, exhibits, [\*3] in the form of correspondence between the City and the hotel, were presented to the trial court, and established the City (1) first made demand for payment of the disputed amount by letter dated April 18, 1996, (2) sent a "Final Notice" demand letter on March 17, 1998, and (3) delivered a 24-hour disconnect notice to the hotel on March 21, 2001. Flagship also presented the testimony of Matthews, as well as its president, Daniel Yeh. The trial court [\*424] found in favor of Flagship, and granted a temporary injunction against the City, pending final resolution of the dispute.

The City appealed the trial court's temporary injunction, and by our order of May 11, 2001, we enjoined the City from terminating the water service to the hotel until further order or the final resolution of this appeal.

The underlying dispute between the parties is not presented to us. The parties agree that the dispositive issue before us is whether the trial court had jurisdiction to issue the temporary injunction to prevent the cessation of water service to the hotel. In resolving this issue, we must construe and apply the relevant provisions of the Texas Water Code as a matter of law, and apply the law to the undisputed [\*4] facts.

### Analysis

[HN1] An applicant for a temporary injunction must establish it has a probable right to the relief sought and it will suffer a probable injury in the interim pending trial on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *City of Friendswood v. Registered Nurse Care Home*, 965 S.W.2d 705, 707 (Tex. App.--Houston

[1st Dist.] 1998, no pet). [HN2] The decision to grant or deny a temporary injunction lies within the sound discretion of the trial court, and we will not reverse that decision absent an abuse of discretion. *Walling*, 863 S.W.2d at 58; *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 262 (Tex. App.--Houston [1st Dist.] 1996, no writ). An erroneous application of the law to undisputed facts will constitute an abuse of discretion. *City of Spring Valley v. Southwestern Bell Tel. Co.*, 484 S.W.2d 579, 581 (Tex. 1972); *Todd v. City of Houston*, 41 S.W.3d 289, 294 (Tex. App.--Houston [1st Dist.] 2001, pet. denied).

The temporary injunction granted by the trial court in this case rests upon statutory construction of relevant provisions of the [\*\*5] Texas Water Code. [HN3] Matters of statutory construction are questions of law for the courts to decide. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). Our objective in construing a statute is to determine and give effect to the intent of the lawmaking body. *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998); *City of Houston v. Morua*, 982 S.W.2d 126, 129 (Tex. App.--Houston [1st Dist.] 1998, no pet.). In so doing, we look first to the plain and common meaning of the statute's words. *Liberty Mut. Ins.*, 966 S.W.2d at 484; see also *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). We also construe the statute in the light of the entire body of law existing at the time of its enactment. *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 454 (Tex. App.--Austin 1989, writ denied). Further, we consider the entire statute, not simply the disputed portions. *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994); *Berel v. HCA Health Servs. of Texas, Inc.*, 881 S.W.2d 21, 25 [\*\*6] (Tex. App.--Houston [1st Dist.] 1994, writ denied). Each provision must be construed in the context of the entire statute of which it is a part. *Bridgestone/Firestone*, 878 S.W.2d at 133. We also should not adopt a construction that would render a law or provision absurd or meaningless. See *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987); *Mueller v. Beamalloy*, 994 S.W.2d 855, 860 (Tex. App.--Houston [1st Dist.] 1999, no pet.). [HN4] In construing a statute, a court may consider the (1) object sought to be obtained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; [\*425] and (7) title (caption), preamble, and emergency provision. *TEX. GOV'T CODE ANN. § 311.023* (Vernon 1998).

We review the relevant provisions of the Texas Water Code with these rules in mind.

The City contends the doctrine of "primary jurisdiction" applies to its dispute with Flagship. [HN5] Primary jurisdiction is an administrative [\*\*7] law doctrine that arises when a court and an agency have concurrent original jurisdiction over a dispute. *Cash America Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000). The Texas Supreme Court has explained the theory of "primary jurisdiction" as follows:

The theory is that when the Legislature has delegated the power to an administrative body to regulate a particular industry or business, the courts may not or will not interfere until the board or bureau has had an opportunity to pass upon the matter and has remedied, or attempted to remedy, the situation. Two of the main arguments supporting this theory are: (1) That the commission, board or bureau is staffed with experts trained in the handling of the complex problems presented, and (2) great benefit is to be derived from a uniform interpretation of laws, rules and regulations by an administrative body whereas different results might be reached under similar fact situations by various courts or juries.

*Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411, 415 (Tex. 1961) (discussing jurisdiction of Railroad Commission). The courts have also noted [HN6] the purpose of the "primary jurisdiction" [\*\*8] doctrine is to assure that the agency will not be bypassed on what is especially committed to it. *Foree v. Crown Central Petroleum Corp.*, 431 S.W.2d 312, 316 (Tex. 1968) (discussing jurisdiction of Railroad Commission). However, where an issue is inherently judicial in nature, the courts are not ousted from jurisdiction unless the legislature, by a valid statute, has explicitly granted exclusive jurisdiction to an administrative body. *Gregg*, 344 S.W.2d at 415.

The legislative policy and purpose behind the creation of the Texas Water Code is expressed in the statute itself, as follows:

[HN7] (a) This chapter is adopted to protect the public interest inherent in the rates and services of retail public utilities.

(b) The legislature finds that:

(1) retail public utilities are by definition monopolies in the areas they serve;

(2) the normal forces of competition that operate to regulate prices in a free enterprise society do not operate for the reason stated in Subdivision (1) of this subsection; and

(3) retail public utility rates, operations, and services are regulated by public agencies, with the objective that this regulation will operate as a substitute [\*\*9] for competition.

(c) The purpose of this chapter is to establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities.

TEX. WATER CODE ANN. § 13.001 (Vernon 2000).

[HN8] A municipality may discontinue a customer's water service for nonpayment of charges for services provided. *Id.* § 13.250(b)(1) (Vernon 2000). As noted above, the City contends Flagship owes payment for water provided by the City from 1990 to 1995. The City has adopted ordinances setting out its procedures, and [\*426] a customer's recourse, in disputes over water disconnection based on nonpayment. GALVESTON, TEX., CHARTER art. II, § 36-69 (1960). It contends Flagship has not complied with these procedures.

With regard to the issue of jurisdiction over disputes regarding water service, section 13.042 of the Water Code provides, in relevant part, as follows:

[HN9] (a) Subject to the limitations imposed in this chapter and for the purpose of regulating rates and services so that those rates may be fair, [\*10] just, and reasonable and the services adequate and efficient, *the governing body of each municipality has exclusive original jurisdiction over all water and sewer utility rates, operations, and services*<sup>1</sup> provided by a water and sewer utility within its corporate limits.

....

(d) *The commission*<sup>2</sup> shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in this chapter.

1 [HN10] The Code defines "services," in part, as "any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to . . . the public." TEX. WATER CODE ANN. § 13.002(21) (Vernon 2000).

2 The "commission" referred to is the Texas Natural Resource Conservation Commission ("TNRCC"). *Id.* § 13.002(5) (Vernon 2000).

TEX. WATER CODE ANN. § 13.042 (Vernon 2000) (emphasis added).

[HN11] An "order" of a municipality [\*11] is "the whole or part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of the regulatory authority in a matter other than rulemaking . . ." *Id.* § 13.002(14) (Vernon 2000).

We have found only one case discussing the issue of jurisdiction in the context of the Water Code. In *Jordan v. Staff Water Supply Corp.*, 919 S.W.2d 833, 835 (Tex. App.--Eastland 1996, no writ), a stockholder of a non-profit water supply corporation sued to appoint a receiver for the assets of the corporation, and alleged the corporation had failed to supply water and water meters to every person living within the area served by the corporation, and had improperly increased its water rates. *Id.* at 834. The court held that, pursuant to the provisions of the Water Code, the TNRCC had primary jurisdiction over the claim of failure to provide universal service within its served area, and had primary appellate jurisdiction over the claim of improper rate increases. *Id.* at 835. The court in *Jordan* did not discuss a municipality's attempt to discontinue a customer's water service, and did not address the issue of jurisdiction [\*\*\*12] under section 13.042.

Flagship points to *Annett v. Sunday Canyon Water Supply Corp.*, 826 S.W.2d 623, 626-27 (Tex. App.--Amarillo 1991, writ denied), as standing, indirectly, for the proposition that the trial court in this case had jurisdiction to grant a temporary injunction. *Annett* involved the discontinuance of water service by a nonprofit water service corporation because of a customer's refusal to install a check valve in the water line. *Id.* at 624. The court held the water service provider was entitled to discontinue service under section 13.250 of the Water Code for the customer's failure to comply with the provider's "reasonable rules and regulations." *Id.* at 627. However, the court did not address whether it had jurisdiction in proceeding to consider the merits of the parties' dispute.

We find neither *Jordan* nor *Annett* instructive on the issue before us. In addition, [\*427] we conclude the doctrine of primary jurisdiction is not applicable to this case. As noted above, the doctrine of primary jurisdiction presupposes the existence of concurrent jurisdiction between the courts and an agency. [\*\*\*13] Here, the Water Code vests the City with *exclusive* original jurisdiction over this dispute, and vests the TNRCC with *exclusive* appellate jurisdiction. Thus, the doctrine of primary jurisdiction does not apply here. [HN12] When the legislature vests exclusive jurisdiction in an agency, exhaustion of administrative remedies is required before a party may seek judicial review of an agency's action. *Bennett*, 35 S.W.3d at 15.

Following the plain meaning of the relevant provisions of the Water Code, we conclude exclusive original jurisdiction over the City's decision to shut off Flagship's water is vested with the City. Further, we conclude exclusive appellate jurisdiction over the City's final disposition of this dispute is vested with the TNRCC.

Flagship contends that, under *section 13.042(f) of the Water Code*, the TNRCC has no power to reverse a decision by the City to shut off its water. We disagree. *Section 13.042(f)* provides, as follows:

[HN13] This subchapter does not give the commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned [\*\*14] corporation, within its corporate limits or to affect or limit the power, jurisdiction, or duties of a municipality that regulates land and supervises water and sewer utilities within its corporate limits, *except as provided by this code*.

*TEX. WATER CODE ANN. § 13.042(f)* (Vernon 2000) (emphasis added). As we hold, and as the City concedes, *section 13.042(d)* vests appellate authority over this dispute with the TNRCC. *Section 13.042(f)* merely limits the power of the TNRCC to enforce the legislative purpose of the Water Code "to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities." *See id.* § 13.001.

Further, and contrary to the assertions of Flagship, relying on the provisions of the Water Code does not leave a municipal water customer without recourse to emergency relief, if necessary. The code provides the TNRCC with the authority to issue emergency orders, with or without a hearing:

[HN14] To compel a water or sewer service provider that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate water service, sewer [\*\*15] service, or both, if the discontinuance of the service is imminent or

has occurred because of the service provider's actions or failure to act.

*TEX. WATER CODE ANN. § 13.041(d)(1)* (Vernon 2000).<sup>3</sup> Thus, instead of seeking emergency injunctive relief through the courts, a municipal water customer may seek similar relief from the TNRCC, after exhausting the administrative remedies provided by the municipality.

3 The City is required to hold a certificate of public convenience and necessity. *Id.* § 13.242(a) (Vernon 2000).

We sustain the City's first issue on appeal. Therefore, we need not address its second issue.

### Conclusion

We hold, pursuant to the clear provisions of the relevant sections of the Texas Water Code, the trial court lacked jurisdiction over this specific dispute regarding Flagship's alleged water service arrearage [\*\*428] and the City's intention to discontinue water service to the hotel.

We do not address, and make no comment regarding, the merits of the underlying [\*\*16] dispute between the parties. Further, we do not hold that the trial court lacks jurisdiction over any other claims brought by the parties.

We vacate the temporary injunction granted by the trial court, and we withdraw our order of May 11, 2001.

Terry Jennings

Justice

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

CHIEF CLERK'S OFFICE

January 8, 2004

Duncan Norton  
General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-04-0252; TCEQ Docket No. 2003-0697-UCR; In Re:  
Victoria Palms Resort, Inc v. City of Donna

Dear Mr. Norton:

The above-referenced matter is set to be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order which have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **January 28, 2004**. Any replies to exceptions or briefs must be filed in the same manner no later than **February 9, 2004**.

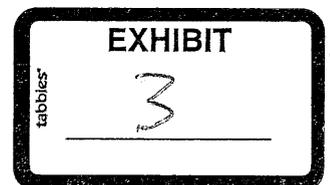
This matter has been designated **TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and eleven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "William G. Newchurch".

William G. Newchurch  
Administrative Law Judge

WGN:nl  
Enclosures  
cc: Mailing List



STATE OFFICE OF ADMINISTRATIVE HEARINGS  
WILLIAM P. CLEMENTS BUILDING  
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Austin, Texas 78701  
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SERVICE LIST

AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
(TCEQ)

STYLE/CASE: VICTORIA PALMS RESORT, INC.

SOAH DOCKET NUMBER: 582-04-0252

TCEQ DOCKET NUMBER: 2003-0697-UCR

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ADMINISTRATIVE COURT

STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

WILLIAM G. NEWCHURCH  
PRESIDING ADMINISTRATIVE LAW JUDGE

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SOAH DOCKET NO. 582-04-0252  
TCEQ DOCKET NO. 2003-0697-UCR

VICTORIA PALMS RESORT, INC.      §      BEFORE THE STATE OFFICE  
V.    §    OF  
CITY OF DONNA                           §      ADMINISTRATIVE HEARINGS  
    §  
    §

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

Victoria Palms Resort, Inc., (Victoria) asks the Commission to review the rates it has been and is being charged by the City of Donna (Donna) for water and sewer service within Donna's corporate limits.<sup>1</sup> Donna responds that it is a municipally-owned utility and the Commission has no jurisdiction to supervise its rates within its corporate limits. For that reason, Donna asks the Commission to dismiss Victoria's Petition (Motion to Dismiss). The Executive Director (ED) and the Public Interest Counsel (PIC) agree with Donna.

The Administrative Law Judge (ALJ) finds that the Commission has no jurisdiction to review Donna's rates within Donna's corporate limits. He recommends that the Commission grant Donna's motion and dismiss Victoria's Petition with prejudice to refile.

**II. SUMMARY DISPOSITION LAW**

Functionally, under the Commission's rules, Donna's motion to dismiss is a motion for summary disposition. The Commission's summary-disposition rule<sup>2</sup> provides:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the

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<sup>1</sup>ED Ex. 1, Victoria Palms Resort, Inc.'s Petition for Review (Petition).

<sup>2</sup>30 TEX. ADMIN. CODE (TAC) § 80.137 (2004).

permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.<sup>3</sup> . . . If the judge grants a motion for summary disposition on all parts of an action, the judge shall close the hearing and prepare a proposal for decision.<sup>4</sup>

To determine that there is no genuine issue as to any material fact and dismiss Victoria's Petition, the Commission and the ALJ must accept each of Victoria's material allegations as true. Accordingly, for the sole purpose of ruling on Donna's Motion to Dismiss, the ALJ accepts as true all of the material facts alleged by Victoria or that it agreed were true at a preliminary hearing.

For the sole purpose of ruling on Donna's motion, the ALJ has or is admitting the following into evidence:

EXHIBIT	SHORT DESCRIPTION
ED Ex. 1	Victoria's Petition <sup>5</sup>
ED Ex. 2	Notice of preliminary hearing <sup>6</sup>
Victoria Ex. 1	Victoria's Response to Donna's Motion to Dismiss

Additionally, at the preliminary hearing, the ALJ took official notice of a Commission emergency order and an extension thereof, which are discussed in context below and which are related to this dispute. In the text below, the ALJ also takes official notice of certain related court activities, to which any objection should be filed as an exception to the proposal for decision (PFD).

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<sup>3</sup>30 TAC § 80.137(c).

<sup>4</sup>30 TAC § 80.137(i).

<sup>5</sup>Admitted at the preliminary hearing only for jurisdictional purposes, which would include Donna's motion to dismiss alleging that the Commission has no jurisdiction.

<sup>6</sup>Admitted at the preliminary hearing only for jurisdictional purposes.

### III. MATERIAL FACTS

Victoria is a Texas corporation. It owns a mobile home park, recreation and convention facilities, a hotel, and a conference center located at 602 N. Victoria Road, Donna, Texas.<sup>7</sup>

Donna is a municipality in Hidalgo County, Texas, that owns and operates a water utility and wastewater treatment and collection system in that county. Donna holds water certificate of convenience and necessity (CCN) No. 12790 and sewer CCN No. 20825, which require it to serve residents of Donna. Victoria "is located within," is a "resident" of, and receives water and sewer service from Donna.<sup>8</sup>

Victoria contends that Donna overcharged it for water and sewer service in the past, overcollecting approximately \$200,000 due to a faulty water meter, and is wrongfully demanding \$97,500 in additional overcharges (Billing Dispute). It maintains that these alleged overcharges violate the City of Donna's tariff, are unreasonable, unjust, discriminatory and grossly exceed rates charged to other customers served by Donna. Donna refuses to credit Victoria with the amount allegedly overcharged. Victoria also claims that Donna has recently enacted sewer rates (New Sewer Rates)<sup>9</sup> that will apply to Victoria, are not just or reasonable to Victoria, and are unreasonably preferential, prejudicial, and discriminatory to Victoria (New Sewer Rate Dispute). Victoria ceased paying Donna for water and sewer service several months ago. It contends that it is simply trying to recoup what it has already overpaid Donna due to the faulty meter.

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<sup>7</sup>ED Ex. 1, p. 2 *et seq.*

<sup>8</sup>ED Ex. 1, pp. 1 and 2; and Victoria Ex. 1, p. 1.

<sup>9</sup>Ordinance No. 842, repealing Ordinance No. 837, which amended No. 772. See Victoria's Response to Motion, Exs. F1, F2, and F3.

In response to Victoria's nonpayment, Donna notified Victoria that its water services would be disconnected for its failure to pay.<sup>10</sup> On June 11, 2003, Victoria filed a suit in Hidalgo County District Court, seeking a temporary injunction from the court ordering Donna not to terminate Victoria's water or sewer service and a declaration that Donna's charges to Victoria were unreasonable.<sup>11</sup> Donna filed a plea to the Hidalgo County District Court's jurisdiction, claiming that the Commission instead had jurisdiction.<sup>12</sup> After presenting oral argument to the Hidalgo County District Court, Victoria abandoned its effort to obtain a temporary injunction from that court.<sup>13</sup> Despite that abandonment, Donna appealed the District Court's denial of the plea to the jurisdiction, asking the Thirteenth Court of Appeals (Corpus Christi Appeals Court) to reverse the District Court and render judgement dismissing Victoria's suit for lack of subject matter jurisdiction.<sup>14</sup> On December 16, 2003, however, Donna moved to abate its appeal.<sup>15</sup>

On June 27, 2003, Donna terminated Victoria's water and sewer service.<sup>16</sup> On that same day, Victoria filed its Petition,<sup>17</sup> in which it asked the Commission to require Donna to reinstate and provide continuous and adequate water service for at least 30 days. On June 27, 2003, the Commission issued an emergency order granting the emergency relief that Victoria sought

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<sup>10</sup>Victoria Ex. 1, Ex. E, p. 4.

<sup>11</sup>*Victoria Palms Resort, Inc. v. City of Donna*, No. C-1379-03-B (93<sup>rd</sup> Dist. Ct., Hidalgo County, Tex. Jun. 11, 2003). See Victoria Ex. 1, Ex. D.

<sup>12</sup>Victoria Ex. 1, Ex. B.

<sup>13</sup>Victoria Ex. 1, Ex. E, p. 4 *et seq.*

<sup>14</sup>*City of Donna v. Victoria Palms Resort, Inc.*, No. 13-03-375-CV (Tex. App.—Corpus Christi, filed Sept. 18, 2003.) See Victoria Ex. 1, Ex. E.

<sup>15</sup>TEXAS JUDICIARY ONLINE, WELCOME TO THE THIRTEENTH COURT OF APPEALS, <<http://www.13thcoa.courts.state.tx.us/opinions/event.asp?EventID=452918>> (Dec. 22, 2003). The ALJ is taking official notice of this fact in this PFD. Any objection should be filed as an exception to the PFD.

<sup>16</sup>Victoria Ex. 1, p. 2.

<sup>17</sup>ED Ex. 1.

(Emergency Order).<sup>18</sup> On July 28, 2003, the Commission affirmed and extended that emergency order until December 24, 2004 (Extended Emergency Order).<sup>19</sup>

On December 17, 2003, Victoria filed a motion with the ED asking for a further extension of the Emergency Order. This case bears the same Commission docket number as the Emergency and Extended Emergency Orders; however, the ALJ does not construe the request for a further extension to be before the ALJ since, the ED has not referred it to SOAH and since the ED has at least arguable authority to grant it *ex parte*.<sup>20</sup>

In its Petition, Victoria also asked the Commission to review the Billing and the New Sewer Rate Disputes<sup>21</sup> and to declare that both the charges stemming from the Billing Dispute and the New Sewer Rates are unreasonable and in violation of Donna's Tariff. On November 20, 2003, Donna filed the Motion to Dismiss, asking the Commission to dismiss portions of Victoria's Petition relating to the Billing and the New Sewer Rate Disputes. Donna claimed that the Commission has no jurisdiction to review either dispute or to grant Victoria the relief it seeks. The Billing and New Service Rate Disputes and the Motion to Dismiss to dismiss them are the subject of this case and PFD.

On September 22, 2003, the Commission's Chief Clerk (Chief Clerk), at the request of the ED, referred this case to SOAH for hearing. On September 26, 2003, the Chief Clerk mailed notice of a preliminary hearing in this case to Victoria, Donna, the ED, and the PIC.<sup>22</sup> On

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<sup>18</sup>*In the Matter of an Emergency Order Concerning Victoria Palms Resort, Inc. and the City of Donna*, Docket No. 2003-0697-UCR, Emergency Order (Jun. 27, 2004).

<sup>19</sup>*In the Matter of an Emergency Order Concerning Victoria Palms Resort, Inc. and the City of Donna*, Docket No. 2003-0697-UCR, An Order Affirming and Extending the Emergency Order (Jul. 28, 2004).

<sup>20</sup>30 TAC § 35.12.

<sup>21</sup>When the Petition was filed, Donna had only proposed the New Sewer Rates, but it subsequently adopted them on August 5, 2003. See Victoria's Response to Motion, Ex. F3.

<sup>22</sup>ED Ex. 2.

October 27, 2003, the ALJ granted Victoria's unopposed motion to refer this case to another SOAH ALJ who would act as a mediator and conduct a mediated settlement conference with the parties. The parties met with the mediator at least twice but were not able to resolve their core disputes.

On November 25, 2003, the ALJ held the noticed preliminary hearing, at which the following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro
ED	Todd Burkey
PIC	Anne Rowland <sup>23</sup>

The ALJ also held a second pre-hearing on December 11, 2003, to obtain a status report. By December 15, 2003, the parties filed their responses to Donna's Motion to Dismiss, which closed the record.

#### **IV. THE COMMISSION HAS NO JURISDICTION OVER DONNA'S RATES WITHIN DONNA'S CORPORATE LIMITS**

Victoria contends that Water Code<sup>24</sup> §§ 13.041, 13.042, and 13.250 give the Commission jurisdiction to consider and rule on the Billing and New Sewer Rate Disputes. For that reason, it urges denial of the Motion to Dismiss. Both the ED and the PIC maintain that the Commission has no such jurisdiction.

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<sup>23</sup>Scott Humphrey also represents the PIC.

<sup>24</sup>TEX. WATER CODE ANN. (West 2003).

Donna believes the Commission has no jurisdiction to review or rule on the New Sewer Rate Dispute. It takes alternative positions on the Commission's jurisdiction to review and rule on the Billing Dispute, but primarily argues that the Commission has no jurisdiction over it either.<sup>25</sup>

As set out below, the ALJ concludes that the Commission has no jurisdiction to hear and rule on either the Billing or the New Sewer Rate Dispute. Hence, he recommends that the Commission grant Donna's primary motion and dismiss Victoria's complaint in its entirety.

#### A. Key Definitions

To properly analyze this jurisdictional dispute, one must first understand the definitions of certain key words and phrases that occur repeatedly throughout the involved statutes. These

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<sup>25</sup>Donna takes alternative positions because, as discussed at length below, two appellate courts have found that the Commission has exclusive jurisdiction over a billing dispute between a municipally owned utility and its customer within the corporate limits and that a district court has no such jurisdiction over such a dispute. When Victoria filed its suit against Donna in Hidalgo County District Court in June 2003 concerning the Billing Dispute, Donna asked for a dismissal, arguing based on those appellate court decisions that the district court had no jurisdiction. However, the Hidalgo County District Court denied Donna's motion, and Donna appealed that ruling to the Corpus Christi Appeals Court.

In this administrative case, however, Donna first learned that the ED believes that the earlier appellate court jurisdictional decisions were incorrectly decided. The ED believes the Commission has no jurisdiction over a dispute between a municipally owned utility and its customer within the corporate limits. Consequently, Donna changed its legal position in this administrative case to primarily argue that the Commission has no jurisdiction over the Billing Dispute. Donna's Motion to Dismiss is based on that legal position. To avoid arguing inconsistent positions at the same time, Donna recently asked the Corpus Christi Appeals Court to abate Donna's appeal of the Hidalgo County District Court's decision.

Trying to cover all bases and its backside, Donna, on December 10, 2003, also filed a conditional motion to dismiss this administrative case for lack of jurisdiction and a motion for severance. In that motion, Donna primarily asks the Commission to dismiss both of Victoria's complaints if the Commission declines to follow the prior jurisdictional decisions by the appellate courts. If the Commission takes that course of action, Donna agrees to drop its contention in the parallel case that the Hidalgo County District Court had no jurisdiction. Alternatively, if the Commission finds, in accordance with the prior appellate court decisions, that it has no jurisdiction over the Billing Dispute, Donna asks the Commission to dismiss Victoria's New Sewer Rate complaint based on separate jurisdictional argument. Given his recommendation in this PFD, the ALJ need not reach or discuss that separate jurisdictional argument.

terms are specifically defined in<sup>26</sup> and for Water Code Chapter 13, in which all of the relevant jurisdictional statutes are located. Words and phrases that have acquired a particular meaning by legislative definition must be construed accordingly.<sup>27</sup> The definitions of the key words and phrases are quite complex and some are not necessarily what one would expect. As a result, these key terms are sometimes used incorrectly, even occasionally by the ALJ. Below are the definitions:

- “Municipality” means a city existing, created, or organized under the general, home-rule, or special laws of this state;<sup>28</sup>
- “Municipally owned utility” means any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities;<sup>29</sup>
- “Retail public utility” means any entity, including a municipality, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation;<sup>30</sup>
- “Water and sewer utility,” “public utility,” or “utility” means any person, other than a municipal corporation and certain other entities, owning or operating for compensation in this state equipment or facilities for the sale of potable water to the public or disposal of sewage, or engaged in certain other activities;<sup>31</sup>
- “Service” means, among other things, any act performed or anything furnished or supplied by a retail public utility in the performance of its duties under Water Code Chapter 13;<sup>32</sup> and

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<sup>26</sup>Water Code § 13.002.

<sup>27</sup>TEX. GOV'T CODE ANN. (Gov't Code) § 311.011(b) (West 2003).

<sup>28</sup>Water Code § 13.002(12).

<sup>29</sup>Water Code § 13.002(13).

<sup>30</sup>Water Code § 13.002(19).

<sup>31</sup>Water Code § 13.002(23).

<sup>32</sup>Water Code § 13.002(21).

- “Rate” means, among other things, every compensation demanded, observed, charged, or collected by any retail public utility for any service and any rules or practices affecting that compensation.<sup>33</sup>

Applying these definitions to this dispute leads the ALJ to the following conclusions:

1. Donna is a “municipality,” a “municipally owned utility,” and a “retail public utility” but not a “water and sewer utility,” a “public utility,” or a “utility;”
2. The potable water and sewage disposal that Donna provided to Victoria in the past, leading to the Billing Dispute, and the sewage disposal that Donna has provided and will provide to Victoria under the New Sewer Rates are “services”;
3. Both the compensation that Donna collected from Victoria in the past for the water and sewer services that led to the Billing Dispute and the amounts that Donna has demanded and will demand from Victoria for sewage service under the New Sewer Rates are “rates”; and
4. Both the Billing and New Sewer Rate Disputes are disputes over Victoria’s “rates.”

**B. Court Decisions Finding that the Commission has Jurisdiction over a Municipally Owned Utility’s Rates**

No party suggests and the ALJ is unaware that the Texas Supreme Court, the Third Court of Appeals (Austin Court of Appeals), or the Travis County District Court has ever held that the Commission has jurisdiction over a municipally owned utility’s rates within the municipality’s corporate limits. Moreover, the ALJ has searched for but found no SOAH case in which an ALJ has ever found that the Commission has such jurisdiction. At the preliminary hearing in this case, the ED represented that the Commission has never exercised such jurisdiction. No party disputed the ED’s representation.

However, the First Court of Appeals (Houston Court of Appeals) and the Sixth Court of Appeals (Texarkana Court of Appeals) have concluded that the Commission has exclusive

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<sup>33</sup>Water Code § 13.002(17).

appellate jurisdiction over a dispute between a municipally owned utility and its customer within that municipality's corporate limits concerning water service bills. If correct, those opinions would indicate that the Commission has jurisdiction over Victoria and Donna's Billing and New Sewer Rate Disputes.

In *City Of Galveston v. Flagship Hotel, Ltd.*<sup>34</sup> (*Flagship I*), a hotel sued a municipally owned utility, alleging that the city was making an improper demand for payment for water service provided in the past to the hotel. Prior to trial on the underlying dispute, the trial court issued a temporary restraining order enjoining the city from discontinuing water service to the hotel. The city appealed, arguing that the trial court had no jurisdiction to issue that order. The Houston Court of Appeals agreed, finding that the Commission had exclusive appellate jurisdiction to review a municipal utility's decision to shut off a customer's water.

*Flagship Hotel, Ltd. v. City Of Galveston*<sup>35</sup> (*Flagship II*) involved the same parties and underlying dispute as *Flagship I*. When it reached the underlying dispute, after the Houston Court of Appeals' decision in *Flagship I*, the trial court found that it had no jurisdiction and dismissed the hotel's underlying water-service billing complaint against the city. When the hotel appealed, the Texarkana Court of Appeals<sup>36</sup> agreed with the trial court. Relying without further analysis on the Houston Court of Appeals' reasoning in *Flagship I*, the Texarkana Court of Appeals concluded that the Commission had exclusive jurisdiction over such disputes.

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<sup>34</sup>73 S.W.3d 422 (Tex.App.-Houston [1stDist.] 2002, no petition).

<sup>35</sup>117 S.W.3d 552 (Tex.App.-Texarkana 2003, no pet. h.)(issued on October 2, 2003). Alternately, see TEXAS JUDICIARY ONLINE, HTML OPINION, <<http://www.6thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=6881>> (Dec. 15, 2003).

<sup>36</sup>The case was transferred from the Houston to the Texarkana Appeals Court on January 10, 2003. TEXAS JUDICIARY ONLINE, SIXTH COURT OF APPEALS CASE MANAGEMENT, <<http://www.6thcoa.courts.state.tx.us/opinions/case.asp?FilingID=5623>> (Dec. 15, 2003). The ALJ is taken official notice of this fact by way of this PFD. Any objection should be filed as an exception to the PFD.

Obviously, Victoria and Donna's dispute is very similar to the one underlying *Flagship I* and *II*. Both involve disputes between a municipally owned water utility and its customer over water bills. Though neither opinion directly so states, it strongly appears that the *Flagship* customer received water service within the municipally owned utility's corporate limits because the city owned and leased the land to the customer where the customer received service. In addition, the court in *Flagship I* discussed and interpreted Water Code § 13.042(f), which limits the Commission's jurisdiction over a municipally owned utility's rates and services *within* the municipality's corporate limits.

Moreover, the *Flagship I* Court, the Commission, and the ALJ agree that the Commission has some jurisdiction over the water "service" of a municipally owned utility that has a CCN, even within the municipality's corporate limits. As the Court found in *Flagship I*, Water Code § 13.041(d)(1) authorizes the Commission to order a municipally owned utility with a CCN to continue to serve a customer on an emergency basis.<sup>37</sup> In fact, the Commission relied on Water Code § 13.041 to issue the Emergency and Extended Emergency Orders requiring Donna to provide continuous and adequate service to Victoria.<sup>38</sup>

In *Flagship I*, however, the Houston Court of Appeals went beyond the specific issue that was before it—which branch of the state government had jurisdiction over a "service" dispute between a municipally owned utility and its in-city customer—to speak on an issue that was not before it.<sup>39</sup> The court stated that the Commission would have exclusive appellate jurisdiction over the city's final disposition of the underlying billing dispute,<sup>40</sup> which concerned the city's "rates." The Houston Court of Appeals interpreted Water Code § 13.042(d) as giving the

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<sup>37</sup>73 SW2d 422, 427 *et seq.*

<sup>38</sup>Emergency Order, pp. 1 and 2; Extended Emergency Order, p. 1.

<sup>39</sup>The Court specifically noted that the underlying billing, *i.e.* "rate," dispute was not presented to it. 73 SW2d 422, 424.

<sup>40</sup>73 S.W.3d 422, 427 *et seq.*

Commission exclusive appellate jurisdiction over a municipally owned utility's "rates."<sup>41</sup> Because no "rate" jurisdiction dispute was before the court in *Flagship I*, that conclusion was dicta that would normally be accorded little or no precedential value.

However, in *Flagship II*, the underlying billing, *i.e.* "rate," dispute was finally before an appellate court. Without further analysis, the Texarkana Court of Appeals adopted the Houston Court of Appeals reasoning in *Flagship I* and held that the Commission had exclusive jurisdiction over that "rate" dispute.

The ALJ hesitantly, respectfully, but firmly disagrees with the Houston and Texarkana Courts of Appeal. As set out below, the ALJ believes that the Commission is not bound in any way by the *Flagship* decisions and that they were incorrectly decided.

### C. The Commission Is Not Bound by the *Flagship I* or *II* Decisions

While the Commission should thoughtfully consider them, the ALJ believes that the Commission is not legally bound to follow the conclusion of the Houston and Texarkana Courts of Appeal in *Flagship I* and *II* that the Commission has jurisdiction over a municipally owned utility's rates within the municipality's limits. The Commission is free to reach a different conclusion.

First, the doctrine of *res judicata* does not bind either the parties in this case or the Commission to the jurisdictional decisions in *Flagship I* or *II*. Under the doctrine of *res judicata*, a court's judgement is final and cannot be further litigated in a subsequent suit between the same parties or their privies.<sup>42</sup> Moreover, a judgment in favor of or against the state on a matter

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<sup>41</sup>73 S.W.3d 422, 426 *et seq.*

<sup>42</sup>*Hammonds v. Holmes*, 559 S.W.2d 345 (Tex. 1977).

affecting the interest of the public includes all citizens, whether they were parties or not, and is treated as *res judicata*.<sup>43</sup>

However, none of the parties in the current case was either a party in *Flagship I* or *II* or a privy to any party in those cases.<sup>44</sup> Moreover, for purposes of considering what might happen should any party in this case seek judicial review of the Commission's decision in this case, neither the Commission directly nor the state of Texas generally was a party in either *Flagship I* or *II*.

Second, the Commission is not constrained by the doctrine of *stare decisis*. That doctrine dictates that once the Texas Supreme Court announces a proposition of law, the decision is generally considered binding precedent on lower courts unless the Supreme Court of Texas overrules the earlier decision.<sup>45</sup> Similarly, a court of appeals will look to and follow its own decisions as precedent if the Supreme Court has not established one.<sup>46</sup> If a court of appeals reexamines a question decided by another court of appeals and disagrees with that decision, the second court of appeals' duty is to announce its disagreement with the prior decision by the other court.<sup>47</sup>

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<sup>43</sup>*Railroad Commission V. Arkansas Fuel Oil Co.*, 148 S.W.2d 895 (Tex. Civ. App.—Austin 1941), writ refused.

<sup>44</sup> A privy is one with an interest in a transaction, contract, or legal action to which one is not a party arising out of a relationship to one of the parties. MERRIAM-WEBSTER ONLINE, MERRIAM-WEBSTER DICTIONARY, <<http://www.m-w.com/cgi-bin/dictionary>>, (2003).

<sup>45</sup>*Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964).

<sup>46</sup>*Wilson v. Underhill*, 131 SW2d 19 (Tex Civ. App., 1939) rev'd on other grounds, 155 SW2d 601; *Wilson v. Donna Irr. Dist.*, 8 SW2d 187 (Tex Civ. App., 1928) writ ref.

<sup>47</sup>*General American Life Ins. Co. v. Rios*, 154 SW2d 191 (Tex. Civ. App, 1941), rev'd on other grounds 164 SW2d 521.

It is important to note that any petition for judicial review of a Commission decision must be filed in the Travis County District Court<sup>48</sup> and any appeal from a decision of that district court must be filed in the Austin Appeals Court.<sup>49</sup> No Party suggests and the ALJ is unaware that the Texas Supreme Court, the Austin Court of Appeals, or the Travis County District Court has ever held that the Commission has appellate jurisdiction over a municipally owned utility's rates within the municipality's limits.

**D. No Rate Jurisdiction under Water Code § 13.042**

In *Flagship I*, the Houston Court of Appeals primarily relied on Water Code § 13.042(d) as giving the Commission jurisdiction over a municipally owned utility's rates within the municipality's corporate limits. That provision does give the Commission appellate jurisdiction to review orders and ordinances of certain municipalities regarding certain water and sewer rates and services. Water Code § 13.042(d) states:

The commission shall have exclusive appellate jurisdiction to review orders or ordinances of **those municipalities** as provided in [Water Code Chapter 13].

(Emphasis added).

Is Donna one of "those municipalities"? For several reasons, the ALJ thinks not.

Words and phrases in the Water Code must be read in context<sup>50</sup> and the entire statute is intended to be effective.<sup>51</sup> In context, Water Codes § 13.042(d)'s reference to "those municipalities" logically refers to the municipalities discussed in the immediately preceding

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<sup>48</sup>Gov't Code § 2001.176(b)(1).

<sup>49</sup>Gov't Code §§ 22.201(d) and 22.220(a).

<sup>50</sup>Gov't Code § 311.011(a).

<sup>51</sup>Gov't Code § 311.021(2).

portions of Water Code § 13.042. Those subsections, Water Code §§ 13.042 (a), (b), and (c) provide:

(a) Subject to the limitations imposed in [Water Code Chapter 13] and for the purpose of regulating rates and services so that those rates may be fair, just, and reasonable and the services adequate and efficient, the governing body of each municipality has exclusive original jurisdiction over all **water and sewer utility** rates, operations, and services provided by a **water and sewer utility** within its corporate limits.

(b) The governing body of a municipality by ordinance may elect to have the commission exercise exclusive original jurisdiction over the **utility** rates, operation, and services of **utilities**, within the incorporated limits of the municipality.

(c) The governing body of a municipality that surrenders its jurisdiction to the commission may reinstate its jurisdiction by ordinance at any time after the second anniversary of the date on which the municipality surrendered its jurisdiction to the commission, except that the municipality may not reinstate its jurisdiction during the pendency of a rate proceeding before the commission. The municipality may not surrender its jurisdiction again until the second anniversary of the date on which the municipality reinstates jurisdiction.

(Emphasis added.)

Thus, a municipality has exclusive original jurisdiction over all “water and sewer utility” “rates,” operations, and “services” provided by a “water and sewer utility” within the municipality’s corporate limits, unless the municipality chooses to let the Commission regulate those activities of such “utilities.” In this case, no party even contends that Donna has surrendered its original jurisdiction to the Commission. More importantly, as discussed above, a “municipally owned utility,” like Donna, is excluded from the definitions of “water and sewer utility” and “utility.”<sup>52</sup> Thus, Water Code § 13.042’s original-jurisdiction provisions concern a municipality’s regulation of *other entities*, not itself.

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<sup>52</sup>Water Code § 13.002(23).

In that statutory context, Donna is not one of “those municipalities,” as Water Code § 13.042(d) uses that phrase, when Donna’s own rates and services are in dispute. Accordingly, Water Code § 13.042(d) does not give the Commission appellate jurisdiction over Donna’s orders and ordinances concerning its own rates and services.

In *Flagship I*, the Houston Court of Appeals noted that a municipality has exclusive original jurisdiction under Water Code § 13.042(a) over all “water and sewer utility” “rates,” operations, and “services” within the municipality’s corporate limits.<sup>53</sup> However, the court did not examine the definition of “water and sewer utility” and erroneously assumed that the phrase included a “municipally owned utility,” which it does not. Based on that error, the court mistakenly assumed that Water Code § 13.042 was speaking about jurisdiction over a municipality’s own rates within its corporate limits<sup>54</sup> and that Water Code § 13.042(d) gave the Commission exclusive appellate jurisdiction to review any order by the municipality concerning that municipality’s rates. That was incorrect.

Lest there be doubt, Water Code § 13.042(f) provides, absent a specific exception elsewhere in the Water Code, that the Commission has no jurisdiction of any kind over a municipally owned utility within its corporate limits. It states:

[Water Code, Chapter 13, Subchapter C, regarding jurisdiction over water rates and services,] does not give the commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned corporation, within its corporate limits . . . except as provided by [the Water Code].

Of course the *Flagship I* Court believed that it had found such an exception in Water Code § 13.042(d), in fact a very broad one, giving the Commission appellate jurisdiction over a municipally owned utility’s rates. That led the *Flagship I* Court to construe Water Code

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<sup>53</sup>73 SW3d 426.

<sup>54</sup>73 SW3d 427.

§ 13.042(f) so narrowly that it virtually disappeared. The court found that Water Code § 13.042(f) only limited the Commission's appellate jurisdiction to ensuring that the municipality's rates, operations, and services were just and reasonable, which is the overall purpose of Water Code Chapter 13.<sup>55</sup> The ALJ cannot imagine what limitation on the Commission jurisdiction would be left.

If as the ALJ concludes, however, Water Code § 13.042(d) does not give the Commission appellate jurisdiction over a municipally owned utility's rates and services, there is no basis for construing Water Code § 13.042(f) so narrowly. To the contrary, Water Code § 13.042(f), as it more literally reads, broadly provides that the Commission has no jurisdiction, absent a specific exception elsewhere, over a municipally owned utility's rates or services within the municipality's limits.

The ALJ concludes that Water Code § 13.042 does not give the Commission jurisdiction over disputes concerning Donna's rates within Donna's corporate limits.

#### **E. No Rate Jurisdiction under Water Code § 13.041**

Victoria also points to Water Code § 13.041(a) as giving the Commission jurisdiction over this case. It broadly provides: "The commission may regulate and supervise the business of every **water and sewer utility** within its jurisdiction . . ." (Emphasis added). Counterintuitively, however, as discussed above, a "municipally owned utility," like Donna, is not a "water and sewer utility." For that reason, Water Code § 13.041(a) does not give the Commission any jurisdiction over Donna's rates.

As already mentioned, Water Code § 13.041(d)(1) does give the Commission some jurisdiction over Donna's "services," but not jurisdiction over its "rates." It provides:

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<sup>55</sup>Water Code § 13.001(c).

The commission may issue emergency orders . . . to compel a **water or sewer service provider that has obtained or is required to obtain a certificate of public convenience and necessity** to provide continuous and adequate water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the service provider's actions or failure to act . . .

(Emphasis added.)

Under this continuous-service statute, it does not matter whether the certificated provider is a municipality or the customer resides in or outside the city's limits. "Water or sewer service provider" is not defined in the Water Code, and no party suggests that it has a technical meaning. Accordingly, it is to be construed in context and according to common usage,<sup>56</sup> as one that provides, supplies, or makes available<sup>57</sup> water or sewer service. That would include a municipally owned utility like Donna.

The Commission relied on Water Code § 13.041(d)(1) to issue the Emergency and Extended Emergency Orders requiring Donna to provide continuous and adequate service to Victoria.<sup>58</sup> As the Commission noted in the Emergency Order, Donna has a CCN from the Commission.<sup>59</sup> Thus, the Commission had jurisdiction to issue the Emergency Order to Donna under Water Code § 13.041(d)(1). However, nothing in Water Code § 13.041(d)(1) or any other portion of that section authorizes the Commission to regulate a municipally owned utility's "rates."

The ALJ concludes that Water Code § 13.041 does not give the Commission jurisdiction over disputes concerning Donna's rates within Donna's corporate limits.

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<sup>56</sup>Gov't Code § 311.011(a).

<sup>57</sup>Merriam-Webster OnLine, Merriam-Webster Dictionary, <<http://www.m-w.com/cgi-bin/dictionary>>, (2003).

<sup>58</sup>Emergency Order, pp. 1 and 2; Extended Emergency Order, p. 1.

<sup>59</sup>Water CCN No. 12790 and sewer CCN No. 20825. See Emergency Order, p. 1.

**F. Water Code § 13.043 Further Emphasizes That the Commission Has No Appellate Jurisdiction over Donna's Rates**

Water Code §§ 13.043(a) and (b) address who can appeal a municipality's rate decisions to the Commission. They also reemphasize the ALJ's previous conclusions that the Commission has no appellate jurisdiction over a municipally owned utility's rates within the municipality's corporate limits. They state:

(a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission. **This subsection does not apply to a municipally owned utility. . . .**

(b) Ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water, drainage, or sewer rates to the commission:

(1) a nonprofit water supply or sewer service corporation . . .;

(2) a utility under the jurisdiction of a municipality inside the corporate limits of the municipality;

(3) **a municipally owned utility, if the ratepayers reside outside the corporate limits of the municipality;**

(4) a district or authority created under . . . the Texas Constitution . . .; and

(5) a utility owned by an affected county . . .

(Emphases added.)

**G. No Rate Jurisdiction Under Water Code § 13.250**

As Water Code § 13.042(f) allows, the Water Code does include exceptions to that section's general rule that the Commission has no jurisdiction over a municipally owned utility's rates or services with the municipality's limits. One of these in -- § 3.0401(d)(1) -- was discussed above.

Similarly, Water Code § 13.250 provides:

(a) [With certain exceptions], any **retail public utility that possesses . . . a certificate of public convenience and necessity** shall serve every consumer within its certified area and shall render continuous and adequate **service** within the area or areas.

\* \* \*

(c) Any discontinuance, reduction, or impairment of **service**, whether with or without approval of the commission, shall be in conformity with and subject to conditions, restrictions, and limitations that the commission prescribes.

(Emphasis added.)

As previously indicated, a “municipally owned utility” is, by definition, a “retail public utility.”<sup>60</sup> However, a municipality need not obtain a CCN from the Commission to provide water or sewer service.<sup>61</sup> The Local Government Code authorizes a municipality to purchase, construct, or operate a utility system inside or outside its municipal boundaries and to regulate the system in a manner that protects the interests of the municipality.<sup>62</sup> However, nothing bars a municipality from obtaining a CCN if it wishes one, generally to inhibit encroachment on its service territory by another provider.

If it chooses to obtain a CCN though, a municipally owned utility is subject to some regulation by the Commission. Water Code § 13.250 is an example of that. Victoria points to Water Code § 13.250(c) and argues under it that Donna, by obtaining a CCN, has subjected itself to full regulation by the Commission, include regulation of Donna’s water and sewer rates. Of course, Water Code § 13.250(c) says no such thing.

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<sup>60</sup>Water Code § 13.002(19).

<sup>61</sup>See Water Code § 13.242(a) and (b), which require “a utility, a utility operated by an affected county, or a water supply or sewer service corporation” to obtain a CCN, which by definitions would not include a “municipally owned utility.”

<sup>62</sup>TEX. LOCAL GOV’T CODE ANN. § 402.001(b) (West 2003).

Water Code § 13.250(c) only speaks of Commission jurisdiction over “discontinuance, reduction, or impairment of *service*.” The Commission, like any state agency, only has the specific powers conferred on it by statute in clear and precise language.<sup>63</sup> Jumping from jurisdiction over “discontinuance, reduction, or impairment of *service*” to rate regulation would surely not meet that “clear and precise language” standard, especially in the face of Water Code § 13.042(f)’s presumptive prohibition of any Commission regulation of municipally owned utilities.

The ALJ concludes that Water Code § 13.250 does not give the Commission jurisdiction over disputes concerning Donna’s rates within Donna’s corporate limits.

#### **H. No Other Exception to the Presumption Against Jurisdiction**

Other than Water Code §§ 13.041, 13.042, and 13.250 discussed above, Victoria does not cite any other statute that even arguably gives the Commission jurisdiction over Donna’s rates within Donna’s corporate limits. The ALJ is not aware of any other such statute.

#### **I. Jurisdiction is not Suggested by the Commission’s Rules**

To the extent any of the above statutes are ambiguous, their administrative construction may be considered.<sup>64</sup> In fact, the Supreme Court of Texas has indicated that courts should give great weight to a state agency’s construction of a statute that the agency is charged with enforcing.<sup>65</sup> Nothing in the Commission’s utility rules,<sup>66</sup> however, indicates that the Commission

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<sup>63</sup>*Sexton v. Mount Olivet Cementary Ass’n*, 720 S.W.2d 129, 137-38 (Tex. App. – Austin 1986, writ ref’d n.r.e.)

<sup>64</sup>Gov’t Code 311.023(6)

<sup>65</sup> *Quick v City of Austin*, 7 S.W.3d 109 (Tex. 1998).

<sup>66</sup>30 TAC Chapter 291.

believes it has jurisdiction over rate disputes involving municipally owned utilities within their corporate limits.

The Commission's appeal-of-ratemaking rule,<sup>67</sup> which implements Water Code § 13.043, specifically provides that it does not apply to a municipally owned utility,<sup>68</sup> unless the ratepayers reside outside the municipality's corporate limits.<sup>69</sup> Similarly, the Commission's customer-service-and-protection rules<sup>70</sup> are generally applicable only to "water and sewer utilities,"<sup>71</sup> which under both the Commission's rules<sup>72</sup> and the Water Code<sup>73</sup> does not include "municipally owned utilities" like Donna. Moreover, the Commission's billing rule,<sup>74</sup> which addresses billing disputes,<sup>75</sup> does not include language that would make it applicable to a municipally owned utility.

The ALJ concludes that the Commission's rules do not suggest that the Commission has interpreted the Water Code as giving it jurisdiction over the rates of a municipally owned utility within the municipality's corporate limits.

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<sup>67</sup>30 TAC § 291.41.

<sup>68</sup>30 TAC § 291.41(a).

<sup>69</sup>30 TAC § 291.41(c)(3).

<sup>70</sup>30 TAC Chapter 291, Subchapter E.

<sup>71</sup>30 TAC § 219.80.

<sup>72</sup>30 TAC § 291.3(50).

<sup>73</sup>Water Code § 13.002(23).

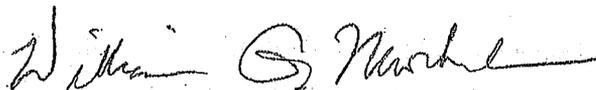
<sup>74</sup>30 TAC § 291.87.

<sup>75</sup>30 TAC § 291.87(k).

**J. ALJ's Conclusion**

The ALJ concludes that the Commission has no jurisdiction over disputes concerning a municipally owned utility's rates within the municipality's corporate limits. For that reason, he also concludes that the Commission has no jurisdiction over Victoria's Billing Dispute or New Sewer Rate Dispute with Donna, both of which are disputes concerning the "rates" of a municipally owned utility within the municipality's corporate limits. The ALJ recommends that the Commission adopt the attached Proposed Order, finding that the Commission has no jurisdiction and granting Donna's motion to dismiss Victoria's complaint with prejudice to refileing.

**SIGNED January 8, 2004.**



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**WILLIAM G. NEWCHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER denying the petition of Victoria Palms Resort, Inc. for review of the rates that it has been and is being charged by the City of Donna; TCEQ DOCKET NO. 2003-0697-UCR; SOAH DOCKET NO. 582-04-0252

On \_\_\_\_\_ the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered the petition of Victoria Palms Resort, Inc., (Victoria) for review of the rates that it has been and is being charged by the City of Donna (Donna). The Petition was presented to the Commission with a Proposal for Decision by William G. Newchurch, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Victoria was represented by J.W. Dyer, Donna was represented by Ricardo J. Navarro, the Executive Director (ED) was represented by Todd Burkey, and the Public Interest Counsel (PIC) was represented by Anne Rowland.

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

1. Victoria is a Texas corporation.
2. Victoria owns a mobile home park, recreation and convention facilities, a hotel, and a conference center located at 602 N. Victoria Road, Donna, Texas.

3. Donna is a municipality in Hidalgo County, Texas, that owns and operates potable water distribution and wastewater treatment and collection systems in that county.
4. Donna holds water Certificate of Convenience and Necessity (CCN) No. 12790 and sewer CCN No. 20825, which require it to serve residents of Donna.
5. Victoria is located within, is a resident of, and receives water and sewer service from Donna within Donna's corporate limits.
6. Victoria contends that Donna overcharged it for water and sewer service in the past, overcollecting approximately \$200,000 due to a faulty water meter, and is wrongfully demanding \$97,500 in additional overcharges (Billing Dispute).
7. Victoria maintains that these alleged overcharges violate the City of Donna's tariff, are unreasonable, unjust, discriminatory, and grossly exceed rates charged to other customers served by Donna.
8. Donna refuses to credit Victoria with the amount Victoria alleges it was overcharged.
9. Victoria also claims that Donna has recently enacted an ordinance setting new sewer rates (New Sewer Rates) that will apply to Victoria, are not just or reasonable to Victoria, and are unreasonably preferential, prejudicial, and discriminatory to Victoria (New Sewer Rate Dispute).
10. Victoria ceased paying Donna for water and sewer service several months ago. It contends that it is simply trying to recoup what it has already overpaid Donna due to the faulty meter.
11. In response to Victoria's nonpayment, Donna notified Victoria that its water services would be disconnected for its failure to pay.

12. On June 27, 2003, Donna terminated Victoria's water and sewer service.
13. On June 27, 2003, Victoria filed with the Commission and served on Donna a petition for review in which it asked the Commission to require Donna to reinstate and provide continuous and adequate water service for at least 30 days to Victoria (Petition).
14. On Jun. 27, 2003, the Commission issued an emergency order granting the emergency relief that Victoria sought (Emergency Order).
15. On July 28, 2003, the Commission affirmed and extended that emergency order until December 24, 2004 (Extended Emergency Order).
16. In its Petition, Victoria also asked the Commission to review the Billing and the New Sewer Rate Disputes and to declare that both the charges stemming from the Billing Dispute and the New Sewer Rates Dispute are unreasonable and in violation of Donna's Tariff.
17. On September 22, 2003, the Commission's Chief Clerk (Chief Clerk), at the request of the ED, referred the Billing and New Service Rate Disputes to SOAH for hearing.
18. On September 26, 2003, the Chief Clerk mailed notice of a preliminary hearing in this case to Victoria, Donna, the ED, and the PIC.
19. On November 20, 2003, Donna filed with the Commission and served on Victoria, the ED, and the PIC a motion asking the Commission to dismiss the Billing and New Sewer Rate Dispute portions of Victoria's Petition.
20. In its motion to dismiss, Donna claimed that the Commission has no jurisdiction to review either the Billing or New Sewer Rate Dispute.

21. On November 25, 2003, the ALJ held the noticed preliminary hearing, at which the following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro
ED	Todd Burkey
PIC	Anne Rowland

22. By December 15, 2003, the parties filed their responses to Donna's Motion to Dismiss, which closed the record.

23. If the judge grants a motion for summary disposition on all parts of an action, the judge shall close the hearing and prepare a proposal for decision. 30 TEX. ADMIN. CODE (TAC) § 80.137(i) (2004).

24. The ALJ's PFD recommended that the Commission grant Donna's motion and summarily dismiss with prejudice to refiling the portions of Donna's Petition that ask the Commission to review the Billing and New Sewer Rate Disputes.

## II. CONCLUSIONS OF LAW

1. Based on the above Findings of Fact and pursuant to TEXAS WATER CODE ANN. (Water Code § 5.311 (West 2003) and TEXAS GOV'T CODE ANN. (Gov't Code) §§ 2003.021 and

2003.047 (West 2003), the SOAH ALJ had jurisdiction to prepare a proposal for decision (PFD) in this case.

2. After the preliminary hearing and up to 21 days before the evidentiary hearing, a party may file a motion for a summary disposition of all or any part of an action. The motion shall state the specific issues upon which summary disposition is sought, and the specific grounds justifying the summary disposition. 30 TAC § 80.137(a).
3. Based on the above Findings of Fact and Conclusions of Law, Donna properly filed its motion to dismiss, which was a motion for summary disposition.
4. Except upon leave of the ALJ, a party may file and serve a written response, any supporting affidavits, and any other relevant documentary evidence at least seven days before the date set for ruling on a motion for summary disposition. 30 TAC § 80.137(b).
5. Based on the above Findings of Fact and Conclusions of Law, Victoria, the ED, and the PIC had a sufficient opportunity to file and did file responses to Donna's motion for summary disposition more than seven days before the ALJ ruled on it via his PFD.
6. The Commission, like any state agency, only has the specific powers conferred on it by statute in clear and precise language. *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App. – Austin 1986, writ ref'd n.r.e.)
7. Words and phrases in the Water Code that have acquired a particular meaning by legislative definition must be construed accordingly. Gov't Code § 311.011(b).
8. A "municipality" means a city existing, created, or organized under the general, home-rule, or special laws of this state. Water Code § 13.002(12).

9. A “municipally owned utility” is any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities. Water Code § 13.002(13).
10. A “water and sewer utility,” “public utility,” or “utility” is any person, other than a municipal corporation and certain other entities, owning or operating for compensation in this state equipment or facilities for the sale of potable water to the public or disposal of sewage, or engaging in certain other activities. Water Code § 13.002(23).
11. “Retail public utility” means any entity, including a municipality, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation. Water Code § 13.002(19).
12. Based on the above Findings of Fact and Conclusions of Law, Donna is a “municipality,” a “municipally owned utility,” and a “retail public utility” but not a “water and sewer utility,” a “public utility,” or a “utility.”
13. “Service” means, among other things, any act performed or anything furnished or supplied by a retail public utility in the performance of its duties under Water Code Chapter 13. Water Code § 13.002(21).
14. “Rate” means, among other things, every compensation demanded, observed, charged, or collected by any retail public utility for any service and any rules or practices affecting that compensation. Water Code § 13.002(17).
15. Based on the above Findings of Fact and Conclusions of Law, the potable water and sewage disposal that Donna provided to Victoria in the past that led to the Billing Dispute

and the sewage disposal that Donna has provided and will provide to Victoria under the New Sewer Rates are services.

16. Based on the above Findings of Fact and Conclusions of Law, both the compensation that Donna collected from Victoria in the past for the water and sewer services that led to the Billing Dispute and the amounts that Donna has demanded or will demand from Victoria for sewage service under the New Sewer Rates are rates.
17. Based on the above Findings of Fact and Conclusions of Law, both the Billing and New Sewer Rate Disputes are disputes over Victoria's rates.
18. Absent a specific exception in the Water Code, the Commission has no jurisdiction of any kind over a municipally owned utility's rates or services within the municipality's corporate limits. Water Code § 13.042(f).
19. Water Code §§ 13.043(a) and (b) authorize a ratepayer that was a party to a rate proceeding before the governing body of a municipally owned utility to appeal that governing body's decision to the Commission only if the ratepayer resides outside the corporate limits of the municipality.
20. Water Code §§ 13.043(a) and (b) do not authorize Victoria, which is a resident of and receives service within Donna, to appeal Donna's decisions concerning the Billing and New Sewer Rate Disputes to the Commission.
21. Water Code § 13.042(a) gives a municipality exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within the municipality's corporate limits.
22. Words and phrases in the Water Code must be read in context, the entire statute is

intended to be effective. Gov't Code §§ 311.011(a) and 311.021(2).

23. Read in the context of Water Code § 13.042, Water Code § 13.042(d) gives the Commission exclusive appellate jurisdiction to review the orders and ordinances issued by a municipality under Water Code § 13.042(a) concerning a water and sewer utility's rates, operations, and services within the municipality's corporate limits.
24. Read in context and considering all of Water Code Chapter 13, Water Code § 13.042(d) does not give the Commission appellate jurisdiction to review the rates, operations, or services of a municipality when it acts as a municipally owned utility because such a municipality, by statutory definition, is not a "water and sewer utility".
25. Water Code § 13.042(d) does not give the Commission appellate jurisdiction to review the Billing or the New Sewer Rate Dispute because Donna, by statutory definition, is not a "water and sewer utility".
26. Water Code § 13.041(a) authorizes the Commission to regulate and supervise the business of every "water and sewer utility" within its jurisdiction.
27. Water Code § 13.041(a) does not authorize the Commission to review either the Billing or the New Sewer Rate Dispute because Donna, by statutory definition, is not a "water and sewer utility."
28. Water Code § 13.041(d)(1) authorizes the Commission, under certain circumstances, to order a water or sewer service provider to provide continuous and adequate service when the provider holds a CCN from the Commission to provide that service.
29. Water Code § 13.041(d)(1) does not authorize the Commission to review a water or sewer service provider's rates even if the provider has a CCN.

30. Water Code § 13.041(d)(1) does not authorize the Commission to review the Billing or New Sewer Rate Dispute, which are disputes concerning Donna's rates.
31. Water Code §§ 13.250(a) and (c) require a retail public utility that has obtained a CCN to comply with the Commission's conditions, restrictions, and limitations when discontinuing, reducing, or impairing service.
32. Water Code §§ 13.250(a) and (c) do not authorize the Commission to review the rates of a retail public utility that has obtained a CCN from the Commission.
33. Water Code §§ 13.250(a) and (c) do not authorize the Commission to review the Billing or New Sewer Rate Dispute, which are disputes concerning Donna's rates.
34. Based on the above Findings of Fact and Conclusions of Law, the Commission has no jurisdiction to review either the Billing or New Sewer Rate Dispute.
35. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response. 30 TAC § 80.137(c).
36. Based on the above Findings of Fact and Conclusions of Law, there is no genuine issue as to any material fact and Donna is entitled as a matter of law to summary disposition in its favor with respect to of the portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes.

37. Based on the above Findings of Fact and Conclusions of Law, the portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes should be dismissed with prejudice to refiling.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes is dismissed with prejudice to refiling.
2. All motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
3. The Chief Clerk of the TCEQ shall forward a copy of this Order to all parties.
4. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of that portion shall not affect the validity of the remaining portions of the Order.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

Kathleen Hartnett White, Chairman

Kathleen Hartnett White, *Chairman*  
R. B. "Ralph" Marquez, *Commissioner*  
Larry R. Soward, *Commissioner*  
Margaret Hoffman, *Executive Director*



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# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 20, 2004

RECEIVED

MAY 28

TO: Persons on the attached mailing list.

TCEQ  
CENTRAL FILE ROOM

RE: Petition of Victoria Palms Resort, Inc. For Review of Rates  
TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252

### Decision of the Commission on Petition

The Texas Commission on Environmental Quality ("TCEQ" or "Commission") has made a decision to grant the above-referenced matter. Enclosed with this letter is a copy of the Commission's order. Unless a Motion for Rehearing ("MFR" or "motion") is timely filed with the chief clerk, as described below, this action of the Commission will become final and only appealable in district court. A MFR is a request for the Commission to review its decision on the matter. Any motion must explain why the Commission should review the decision.

### Deadline for Filing Motion for Rehearing.

A MFR must be received by the chief clerk's office no later than 20 days after the date a person is notified of the Commission's order on this matter. A person is presumed to have been notified on the third day after the date that this order is mailed.

An original and 11 copies of the motion must be sent to the chief clerk at the following address:

LaDonna Castañuela, Chief Clerk  
TCEQ, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087



In addition, a copy of the motion must be sent on the same day to each of the individuals on the attached mailing list. A certificate of service stating that copies of the motion was sent to those on the mailing list must also be sent to the chief clerk.

The written motion must contain (1) the name and representative capacity of the person filing the motion; (2) the style and official docket number assigned by SOAH or official docket number assigned by the Commission; (3) the date of the order; and (4) a concise statement of each allegation of error.

RECEIVED

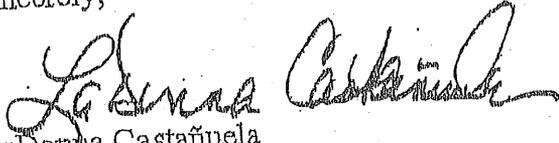
MAY 22 2004

ND

Unless the time for the Commission to act on the motion is extended, the MFR is overruled by operation of law 45 days after a person is notified of the Commission's order on this matter.

If you have any questions or need additional information about the procedures described in this letter, please call the Office of Public Assistance toll free at 1-800-687-4040.

Sincerely,



LaDonna Castañuela  
Chief Clerk

LDC/is

Enclosure

MAILING LIST

Petition of Victoria Palms Resort, Inc. For Review of Rates  
 TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252

John R. Moore  
 604 West 12<sup>th</sup> Street  
 Austin, Texas 78701  
*Representing: Victoria Palms Resort, Inc.*

J.W. Dyer  
 Dyer & Associates  
 3700 North 10<sup>th</sup> Street, Suite 105  
 McAllen, Texas 78501  
*Representing: Victoria Palms Resort, Inc.*

Ricardo J. Navarro  
 Denton, Navarro, Rocha & Bernal  
 Bank of America Building  
 222 East Van Buren, Suite 405  
 Harlingen, Texas 78550  
*Representing: City of Donna*

FOR THE EXECUTIVE DIRECTOR:

Todd Burkey, Staff Attorney  
 Texas Commission on Environmental Quality  
 Environmental Law Division MC-173  
 P.O. Box 13087  
 Austin, Texas 78711-3087

Prabin Basnet, Staff Engineer  
 Texas Commission on Environmental Quality  
 Water Supply Division MC-153  
 P.O. Box 13087  
 Austin, Texas 78711-3087

FOR OFFICE OF PUBLIC ASSISTANCE:

Jodena Henneke, Director  
 Texas Commission on Environmental Quality  
 Office of Public Assistance MC-108  
 P.O. Box 13087  
 Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Anne Rowland, Attorney  
 Texas Commission on Environmental Quality  
 Public Interest Counsel MC-103  
 P.O. Box 13087  
 Austin, Texas 78711-3087

FOR THE CHIEF CLERK:

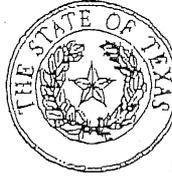
LaDonna Castañuela, Chief Clerk  
 Texas Commission on Environmental Quality  
 Office of Chief Clerk MC-105  
 P.O. Box 13087  
 Austin, Texas 78711-3087

\* The Honorable William G. Newchurch  
 Administrative Law Judge  
 State Office of Administrative Hearings  
 P. O. Box 13025  
 Austin, Texas 78711-3025

\* Courtesy Copy

EXHIBIT  B  <sup>10</sup>

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS  
COUNTY OF TRAVIS

I hereby certify that this is a true and correct copy of a  
Texas Commission on Environmental Quality document,  
which is filed in the permanent records of the Commission,  
Given under my hand and the seal of office on

MAY 20 2004

*LaDonna Costantini*  
LaDonna Costantini, Chief Clerk  
Texas Commission on Environmental Quality

AN ORDER denying the petition of Victoria Palms Resort, Inc. for review of the rates that it has been and is being charged by the City of Donna; TCEQ DOCKET NO. 2003-0697-UCR; SOAH DOCKET NO. 582-04-0252

On April 28, 2004, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered the petition of Victoria Palms Resort, Inc., (Victoria) for review of the rates that it has been and is being charged by the City of Donna (Donna). The Petition was presented to the Commission with a Proposal for Decision by William G. Newchurch, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Victoria was represented by J.W. Dyer, Donna was represented by Ricardo J. Navarro, the Executive Director (ED) was represented by Todd Burkey, and the Public Interest Counsel (PIC) was represented by Anne Rowland.

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

1. Victoria is a Texas corporation.
2. Victoria owns a mobile home park, recreation and convention facilities, a hotel, and a conference center located at 602 N. Victoria Road, Donna, Texas.

3. Donna is a municipality in Hidalgo County, Texas, that owns and operates potable water distribution and wastewater treatment and collection systems in that county.
4. Donna holds water Certificate of Convenience and Necessity (CCN) No. 12790 and sewer CCN No. 20825, which require it to serve residents of Donna.
5. Victoria is located within, is a resident of, and receives water and sewer service from Donna within Donna's corporate limits.
6. Victoria contends that Donna overcharged it for water and sewer service in the past, over-collecting approximately \$200,000 due to a faulty water meter, and is wrongfully demanding \$97,500 in additional overcharges (Billing Dispute).
7. Victoria maintains that these alleged overcharges violate the City of Donna's tariff, are unreasonable, unjust, discriminatory, and grossly exceed rates charged to other customers served by Donna.
8. Donna refuses to credit Victoria with the amount Victoria alleges it was overcharged.
9. Victoria also claims that Donna has recently enacted an ordinance setting new sewer rates (New Sewer Rates) that will apply to Victoria, are not just or reasonable to Victoria, and are unreasonably preferential, prejudicial, and discriminatory to Victoria (New Sewer Rate Dispute).
10. Victoria ceased paying Donna for water and sewer service several months ago. It contends that it is simply trying to recoup what it has already overpaid Donna due to the faulty meter.
11. In response to Victoria's nonpayment, Donna notified Victoria that its water services would be disconnected for its failure to pay.

12. On June 27, 2003, Donna terminated Victoria's water and sewer service.
13. On June 27, 2003, Victoria filed with the Commission and served on Donna a petition for review in which it asked the Commission to require Donna to reinstate and provide continuous and adequate water service for at least 30 days to Victoria (Petition).
14. On June 27, 2003, the Commission issued an emergency order granting the emergency relief that Victoria sought (Emergency Order).
15. On July 28, 2003, the Commission affirmed and extended that emergency order until December 24, 2004 (Extended Emergency Order).
16. In its Petition, Victoria also asked the Commission to review the Billing and the New Sewer Rate Disputes and to declare that both the charges stemming from the Billing Dispute and the New Sewer Rates Dispute are unreasonable and in violation of Donna's Tariff.
17. On September 22, 2003, the Commission's Chief Clerk (Chief Clerk), at the request of the ED, referred the Billing and New Service Rate Disputes to SOAH for hearing.
18. On September 26, 2003, the Chief Clerk mailed notice of a preliminary hearing in this case to Victoria, Donna, the ED, and the PIC.
19. On November 20, 2003, Donna filed with the Commission and served on Victoria, the ED, and the PIC a motion asking the Commission to dismiss the Billing and New Sewer Rate Dispute portions of Victoria's Petition.
20. In its motion to dismiss, Donna claimed that the Commission has no jurisdiction to review either the Billing or New Sewer Rate Dispute.

21. On November 25, 2003, the ALJ held the noticed preliminary hearing, at which the following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro
ED	Todd Burkey
PIC	Anne Rowland

22. By December 15, 2003, the parties filed their responses to Donna's Motion to Dismiss, which closed the record.

23. If the judge grants a motion for summary disposition on all parts of an action, the judge shall close the hearing and prepare a proposal for decision. 30 TEX. ADMIN. CODE (TAC) § 80.137(i) (2004).

24. The ALJ's PFD recommended that the Commission grant Donna's motion and summarily dismiss with prejudice to refiling the portions of Donna's Petition that ask the Commission to review the Billing and New Sewer Rate Disputes.

## II. CONCLUSIONS OF LAW

1. Based on the above Findings of Fact and pursuant to TEXAS WATER CODE ANN. (Water Code § 5.311 (West 2003) and TEXAS GOV'T CODE ANN. (Gov't Code) §§ 2003.021 and

2003,047 (West 2003), the SOAH ALJ had jurisdiction to prepare a proposal for decision (PFD) in this case.

2. After the preliminary hearing and up to 21 days before the evidentiary hearing, a party may file a motion for a summary disposition of all or any part of an action. The motion shall state the specific issues upon which summary disposition is sought, and the specific grounds justifying the summary disposition. 30 TAC § 80.137(a).
3. Based on the above Findings of Fact and Conclusions of Law, Donna properly filed its motion to dismiss, which was a motion for summary disposition.
4. Except upon leave of the ALJ, a party may file and serve a written response, any supporting affidavits, and any other relevant documentary evidence at least seven days before the date set for ruling on a motion for summary disposition. 30 TAC § 80.137(b).
5. Based on the above Findings of Fact and Conclusions of Law, Victoria, the ED, and the PIC had a sufficient opportunity to file and did file responses to Donna's motion for summary disposition more than seven days before the ALJ ruled on it via his PFD.
6. The Commission, like any state agency, only has the specific powers conferred on it by statute in clear and precise language. *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App. – Austin 1986, writ ref'd n.r.e.)
7. Words and phrases in the Water Code that have acquired a particular meaning by legislative definition must be construed accordingly. Gov't Code § 311.011(b).
8. A "municipality" means a city existing, created, or organized under the general, home-rule, or special laws of this state. Water Code § 13.002(12).

9. A "municipally owned utility" is any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities. Water Code § 13.002(13).
10. A "water and sewer utility," "public utility," or "utility" is any person, other than a municipal corporation and certain other entities, owning or operating for compensation in this state equipment or facilities for the sale of potable water to the public or disposal of sewage, or engaging in certain other activities. Water Code § 13.002(23).
11. "Retail public utility" means any entity, including a municipality, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation. Water Code § 13.002(19).
12. Based on the above Findings of Fact and Conclusions of Law, Donna is a "municipality," a "municipally owned utility," and a "retail public utility" but not a "water and sewer utility," a "public utility," or a "utility."
13. "Service" means, among other things, any act performed or anything furnished or supplied by a retail public utility in the performance of its duties under Water Code Chapter 13. Water Code § 13.002(21).
14. "Rate" means, among other things, every compensation demanded, observed, charged, or collected by any retail public utility for any service and any rules or practices affecting that compensation. Water Code § 13.002(17).
15. Based on the above Findings of Fact and Conclusions of Law, the potable water and sewage disposal that Donna provided to Victoria in the past that led to the Billing Dispute

and the sewage disposal that Donna has provided and will provide to Victoria under the New Sewer Rates are services.

16. Based on the above Findings of Fact and Conclusions of Law, both the compensation that Donna collected from Victoria in the past for the water and sewer services that led to the Billing Dispute and the amounts that Donna has demanded or will demand from Victoria for sewage service under the New Sewer Rates are rates.
17. Based on the above Findings of Fact and Conclusions of Law, both the Billing and New Sewer Rate Disputes are disputes over Victoria's rates.
18. Absent a specific exception in the Water Code, the Commission has no jurisdiction of any kind over a municipally owned utility's rates or services within the municipality's corporate limits. Water Code § 13.042(f).
19. Water Code §§ 13.043(a) and (b) authorize a ratepayer that was a party to a rate proceeding before the governing body of a municipally owned utility to appeal that governing body's decision to the Commission only if the ratepayer resides outside the corporate limits of the municipality.
20. Water Code §§ 13.043(a) and (b) do not authorize Victoria, which is a resident of and receives service within Donna, to appeal Donna's decisions concerning the Billing and New Sewer Rate Disputes to the Commission.
21. Water Code § 13.042(a) gives a municipality exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within the municipality's corporate limits.
22. Words and phrases in the Water Code must be read in context, the entire statute is

intended to be effective. Gov't Code §§ 311.011(a) and 311.021(2).

23. Read in the context of Water Code § 13.042, Water Code § 13.042(d) gives the Commission exclusive appellate jurisdiction to review the orders and ordinances issued by a municipality under Water Code § 13.042(a) concerning a water and sewer utility's rates, operations, and services within the municipality's corporate limits.
24. Read in context and considering all of Water Code Chapter 13, Water Code § 13.042(d) does not give the Commission appellate jurisdiction to review the rates, operations, or services of a municipality when it acts as a municipally owned utility because such a municipality, by statutory definition, is not a "water and sewer utility".
25. Water Code § 13.042(d) does not give the Commission appellate jurisdiction to review the Billing or the New Sewer Rate Dispute because Donna, by statutory definition, is not a "water and sewer utility".
26. Water Code § 13.041(a) authorizes the Commission to regulate and supervise the business of every "water and sewer utility" within its jurisdiction.
27. Water Code § 13.041(a) does not authorize the Commission to review either the Billing or the New Sewer Rate Dispute because Donna, by statutory definition, is not a "water and sewer utility."
28. Water Code § 13.041(d)(1) authorizes the Commission, under certain circumstances, to order a water or sewer service provider to provide continuous and adequate service when the provider holds a CCN from the Commission to provide that service.
29. Water Code § 13.041(d)(1) does not authorize the Commission to review a water or sewer service provider's rates even if the provider has a CCN.

30. Water Code § 13.041(d)(1) does not authorize the Commission to review the Billing or New Sewer Rate Dispute, which are disputes concerning Donna's rates.
31. Water Code §§ 13.250(a) and (c) require a retail public utility that has obtained a CCN to comply with the Commission's conditions, restrictions, and limitations when discontinuing, reducing, or impairing service.
32. Water Code §§ 13.250(a) and (c) do not authorize the Commission to review the rates of a retail public utility that has obtained a CCN from the Commission.
33. Water Code §§ 13.250(a) and (c) do not authorize the Commission to review the Billing or New Sewer Rate Dispute, which are disputes concerning Donna's rates.
34. Based on the above Findings of Fact and Conclusions of Law, the Commission has no jurisdiction to review either the Billing or New Sewer Rate Dispute.
35. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response. 30 TAC § 80.137(c).
36. Based on the above Findings of Fact and Conclusions of Law, there is no genuine issue as to any material fact and Donna is entitled as a matter of law to summary disposition in its favor with respect to of the portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes.

37. Based on the above Findings of Fact and Conclusions of Law, the portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes should be dismissed with prejudice to refiling.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes are dismissed with prejudice to refiling.
2. All motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
3. The Chief Clerk of the TCEQ shall forward a copy of this Order to all parties.
4. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of that portion shall not affect the validity of the remaining portions of the Order.
5. The effective date of this Order is the date the Order is final, as provided by 30.TAC § 80.273 and Gov't Code § 2001.144.

Issue Date: **MAY 14 2004**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Kathleen Hartnett White*  
Kathleen Hartnett White, Chairman

EXHIBIT " C "



# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 06- 9136

## POLICIES FOR TRANSFER OF CASES BETWEEN COURTS OF APPEALS

### **ORDERED** that:

The transfer of cases between courts of appeals, for the equalization of dockets as mandated by the Legislature in the General Appropriations Act, and for other good cause pursuant to the Supreme Court's authority under Chapter 73 of the Government Code, will in general be in accordance with these guidelines. This order supercedes and vacates Misc. Docket No. 96-9224 (Oct. 24, 1996) and any other Supreme Court orders regarding policies for the transfer of cases between courts of appeals.

### **General Guidelines for Docket Equalization Transfers**

- 1.01 The decision to transfer cases for docket equalization purposes will be made by the Supreme Court based on the relative number of cases filed in each of the courts of appeals compared to the statewide average per justice of cases filed, adjusted for historical case filing data. Other factors which may be considered include the availability of appropriated funds for reimbursing the travel and living expenses of the court to which cases are transferred to hear oral arguments at the location of the transferring court and the past or expected absence of justices from a court due to illness, disqualification, absence, or good cause.
- 1.02 Cases transferred shall not include original proceedings; appeals from interlocutory orders; appeals from denial of writs of habeas corpus; appeals in extradition cases; appeals regarding the amount of bail set in a criminal case; appeals from trial courts and pretrial courts in



multidistrict litigation pursuant to Rule 13.9(b) of the Rules of Judicial Administration; and those cases that, in the opinion of the Chief Justice of the transferring court, contain extraordinary circumstances or circumstances indicating that emergency action may be required.

- 1.03 Any case that is a companion to a case transferred for docket equalization purposes shall also be transferred to the same court of appeals if, for the case designated for transfer, appeal was perfected prior to appeal being perfected in any companion cases. If the case for which appeal was first perfected was not designated for transfer for docket equalization purposes but one or more later-perfected companion cases is designated for such transfer, the first-perfected appeal and any companion cases shall be retained by the court in which originally filed. For purposes of this provision, companion cases are appeals that arise out of the same trial-court proceeding and are not otherwise excluded from docket equalization transfers under §1.02.
- 1.04 The transferring court, through its clerk, shall transfer the appellate record in each case, and certify all orders made, to the court of appeals to which the cases are transferred. When a block of cases is transferred, the transferring court will implement the transfer of the case files in groups not less than once a month, or after all the requisite number of cases have been filed, if that number of new filings is reached before 30 days after the transfer is effective.
- 1.05 The transferring court shall immediately notify the parties or their attorneys in the cases transferred of the transfer and the court to which transferred.
- 1.06 Upon completion of the transfer of a group of the cases ordered transferred, the transferring court shall submit a list of the cases transferred, identified by style and number, to the Office of Court Administration.

#### **Transfer of Future-Filed Cases for Docket Equalization Purposes**

- 2.01 The Supreme Court may order transferred a block of cases consisting of a specified number of the cases next filed in the transferring court on and after a certain date in the future. The order of the Supreme Court may specify that the cases be all the next civil or all the next criminal cases filed, or all the next cases filed, regardless of whether civil or criminal. When the Supreme Court orders the transfer of any case for which appeal has not been perfected prior to the date of the transfer order, until the transfer of the first group of cases has been completed and the notices required by paragraph 1.05 have been issued, the existence and content of a proposed or final transfer order of the Supreme Court shall be a confidential record of the judiciary until the transfers described therein have been completed, and until

the completion of all such transfers no justice or employee of the court from which cases are transferred, the court to which cases are transferred, the Supreme Court, the Office of Court Administration, or other employee of the judicial branch of government shall release or divulge any information concerning the transfer, except as necessary to effect transfer of the cases. Any order of the Supreme Court ordering transfer of one or more cases next filed in the transferring court on and after a certain date in the future shall be filed separate from any transfer order ordering transfer of one or more cases next filed in the transferring court on and after a certain date in the past, *i.e.*, prior to the date the transfer order is signed.

- 2.02 The transferring court shall make the necessary orders for the transfer.

#### **Transfer of Blocks of Pending Cases**

- 3.01 Upon the agreement of the Chief Justices of two courts of appeals, the Supreme Court may order the transfer of a specified number of cases pending in the transferring court. The Chief Justices shall communicate their agreement to the Supreme Court along with an agreed criteria for the selection of the cases to be transferred, such as the oldest pending cases ready for oral argument but not yet set.

- 3.02 Upon approval by the Supreme Court, the Chief Justice of the proposed transferring court shall communicate to the Office of Court Administration a sequential list beginning with the oldest case meeting the agreed criteria proposed to be transferred, listed by docket number and style. In addition to those cases specified by paragraphs 1.02 and 1.03, cases may not be placed on this list if any of the following criteria apply:

3.021 the case has been set for oral argument within the next thirty days and all parties have been notified of the date of the setting;

3.022 the clerk has been notified by both parties that a settlement has been reached in the case and that an agreed order is being prepared for submission to the court; or

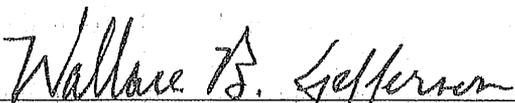
3.023 other similar circumstances exist that counsel against transfer of a particular case which would normally be included in the transfer order.

- 3.03 The transferring court shall make the necessary orders for the transfer of the specified list of cases.

**Procedure for Requesting Re-Transfer of Individual Pending  
Cases Transferred for Docket Equalization, and for Requesting  
Transfer of Cases Pursuant to Government Code Chapter 73.**

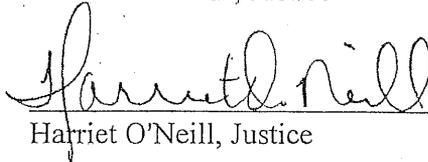
- 4.01 Any party to a case transferred for docket equalization purposes may file a motion, pursuant to the procedures described in this section, with the court of appeals to which the case has been transferred stating good cause for why the case should be returned to the court of appeals in which the appeal was originally filed. The procedures stated in this section shall also govern a party's motion to transfer a case from one court of appeals to another pursuant to the Supreme Court's authority under Government Code Chapter 73.
- 4.02 A motion to transfer or to re-transfer shall be addressed to the Supreme Court, but filed simultaneously in the court in which the case is pending as well as in the court to which the movant requests transfer. The motion should request the Chief Justices of the respective courts of appeals, after considering the transfer request, to forward a copy of the motion to the Supreme Court, along with a letter from each of the two Chief Justices stating his or her concurrence or non-concurrence with the request to transfer the case. Any briefing by a party regarding the transfer motion also should be simultaneously filed in both courts of appeals and forwarded to the Supreme Court.
- 4.03 The Chief Justices of the two courts of appeals involved should independently consider the transfer request and forward to the Supreme Court a letter commenting thereon within ten business days after receipt of the transfer motion, unless exceptional circumstances require additional time.
- 4.04 After receipt of a motion and letters from the Chief Justices of both courts of appeals commenting on the requested transfer, along with any briefs of the parties forwarded by the courts of appeals, the Supreme Court will consider the motion.

SIGNED this 22<sup>nd</sup> day of September 2006.

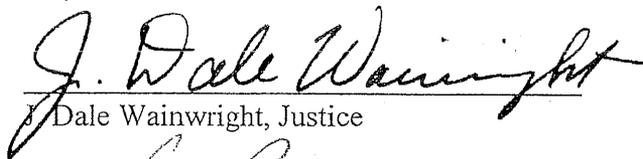
  
Wallace B. Jefferson, Chief Justice



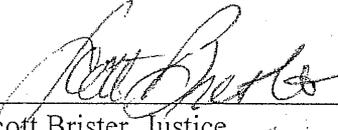
Nathan L. Hecht, Justice



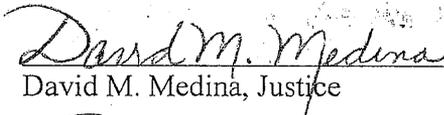
Harriet O'Neill, Justice



Dale Wainwright, Justice



Scott Brister, Justice



David M. Medina, Justice



Paul W. Green, Justice



Phil Johnson, Justice



Don R. Willett, Justice



LEXSEE 117 SW3D 552

FLAGSHIP HOTEL, LTD., Appellant v. THE CITY OF GALVESTON, Appellee

No. 06-03-00016-CV

COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA

*117 S.W.3d 552; 2003 Tex. App. LEXIS 8488*

August 27, 2003, Submitted

October 2, 2003, Decided

**SUBSEQUENT HISTORY:** Rehearing overruled by *Flagship Hotel, Ltd. v. City of Galveston, 2003 Tex. App. LEXIS 9128 (Tex. App. Texarkana, Oct. 28, 2003)* Petition for review denied by *Willie G's Post Oak, Inc. v. Flagship Hotel, Ltd., 2004 Tex. LEXIS 416 (Tex., May 7, 2004)*

**PRIOR HISTORY:** **[\*\*1]** On Appeal from the 405th Judicial District Court, Galveston County, Texas. Trial Court No. 98CV0795. *City of Galveston v. Flagship Hotel, 73 S.W.3d 422, 2002 Tex. App. LEXIS 1936 (Tex. App. Houston 1st Dist., 2002)*

**DISPOSITION:** Trial court's judgment reversed in part, rendered in part, and remanded in part.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff hotel brought suit against defendant city alleging, inter alia, the city was liable for failure to properly repair and maintain the pier the hotel was built on, for water payments made to the city, and for ad valorem taxes collected from the hotel in violation of the parties' lease. The 405th Judicial District Court, Galveston County, Texas, found portions of the lease were ambiguous, void, and unenforceable. Both parties appealed.

**OVERVIEW:** On review, the hotel contended the trial court erred in applying *Tex. Loc. Gov't Code Ann. § 307.023* (1999) in its determination of when the term of the lease expired. The appellate court agreed, finding that although the statute prohibited a lease from exceeding a term of 40 years, it did not prohibit the city from making successive leases, so long as the term of any such successive lease did not exceed 40 years. Contrary to the hotel's argument, the appellate court found the maintenance provisions of the lease were not ambiguous. The city was

correct in contending that a prior court's decision was the law of this case and controlled the jurisdictional question surrounding the water dispute; the hotel had to exhaust its administrative remedies. As the hotel was the only party that received a judgment under breach of contract, it was the prevailing party; thus, the trial court abused its discretion in failing to award the hotel attorney's fees. Further, as the city failed to segregate fees attributable to the breach of contract cause of action from the declaratory judgment action, the trial court abused its discretion by awarding fees based on unsegregated attorney's fees.

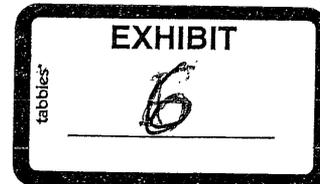
**OUTCOME:** Those portions of the judgment determining when the term of the lease expired and denying the hotel attorney's fees were reversed. The award of attorney's fees to the city was reversed and remanded for determination of the properly segregated fees, and for determination of whether an award of such fees to the city was equitable and just. Otherwise, the judgment was affirmed.

**LexisNexis(R) Headnotes**

*Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview*

*Civil Procedure > Summary Judgment > Standards > Genuine Disputes*

[HN1] The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true. Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor.



***Civil Procedure > Appeals > Standards of Review > De Novo Review***

[HN2] Questions of law are reviewed de novo and will be upheld if the judgment can be sustained on any legal theory supported by the evidence.

***Contracts Law > Types of Contracts > Lease Agreements > General Overview***

***Public Contracts Law > Types of Contracts > Local Contracts Generally***

[HN3] *Tex. Loc. Gov't Code Ann. § 307.023* (1999) allows the governing body of the municipality to enter into any contract in connection with the pier and its facilities on terms it considers to be in the best interest of the municipality. However, such a lease cannot exceed 40 years from the date of the lease or contract.

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Contracts Law > Contract Interpretation > General Overview***

[HN4] The interpretation of an unambiguous contract is a question of law, which is reviewed de novo.

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

***Governments > Legislation > Interpretation***

[HN5] The appellate court reviews the trial court's interpretation of applicable statutes de novo. When construing a statute, the appellate court looks to the legislature's intent. If possible, the appellate court must ascertain the legislature's intent from the language it used in the statute and not look to extraneous matters.

***Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview***

***Contracts Law > Defenses > Ambiguity & Mistake > General Overview***

***Contracts Law > Formation > Ambiguity & Mistake > General Overview***

[HN6] Whether a contract is ambiguous is a question of law. There are two steps to an ambiguity analysis. First, the court applies the applicable rules of construction and decides if the contract is ambiguous. The second step is reached only if the court finds the contract is ambiguous. If the court finds a contract ambiguous, then a trier of fact may consider the parties' interpretation and other extraneous evidence. Because an ambiguous contract raises a question of fact, it cannot be disposed of on summary judgment. The primary concern in the first step of the ambiguity analysis is to determine and give effect

to the intentions of the parties as expressed in the instrument. The court looks only within the four corners of the agreement to see what is actually stated, not at what was allegedly meant. No single provision of the contract is to be controlling, as the court must consider all of the provisions with reference to the entire contract.

***Contracts Law > Contract Interpretation > General Overview***

[HN7] When a contract contains specific terms within a general clause, the general clause should be read in light of the specific terms.

***Civil Procedure > Jurisdiction > General Overview***

***Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions***

[HN8] The purpose of a temporary injunction is to preserve the status quo, or the last, actual, peaceable, non-contested status which preceded the pending controversy. A temporary injunction is issued only on a showing of a probable injury and a probable right to recover after a final hearing.

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards***

***Civil Procedure > Appeals > Standards of Review > Abuse of Discretion***

***Contracts Law > Breach > General Overview***

[HN9] A trial court's award of attorney's fees is reviewed for an abuse of discretion. Attorney's fees are awarded under *Tex. Civ. Prac. & Rem. Code Ann. § 38.001* (1997) for a breach of contract claim. When a prevailing party in a breach of contract suit seeks attorney's fees under § 38.001, makes its proof, and meets the requirements of the section, an award of attorney's fees is mandatory.

***Civil Procedure > Judgments > General Overview***

***Civil Procedure > Remedies > Costs & Attorney Fees > General Overview***

***Contracts Law > Breach > Causes of Action > General Overview***

[HN10] While only a prevailing party may recover under *Tex. Civ. Prac. & Rem. Code Ann. § 38.001* (1997), net recovery in the overall suit is not required. Determination of the prevailing party focus should be based on the success on the merits, i.e., the party who is vindicated by the trial court's judgment. Accordingly, a "prevailing party" means the party in whose favor a judgment is rendered, regardless of the amount of damages awarded. If multiple parties receive judgment under the cause of action,

the party which received judgment on the "main issue" is the prevailing party.

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*

*Evidence > Procedural Considerations > Burdens of Proof > General Overview*

[HN11] A party seeking to recover attorney's fees carries the burden of proof to establish the amount which is reasonable and necessary. The general rule is that attorney's fees attributable to other defendants and other causes of action must be segregated. An exception to the general rule is when the claims are inseparably intertwined. The determination of whether attorney's fees can be segregated is a question for the court. This determination requires a consideration of the substantive law necessary to establish facts to support a recovery of the multiple claims.

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*

[HN12] Uncontroverted testimony by an interested witness concerning attorney's fees may establish a fact as a matter of law.

*Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview*

*Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview*

[HN13] *Tex. Civ. Prac. & Rem. Code Ann. § 37.009* (1997) authorizes the trial court to award costs and "reasonable and necessary" attorney's fees that are "equitable and just." A party is not required to substantially prevail in order to be awarded attorney's fees under § 37.009. Thus, it is not an abuse of discretion to award attorney's fees to a nonprevailing party if that is equitable and just under the circumstances.

*Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > General Overview*

*Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview*

*Civil Procedure > Remedies > Costs & Attorney Fees > General Overview*

[HN14] When a party brings a declaratory judgment action by way of a counterclaim, and that counterclaim involves only issues already raised by the original claim, the party is not entitled to an award of attorney's fees.

**COUNSEL:** Hon. Jeffrey M. Travis, Travis & Thompson, PC, Dallas, TX.

Hon. William S. Helfand, Hon. Kevin D. Jewell, Magenheim, Bateman & Helfand, Houston, TX.

**JUDGES:** Before Morriss, C.J., Ross and Carter, JJ. Opinion by Justice Ross.

**OPINION BY:** Donald R. Ross

**OPINION**

[\*556] This lawsuit centers around a lease between the City of Galveston and Flagship Hotel, Ltd. The leased premises consist of the Galveston Marine Park and Pier and the Flagship Hotel built on the pier.<sup>1</sup> There are four issues before this Court: (1) the expiration date of the lease; (2) whether the trial court erred in ruling that the provisions of the lease relating to the parties' respective maintenance obligations were unambiguous; (3) whether the trial court erred in sustaining the City's plea to the jurisdiction concerning Flagship's effort to obtain declaratory relief with regard to its alleged water and sewer arrearage; and (4) whether the trial court erred in failing to award attorney's fees to Flagship and whether the trial court erred in awarding attorney's fees to the City.

1 On September 30, 2002, the City invited bids to purchase the Flagship Hotel and the pier on which it stands. Landry's Restaurants, Inc. submitted a bid, and the city council awarded the sale of the hotel and pier to Landry's October 24, 2002. The sale was scheduled to close May 31, 2003.

[\*\*2] **Background**

On May 20, 1963, the City of Galveston and Nide Corporation entered into a lease agreement under which the City was to construct a hotel on the pier and then lease the hotel and the pier to Nide. By agreement, the lease was to commence January 18, 1966, and run for forty years, until January 18, 2006. After a series of assignments, Flagship Hotel, Ltd. became the lessee. The 1963 lease remains the active lease, but it has been modified by five separate amendments. Three of these amendments purported to extend the time period covered by the lease.

On September 1, 1998, Flagship brought suit against the City. In its petition, Flagship alleged: (1) the City was liable for failure to properly repair and maintain the pier, its surface, drive ramps, curbs, and railings; (2) the City was liable for water payments Flagship had made to the City in excess of an alleged agreement between the parties; (3) the City was liable for ad valorem taxes collected from Flagship in violation of the terms of the

lease; and (4) the City was liable for Flagship's reasonable and necessary attorney's fees. The City responded with a general denial of Flagship's claims and asserted various [\*\*3] affirmative defenses. The City also filed a counterclaim which requested a declaration that the lease was void.

On December 18, 1998, the City filed a motion for summary judgment, contending the lease was void and unenforceable. The trial court partially granted the motion, finding the fourth amendment to the lease was void and unenforceable. On January 30, 2001, both parties filed countervailing motions for summary judgment. On March 6, 2001, the trial court denied Flagship's motion and partially granted the City's motion on grounds that are not before this Court on appeal.

On March 21, 2001, the City filed a plea to the jurisdiction as to Flagship's request for declaratory judgment regarding the water and sewer billing. On March 22, 2001, Flagship applied for a temporary [\*557] restraining order and temporary injunction to keep the City from turning off its water supply. The trial court granted the temporary restraining order April 16, 2001, and granted the injunction May 8, 2001. The City then brought an interlocutory appeal from the injunction, contending the trial court lacked jurisdiction over the water bill dispute. On May 11, 2001, the First Court of Appeals held the trial court [\*\*4] lacked jurisdiction to issue the injunction. *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422 (Tex. App.-Houston [1st Dist.] 2002, no pet.).

On November 19, 2001, Flagship filed another motion for summary judgment, and on December 11, 2001, the City filed a cross-motion for summary judgment. The trial court denied both these motions January 30, 2002. The parties filed a motion for reconsideration, and on March 27, 2002, the trial court entered a final judgment addressing both motions. Both parties appeal from this judgment, which provides in relevant part as follows:

3. The Fourth Amendment to the Lease Agreement between the Plaintiff and Defendant concerning the Flagship Hotel and Pier, dated May 10, 1988, is void and unenforceable.

[4.] The Fifth Amendment to the Lease dated August 18, 1993, and as modified is not void. The Fifth Amendment to the Lease does not extend the term of the Lease and cannot relate back to a void lease. The effective date of the original Lease was adjusted in 1966 by agreement between the City and the original Lessee. THE COURT HEREBY ORDERS the Lease between the Flagship and the City expires January 18, 2006.

5. The Court [\*\*5] reverses its order, dated March 6, 2001. The City is entitled to summary judgment that

the obligations of the City to repair and maintain the pier and premises are limited to repairs beneath the surface of the pier; and the gas line is excluded from the City's repair and maintenance obligations. The original contract is clear that Lessee is responsible for "the making of any and all exterior repairs to the premises". The Second Amendment to the Lease is not clear who is responsible for the exterior repairs above the surface of the deck other than the Hotel structure and its amenities. However, where a contract contains specific terms within a general clause the general portion of the clause should be read in light of the specific terms. The specific items mentioned in the Lease are all structural components of the pier located beneath the surface of the deck. Therefore, the Defendant's obligations are to be interpreted accordingly. In addition, any obligation not modified by the Second Amendment remains as drafted into the original Lease. Therefore, it is HEREBY ORDERED BY THE COURT the responsibility for exterior repairs above the surface of the deck on which the Hotel is located, [\*\*6] whether it be lights, pier rails, or guard rails, are the responsibility of the Plaintiff.

8. Plaintiff, as lessee of the Flagship Hotel pursuant to the Lease Agreement, as amended, with the City is not liable for City ad valorem [\*558] taxes on the leasehold and leasehold improvements of the Flagship Pier and Hotel. THIS COURT HEREBY ORDERS the City is liable for Plaintiff's payment of ad valorem taxes on the leasehold or leasehold improvements in the sum of \$ 47,322.06.

9. THE COURT FURTHER FINDS the First Court of Appeals decision and order dated March 14, 2002 holds this Court does not have jurisdiction to rule on the Flagship's alleged water service arrearage based on the First Court of Appeals statement in its conclusion: "We hold, pursuant to the clear provisions of the relevant sections of the Texas Water Code, the trial court lacked jurisdiction over **this specific dispute regarding Flagship's alleged water service arrearage** and the City's intention to discontinue water service to the hotel." Therefore, the defendant's Plea to Jurisdiction as to Plaintiff's Request for Declaratory Judgment Regarding Water and Sewer Billing is **GRANTED**. It is therefore **ORDERED** [\*\*7] that Plaintiff's Request for Declaratory Judgment Regarding Water and Sewer Billing is dismissed for want of subject matter jurisdiction.

#### Standard of Review

[HN1] The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546,

548, 28 Tex. Sup. Ct. J. 384 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Id.* at 548-49. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* at 549. [HN2] Questions of law are reviewed de novo and will be upheld if the judgment can be sustained on any legal theory supported by the evidence. *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131 (Tex. App.-Houston [14th Dist.] 2000, pet. dismiss'd).

### Expiration Date of the Lease

As its first point of error, Flagship contends the trial court erred in applying *Section 307.023 of the Texas Local Government Code* [\*\*8] to hold that the term of the lease expires January 18, 2006. [HN3] This statute allows the governing body of the municipality to enter into any contract in connection with the pier and its facilities on terms it considers to be in the best interest of the municipality. However, such a lease cannot "exceed 40 years from the date of the lease or contract." *TEX. LOC. GOV'T CODE ANN. § 307.023* (Vernon 1999).

In this case, the lease was signed May 20, 1963, but by agreement, the lease was to commence January 18, 1966, and run for forty years, until January 18, 2006. On January 28, 1981, the City and Gulf Resorts, Ltd., the lessee at that time, executed a second amendment to the lease. By this second amendment, Gulf Resorts agreed to spend not less than \$ 700,000.00 for hotel improvements by December 31, 1981. The primary term was still to run until January 18, 2006, but under the second amendment, the lessee had the option to renew the lease for three additional five-year periods. If all renewal options were exercised, the lease would end January 18, 2021 (39 years, 11 months and 20 days from the date of the second amendment). In May 1988, the City and Hospitality [\*\*9] Interests, Inc., the lessee at that time, executed a fourth amendment to the lease. Under the fourth amendment, Hospitality Interests agreed to spend not less than \$ 600,000.00 for hotel improvements by July 1, 1988. The primary term of the lease was still to run until January 18, 2006, but under the fourth amendment, the lessee had the option to renew for five [\*\*559] successive five-year terms. If all options were exercised, the lease would run until January 18, 2031 (42 years and 7 months from the date of the fourth amendment). In August 1993, the lease was amended a fifth time. Under the fifth amendment, Evergreen Lodging, Inc., the lessee at that time, agreed to spend \$ 250,000.00 for renovations by December 1992 as a condition precedent to its right to invoke the five five-year renewal options as provided in the fourth amendment. If all options were exercised under the fifth amendment, the lease would expire January 18,

2031 (37 years and 5 months from the date of the fifth amendment).

[HN4] The interpretation of an unambiguous contract is a question of law, which is reviewed de novo. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650-51, 42 Tex. Sup. Ct. J. 656 (Tex. 1999). [HN5] We also [\*\*10] review the trial court's interpretation of applicable statutes de novo. *Tex-Air Helicopters, Inc. v. Galveston County Appraisal Review Bd.*, 76 S.W.3d 575, 581 (Tex. App.-Houston [14th Dist.] 2002, pet. denied). When construing a statute, we look to the Legislature's intent. *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527, 43 Tex. Sup. Ct. J. 690 (Tex. 2000). If possible, we must ascertain the Legislature's intent from the language it used in the statute and not look to extraneous matters. *Id.*

[\*\*560] Flagship contends each amendment to the original lease created a new lease; thus, both the second and the fifth amendments are effective to create new lease agreements with terms extending the leasehold interest until January 18, 2021, or January 18, 2031, respectively, without violating *Section 307.023*. Flagship agrees that the plain language of the statute prohibits a particular lease from exceeding a term of forty years, but contends nothing in the statute prohibits the City from making successive leases, so long as the term of any such successive lease does not exceed forty years.

Flagship relies on *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 547-48 [\*\*11] (Tex. App.-Houston [1st Dist.] 1994, no writ), to illustrate that, "A modification to a contract creates a new contract that includes the new, modified provisions and the unchanged old provisions." See also *Greenbelt Elec. Coop., Inc. v. Johnson*, 608 S.W.2d 320, 325 (Tex. Civ. App.-Amarillo 1980, no writ). Flagship contends that each time an amendment was executed by the parties, a new lease agreement was formed and the provisions of *Section 307.023* must be applied to that new lease agreement independently of the old agreement. The City, on the other hand, contends the date of the lease remains as an unchanged old provision of the original lease, which causes the forty years to still run from that original date, because *Section 307.023* states a lease cannot "exceed 40 years from the date of the lease." The City summarizes its position by saying, "In short, the addition of the amendments to the lease does not modify or nullify the commencement date of the original lease. Rather, the amendments are merely an attempt to add something to the lease: an extension of the lease term."

The City believes Flagship's method of calculating the lease term, which essentially [\*\*12] allows infinite extensions of the lease term, so long as no single one extends beyond forty years, contradicts the wording of

*Section 307.023*, which says a lease cannot "exceed 40 years from the date of the lease . . ." *TEX. LOC. GOV'T CODE ANN. § 307.023* (emphasis added). One of the purposes of *Section 307.023* is to prevent the City from entering into an extremely lengthy lease of the pier. The forty-year term limit allows the City the opportunity to re-evaluate what it is doing with the premises at least once every forty years. Flagship contends the amendments were in compliance with the intent of *Section 307.023* because the City was able to re-evaluate its use of the pier at the time of the negotiations for each amendment. In fact, the City was able to negotiate improvements to the premises with each new amendment. At the time of the amendments (except for the fourth amendment, which Flagship admits is void), the City was not locked into a newly negotiated term of longer than forty years.

Each party asserts two alternative dates which it contends must be the expiration of the lease. Flagship's first alternative is that the lease runs until [\*\*13] January 18, 2031, pursuant to the fifth amendment. Flagship's second alternative is that the lease runs until January 18, 2021, pursuant to the second amendment. The City's first alternative is that the lease runs until May 20, 2003, pursuant to the date of the original lease. The City's second alternative is that the lease runs until January 18, 2006, pursuant to the agreed start date of the lease.

We hold that Flagship's first alternative is the correct expiration date of the lease. We agree with the trial court that the fourth amendment to the lease is void as to its term, because it was in excess of forty years from the time of the execution of the fourth amendment. However, portions of the fourth amendment were validly incorporated into the fifth amendment, even though the fourth amendment itself is void. The fifth amendment provides:

Article III of the Amended Lease is hereby further amended by amending Section 3.05, as set forth in the Fourth Amendment to Lease, as hereinafter set forth:

Section 3.05 It shall be a condition precedent to the effectiveness of the provisions of Section (3) of the Fourth Amendment to this lease (which Section amends Section 4.01 of this Lease) [\*\*14] that the Lessee shall promptly commence with the remodeling and redecoration of the Hotel being operated on a portion of the demised premises and that the Lessee shall, without liability to the Lessor, incur expenses of not less than \$250,000 by the 31st day of December, 1992, or as soon thereafter as is practicable, . . .

Although the fourth amendment is void, other provisions were incorporated into the fifth amendment when the City and Flagship negotiated their incorporation. The fifth amendment is within the forty-year statutory limit

and is a valid amendment. The term of the lease is based on a forty-year period from the original lease dated January 18, 1966, plus an additional twenty-five years (five five-year options), which causes the lease to expire January 18, 2031. The period from the date of the fifth amendment, August 18, 1993, to January 18, 2031, is thirty-seven years and five months. Because this is less than forty years, Flagship is in compliance with the requirements of *Section 307.023*.

We believe this approach is in harmony with the intent of the statute to prevent the City from binding itself for longer than forty years at any one time. With the exception [\*\*15] of the fourth amendment, the newly negotiated terms did not exceed forty years from the time they were agreed on by the parties. Because each amendment created a new lease for the purpose of *Section 307.023*, the lease expires January 18, 2031. Flagship's contention the trial court erred in holding the lease expires January 18, 2006, is sustained.

#### Maintenance Obligations

Flagship contends the maintenance obligations of the parties were ambiguous because of conflicts within the contract. Flagship also contends the ambiguity was [\*\*561] evidenced by previous actions taken by the City. Despite these contentions, the trial court granted summary judgment in the City's favor with respect to the maintenance obligations of the parties.

[HN6] Whether a contract is ambiguous is a question of law. *O'Kehie v. Harris Leasing Co.*, 80 S.W.3d 316, 318 (Tex. App.-Texarkana 2002, no pet.). There are two steps to an ambiguity analysis. *Cook Composites, Inc.*, 15 S.W.3d at 131. First, we apply the applicable rules of construction and decide if the contract is ambiguous. *Id.* The second step is reached only if we find the contract is ambiguous. *Id.* If we find [\*\*16] a contract ambiguous, then a trier of fact may consider the parties' interpretation and other extraneous evidence. *Id.* Because an ambiguous contract raises a question of fact, it cannot be disposed of on summary judgment. *Id.*

The primary concern in the first step of the ambiguity analysis is to determine and give effect to the intentions of the parties as expressed in the instrument. *Id.* We look only within the four corners of the agreement to see what is actually stated, not at what was allegedly meant. *Id.* No single provision of the contract is to be controlling, as we must consider all of the provisions with reference to the entire contract. *Id.* at 132.

The maintenance provisions of this lease are found in article VI of the original lease, as amended by provisions contained in the second amendment. Under sections 6.01 and 6.02 of the original lease, the lessee was assigned all duties with regard to paying for expenses

relating to the maintenance of the "demised premises," which were defined as the pier and any improvements to the pier. The second amendment to the lease added sections 6.07 and 6.08 to the maintenance provisions of the lease. [\*\*17] Flagship contends that, when sections 6.07 and 6.08 of the lease are read together, it becomes ambiguous as to the maintenance for which the City is responsible with respect to the pier.

Section 6.07 reads:

The Lessee further agrees to maintain the Hotel in a first class condition, both as to structure and amenities. . .

Section 6.08 reads:

Notwithstanding the provisions of Section 6.01 hereof, during the term of this lease, the Lessor shall, at its expense, pay all maintenance and operation expenses of that portion of the demised premises commencing with the surface of the deck on which the Hotel is located and proceeding downward. Such responsibility shall include, without limitation, the keeping and maintaining in good repair of the columns, beams, supporting members and other structural portions of the demised premises from the surface of the deck upon which the Hotel is located and proceeding downward, and the making of any and all repairs thereto.

Section 6.01, which was a part of the original lease, reads, in part:

Lessee shall, at its expense, pay all maintenance and operation expenses of the demised premises . . . including . . . the making of any and all exterior [\*\*18] repairs to the premises.

Flagship asserts:

When the provisions of section 6.07 are read in conjunction with the provisions of section 6.08, it is unclear which party had the obligations to maintain things attached to the leasehold property. The term "surface of the deck" is ambiguous in that it is unclear whether the "surface of the deck" is intended to mean things attached to the Pier (such as light poles and railings) or whether the "surface of the deck" is the pavement [\*562] of the deck only, or if it even includes the pavement on the deck.

The City contends that there is no conflict between the two sections and maintains that, while section 6.07 obligates Flagship to maintain the hotel in a first-class condition as to its structure and amenities, it does not absolutely limit Flagship's obligations or negate responsibility on the part of Flagship in maintaining other portions of the premises.

[HN7] When a contract contains specific terms within a general clause, the general clause should be read

in light of the specific terms. See *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666, 30 Tex. Sup. Ct. J. 191 (Tex. 1987). All of the lease's specific terms requiring repairs to be made by the City [\*\*19] refer to structural components of the pier located beneath the surface of the deck. Again, section 6.08 reads:

Notwithstanding the provisions of Section 6.01 hereof, during the term of this lease, the Lessor shall, at its expense, pay all maintenance and operation expenses of that portion of the demised premises commencing with the surface of the deck on which the Hotel is located and proceeding downward. Such responsibility shall include, without limitation, the keeping and maintaining in good repair of the columns, beams, supporting members and other structural portions of the demised premises from the surface of the deck upon which the Hotel is located and proceeding downward, and the making of any and all repairs thereto.

Considering only the language within the four corners of the contract, we perceive no ambiguity in the maintenance obligations of each party, especially in light of the specific terms listed after the general term "surface of the deck." The City's maintenance obligations start with the surface of the deck, including the pavement, and proceed downward, just as the plain language of section 6.08 states. We do not find "surface of the deck" to be an ambiguous [\*\*20] phrase. Neither do we find that "surface of the deck" would include things attached to it, especially when the obligation is described as surface of the deck and proceeding downward. The things attached to the deck, such as light poles and railing, would be described as proceeding upward from the surface of the deck. We therefore agree with the trial court that the contract is not ambiguous. Flagship's contention to the contrary is overruled.

#### Plea to the Jurisdiction

In the underlying lawsuit, Flagship asked for a declaratory judgment that its alleged water and sewer arrearage was barred both by the statute of limitations and by agreements between the Galveston City Manager and Flagship. Flagship also sought an injunction preventing the City from cutting off water service to the hotel. The trial court granted the injunction, and the City brought an interlocutory appeal.

The First Court of Appeals held the trial court lacked jurisdiction over the specific dispute regarding Flagship's alleged water service arrearage and the City's intention to discontinue water service to the hotel. *Flagship Hotel, Ltd.*, 73 S.W.3d at 427-28. After considering the First [\*\*21] Court of Appeals' opinion, the trial court granted the City's plea to the jurisdiction. The trial court held it did not have jurisdiction to rule on Flagship's alleged water service arrearage "based on the First Court of

Appeals statement in its conclusion: 'We hold, pursuant to the clear provisions of the relevant sections of the Texas Water Code, the trial court lacked jurisdiction over **this specific dispute regarding Flagship's alleged water service arrearage** [\*563] and the City's intention to discontinue water service to the hotel!."

As part of this appeal, Flagship contends the trial court erred in granting the City's plea and in dismissing its declaratory judgment claims relating to the water issues. Flagship argues that the First Court of Appeals' opinion addresses only claims for injunctive relief. Flagship contends the trial court has jurisdiction over the declaratory judgment claims relating to the water issues and only lacks jurisdiction with respect to its request for injunctive relief.

The City contends the prior decision of the First Court of Appeals is the law of this case and controls the jurisdictional question surrounding the water dispute; the City alleges Flagship's [\*\*22] interpretation of the opinion is much too restrictive. The City points out [HN8] the purpose of a temporary injunction is "to preserve the status quo, or the 'last, actual, peaceable, noncontested status which preceded the pending controversy.'" *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 827 (Tex. Civ. App.-Austin 1981, writ ref'd n.r.e.). A temporary injunction is issued only on a showing of a probable injury and a probable right to recover after a final hearing. *Id.* at 828.

Although the First Court of Appeals' decision only addressed whether the trial court could issue a temporary injunction, it held that the Texas Water Code granted the City exclusive original jurisdiction over such disputes and the Texas Natural Resource Conservation Commission (TNRCC) appellate jurisdiction. *See Flagship Hotel, Ltd.*, 73 S.W.3d at 427. We find the First Court of Appeals' reasoning persuasive, and Flagship must exhaust its administrative remedies through the Texas Commission on Environmental Quality, formerly the TNRCC.

The trial court properly sustained the City's plea to the jurisdiction.

#### Attorney's Fees

Flagship contends [\*\*23] the trial court abused its discretion by failing to award attorney's fees under *Section 38.001*. *See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001* (Vernon 1997). The City contends Flagship was not entitled to attorney's fees because it was not a prevailing party on its breach of contract claim.<sup>2</sup>

2 THE CITY CONTENDED AT ORAL ARGUMENT FLAGSHIP HAD NOT PRESENTED THE CLAIM AS REQUIRED UNDER SECTION 38.002. *SEE TEX. CIV. PRAC. & REM.*

*CODE ANN. § 38.002* (Vernon 1997). This error had not been alleged in the City's briefs. Arguments and claims of error not raised in the party's brief are considered waived. *See Vawter v. Garvey*, 786 S.W.2d 263, 33 Tex. Sup. Ct. J. 300 (Tex. 1990); *In re R.L.H.*, 771 S.W.2d 697 (Tex. App.-Austin 1989, writ denied). By failing to present a point or argument, a party waives the right to complain of the error. The court of appeals will err if it reverses on that ground in the absence of properly assigned error. *Pat Baker Co. v. Wilson*, 971 S.W.2d 447, 450, 41 Tex. Sup. Ct. J. 1013 (Tex. 1998); *Vawter*, 786 S.W.2d 263, 33 Tex. Sup. Ct. J. 300; *Allright, Inc. v. Pearson*, 735 S.W.2d 240, 30 Tex. Sup. Ct. J. 431 (Tex. 1987).

[\*\*24] [HN9] A trial court's award of attorney's fees is reviewed for an abuse of discretion. *Au Pharm., Inc. v. Boston*, 986 S.W.2d 331, 337 (Tex. App.-Texarkana 1999, no pet.); *Knighton v. Int'l Bus. Machs. Corp.*, 856 S.W.2d 206, 210 (Tex. App.-Houston [1st Dist.] 1993, writ denied). Attorney's fees are awarded under *Section 38.001* for a breach of contract claim. "When a prevailing party in a breach of contract suit seeks attorney's fees under *Section 38.001*, makes its proof, and meets the requirements of the section, an award of attorney's fees is mandatory." *Atl. Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 449 (Tex. App.-Texarkana 1993, writ denied); *see Bocquet v. Herring*, 972 S.W.2d 19, 20-21, 41 Tex. Sup. Ct. J. 650 (Tex. 1998).

[\*564] To recover under *Section 38.001*, a party must be a prevailing party and be awarded damages. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390, 40 Tex. Sup. Ct. J. 610 (Tex. 1997); *Howard v. City of Kerrville*, 75 S.W.3d 112, 119 (Tex. App.-San Antonio 2002, pet. denied). Several courts of appeals have defined a prevailing party as the party to the suit "who successfully prosecutes the action or successfully defends [\*\*25] against it, prevailing on the main issue, even though not to the extent of its original contention."<sup>3</sup> This definition originated from the definition in *Black's Law Dictionary*.<sup>4</sup> The City argues Flagship is not a prevailing party because it did not recover on the main issue. Flagship only recovered for one of the three allegations of breach of contract. The City argues that, since it successfully defended on the main issue of repairs and maintenance, Flagship did not prevail on the main issue.

3 *Fed. Deposit Ins. Corp. v. Graham*, 882 S.W.2d 890, 900 (Tex. App.-Houston [14th Dist.] 1994, no writ) (quoting *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 357 (Tex. App.-Houston [14th Dist.] 1991, writ denied)); *see City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex.

*App.-Amarillo 1997, no pet.*); *G. Richard Goins Constr. Co. v. S.B. McLaughlin Assocs.*, 930 S.W.2d 124, 130 (Tex. App.-Tyler 1996, writ denied); *Weng Enters., Inc. v. Embassy World Travel, Inc.*, 837 S.W.2d 217, 222-23 (Tex. App.-Houston [1st Dist.] 1992, no writ); *Hoffman v. Deck Masters, Inc.*, 662 S.W.2d 438, 441 (Tex. App.-Corpus Christi 1983, no writ).

[\*\*26]

4 The Court of Appeals at Corpus Christi adopted the definition from the fifth edition of Black's Law Dictionary published in 1979. See *Hoffman*, 662 S.W.2d at 441. The First Court of Appeals at Houston adopted the definition from *Hoffman*. See *Weng Enters., Inc.*, 837 S.W.2d at 222-23. The Court of Appeals at Tyler adopted the definition from *Weng*. See *G. Richard Goins Constr. Co.*, 930 S.W.2d at 130. The Fourteenth Court of Appeals at Houston adopted the definition from the fourth edition of Black's Law Dictionary. See *Criton*, 809 S.W.2d at 357. The Court of Appeals at Amarillo adopted the definition from both of the Courts of Appeals at Houston. See *Glick*, 991 S.W.2d at 17.

Black's Law Dictionary now defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." BLACK'S LAW DICTIONARY 1145 (7th ed. 1999). Our research indicates courts have only considered whether a party prevailed on the main issue where both parties received judgment under [\*\*27] the cause of action, i.e., where both parties breached the contract. *Fed. Deposit Ins. Corp. v. Graham*, 882 S.W.2d 890, 900-01 (Tex. App.-Houston [14th Dist.] 1994, no writ); *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 357-58 (Tex. App.-Houston [14th Dist.] 1991, writ denied); *Hoffman v. Deck Masters, Inc.*, 662 S.W.2d 438, 441 (Tex. App.-Corpus Christi 1983, no writ). If only one party prevailed, courts have concluded that party prevailed on the main issue. See *Norrell v. Aransas County Navigation Dist. # 1*, 1 S.W.3d 296, 303 (Tex. App.-Corpus Christi 1999, no pet.); *Emery Air Freight Corp. v. Gen. Transp. Sys., Inc.*, 933 S.W.2d 312, 316 (Tex. App.-Houston [14th Dist.] 1996, no writ); *Weng Enters., Inc. v. Embassy World Travel, Inc.*, 837 S.W.2d 217, 222-23 (Tex. App.-Houston [1st Dist.] 1992, no writ).

We believe the main focus of our inquiry should be whether the agreement was breached, not the extent of the breach. Flagship prevailed on the breach of contract cause of action, although the extent of the breach was not as substantial as first alleged. The definitions [\*\*28] adopted by other courts do not require the party to receive a judgment "to the extent of its original contention." <sup>5</sup> [HN10] Further, while only [\*\*565] a prevailing

party may recover under Section 38.001, net recovery in the overall suit is not required. *Atl. Richfield Co.*, 860 S.W.2d at 449. Determination of the prevailing party focus should be based on the success on the merits, i.e., the party who is vindicated by the trial court's judgment. *City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex. App.-Amarillo 1997, no pet.).

5 See *Glick*, 991 S.W.2d at 17; *G. Richard Goins Constr. Co.*, 930 S.W.2d at 130; *Graham*, 882 S.W.2d at 900; *Weng Enters., Inc.*, 837 S.W.2d at 222-23; *Hoffman*, 662 S.W.2d at 441.

Accordingly, we hold that "prevailing party" means the "party in whose favor a judgment is rendered, regardless of the amount of damages awarded." See BLACK'S LAW DICTIONARY 1145. If multiple parties receive [\*\*29] judgment under the cause of action, the party which received judgment on the "main issue" is the prevailing party. Since Flagship is the only party that received a judgment under breach of contract (for recovery of sums paid by Flagship to the City for ad valorem taxes), Flagship is the prevailing party. Because Flagship also received damages (\$ 47,322.06), it was entitled to its attorney's fees.

The City also argues Flagship was not entitled to its attorney's fees because it failed to segregate the fees attributable to the contract cause of action from its other causes of action. [HN11] A party seeking to recover attorney's fees carries the burden of proof to establish the amount which is reasonable and necessary. See *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10, 35 Tex. Sup. Ct. J. 206 (Tex. 1991) (DTPA); *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 40 (Tex. App.-Amarillo 1997, writ denied) (adopting *Stewart* in context of Section 38.001). The general rule is that attorney's fees attributable to other defendants and other causes of action must be segregated. See *Stewart Title Guar. Co.*, 822 S.W.2d at 10-11; *Aetna Cas. & Sur.*, 944 S.W.2d at 40. [\*\*30] An exception to the general rule is when the claims are inseparably intertwined. *Stewart Title Guar. Co.*, 822 S.W.2d at 11; *Aetna Cas. & Sur.*, 944 S.W.2d at 40. The determination of whether attorney's fees can be segregated is a question for the court. *Aetna Cas. & Sur.*, 944 S.W.2d at 41. This determination requires a consideration of the substantive law necessary to establish facts to support a recovery of the multiple claims. *Id.*

We hold that, in the instant case, the declaratory judgment actions were not inseparable from the breach of contract claims. Validity of the modifications of the lease, construction of the provisions relating to the parties' respective maintenance obligations, and liability for water payments, are all claims that are not inseparably intertwined with the breach of contract claims. Flagship correctly points out it did segregate the breach of con-

tract claims from the other causes of action. The City argues Flagship should further segregate fees based on the different theories of breach of contract. However, segregation based on separate theories of the same cause of action is not necessary.<sup>6</sup>

6 Courts examine segregation based on whether different causes of action have similar elements and arise out of the same set of circumstances. They do not examine whether the different theories of the same cause of action need to be segregated. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11, 35 Tex. Sup. Ct. J. 206 (Tex. 1991); *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 41 (Tex. App.-Amarillo 1997, writ denied); *Panizo v. Young Men's Christian Ass'n*, 938 S.W.2d 163, 169-70 (Tex. App.-Houston [1st Dist.] 1996, no writ); *Kenneth H. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229, 236-37 (Tex. App.-Houston [1st Dist.] 1994, writ denied); see also *Au Pharm., Inc. v. Boston*, 986 S.W.2d 331, 338 (Tex. App.-Texarkana 1999, no pet.).

[\*\*31] The breach of contract claims are not inseparable from the other claims.<sup>7</sup> [\*566] Because Flagship did segregate its attorney's fees in its counsel's affidavit, and because the City only contests this segregation on the basis of the different theories of breach of contract, Flagship's affidavit is uncontroverted. [HN12] Uncontroverted testimony by an interested witness concerning attorney's fees may establish a fact as a matter of law. *Cale's Clean Scene Carwash, Inc. v. Hubbard*, 76 S.W.3d 784, 787 (Tex. App.-Houston [14th Dist.] 2002, no pet.). The uncontroverted affidavit establishes the reasonable and necessary attorney's fees for the breach of contract claim as \$ 48,862.00. The trial court abused its discretion in failing to award Flagship its attorney's fees in this amount.

7 Flagship argues that the segregation standard is difficult to meet. We disagree and note that segregated attorney's fees can be established with evidence of unsegregated attorney's fees and a rough percent of the amount attributable to the breach of contract claim. *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 369 (Tex. App.-Fort Worth 1990, no writ); accord *Bradbury v. Scott*, 788 S.W.2d 31, 40 (Tex. App.-Houston [1st Dist.] 1989, writ denied).

[\*\*32] Flagship contends the trial court erred in awarding attorney's fees to the City. The City contends it was entitled to attorney's fees under both *Sections 38.001* (breach of contract) and *37.009* (declaratory judgment) of the Texas Civil Practice and Remedies Code. Flagship

contends the City was not entitled to attorney's fees because attorney's fees were awarded under *Section 38.001* and, because the City breached the contract, it was not a "prevailing party."

The order granting attorney's fees does not state a basis for the award, and the City alleged it was entitled to attorney's fees under both *Sections 38.001 and 37.009*. *Section 37.009* [HN13] authorizes the trial court to award costs and "reasonable and necessary" attorney's fees that are "equitable and just." *TEX. CIV. PRAC. & REM. CODE ANN. § 37.009* (Vernon 1997). A party is not required to substantially prevail in order to be awarded attorney's fees under *Section 37.009*. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637, 39 Tex. Sup. Ct. J. 858 (Tex. 1996). Thus, it is not an abuse of discretion to award attorney's fees to a nonprevailing party if that is equitable [\*\*33] and just under the circumstances.

Flagship further contends the City cannot be awarded attorney's fees under *Section 37.009* because the declaratory judgment did not give rise to any new issues. [HN14] When a party brings a declaratory judgment action by way of a counterclaim, and that counterclaim involves only issues already raised by the original claim, the party is not entitled to an award of attorney's fees.<sup>8</sup> However, validity of the contract modifications and liability as to water payments were issues not raised in the breach of contract claim. The declaratory judgment action therefore raised new issues.

8 See *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 730 (Tex. App.-Waco 1998, pet. denied); see also *John Chezick Buick Co. v. Friendly Chevrolet Co.*, 749 S.W.2d 591, 594-95 (Tex. App.-Dallas 1988, writ denied); *Narisi v. Legend Diversified Invs.*, 715 S.W.2d 49, 51-52 (Tex. App.-Dallas 1986, writ ref'd n.r.e.); *Johnson v. Hewitt*, 539 S.W.2d 239, 240-41 (Tex. Civ. App.-Houston [1st Dist.] 1976, no writ); *Joseph v. City of Ranger*, 188 S.W.2d 1013, 1014-15 (Tex. Civ. App.-Eastland 1945, writ ref'd w.o.m.).

[\*\*34] The trial court's discretion in awarding attorney's fees under *Section 37.009* is limited by whether the attorney's fees were "reasonable and necessary" as well as whether they were "equitable and just." See *Arthur M. Deck & Assocs. v. Crispin*, 888 S.W.2d 56, 62 (Tex. App.-Houston [1st Dist.] 1994, writ denied); see also *Bocquet*, 972 S.W.2d at 20. Further, a party is entitled only to the attorney's fees attributable to the declaratory judgment [\*567] action and must segregate such fees from the other causes of action. *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 143 (Tex. App.-El Paso 1997, pet. denied).

Here, the City failed to segregate fees attributable to the breach of contract cause of action from the cause of action seeking declaratory judgment. As discussed above, these causes are not inseparable. Therefore, we hold the trial court abused its discretion by awarding fees based on unsegregated attorney's fees. Unsegregated attorney's fees however, is some evidence of segregated attorney's fees. *See Stewart Title Guar. Co., 822 S.W.2d at 12.* We therefore reverse the trial court's award and remand this issue to the [\*\*35] trial court for determination, pursuant to *Section 37.009*, of the properly segregated fees, and for determination of whether an award of such fees is "equitable and just" in light of our opinion, and if so, what amount is "reasonable and necessary."

### Summary and Conclusion

In summary, we reverse the trial court's judgment that the term of the lease expires January 18, 2006, and render judgment that such term expires January 18, 2031. We affirm the trial court's judgment that the provisions

of the lease relating to the parties' respective maintenance obligations are unambiguous. We affirm the trial court's determination that it lacked jurisdiction over the water service arrearage. We reverse the judgment denying attorney's fees to Flagship and render judgment that Flagship recover its attorney's fees from the City in the amount of \$ 48,862.00. We reverse the judgment granting the City its attorney's fees and remand this issue for determination (under *Section 37.009 of the Texas Civil Practice and Remedies Code*), of the properly segregated fees, and for determination of whether an award of such fees to the City is "equitable and just" [\*\*36] in light of our opinion, and if so, what amount is "reasonable and necessary."

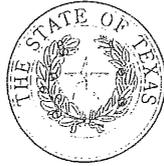
Accordingly, the trial court's judgment is reversed in part, rendered in part, and remanded in part for further proceedings consistent with this opinion.

Donald R. Ross

Justice



# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

October 12, 2006

Derek Seal  
General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-06-1766; TCEQ Docket No. 2005-2091-UCR; In Re: Victoria Palms Resort, Inc. v. City of Donna, Texas

Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 1, 2006. Any replies to exceptions or briefs must be filed in the same manner no later than November 11, 2006.

This matter has been designated **TCEQ Docket No. 2005-2091-UCR; SOAH Docket No. 582-06-1766**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and eleven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary W. Elkins".

Gary W. Elkins  
Administrative Law Judge

GWE/Ls  
Enclosures  
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CITY OF DONNA

SOAH DOCKET NUMBER: 582-06-1766

REFERRING AGENCY CASE: 2005-2091-UCR

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STATE OFFICE OF ADMINISTRATIVE

ADMINISTRATIVE LAW JUDGE

HEARINGS

ALJ GARY W. ELKINS

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CITY OF DONNA

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-06-1766  
TCEQ DOCKET NO. 2005-2091-UCR

VICTORIA PALMS RESORT, INC. § BEFORE THE STATE OFFICE  
V. § OF  
CITY OF DONNA, TEXAS § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

Pursuant to its First Amended Complaint and Petition for Review (Petition) dated June 26, 2006, Victoria Palms Resort, Inc. (Victoria) challenges water and sewer rates adopted by the City of Donna, Texas (Donna). Victoria asks the Texas Commission on Environmental Quality (Commission) to declare them unjust, unreasonable, and a violation of Donna's tariff and the Texas Water Code. Donna challenges the Petition as beyond the scope of the Commission's jurisdiction and as the same relief previously sought by Victoria in 2003, addressed in a Proposal for Decision by an Administrative Law Judge (ALJ), and rejected by the Commission in a final order dismissing the case on May 14, 2004.<sup>1</sup> Consistent with the Commission's conclusion in the 2003 case, Donna argues, it has no jurisdiction over rates assessed by a municipality within its corporate limits. Consequently, Donna asks that the Petition be dismissed as not properly before the Commission. The Executive Director (ED) and the Public Interest Counsel (PIC) join in Donna's position and in the requested relief.

The ALJ agrees with Donna's position. For a second time, Victoria is pursuing causes of action against Donna over which the Commission previously concluded it had no jurisdiction. The Commission should arrive at the same conclusion it reached in the 2003 case—that it does not have jurisdiction to review a billing or rate dispute between Victoria and Donna.

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<sup>1</sup> See, *Victoria Palms Resort V. City of Donna*, TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252 (May 14, 2004).

## II. PROCEDURAL HISTORY

In response to Victoria's Petition filed with the Commission on November 22, 2005, Donna filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, which was received by the State Office of Administrative Hearings (SOAH) on May 31, 2006.<sup>2</sup> On June 6, 2006, PIC filed its Response to Donna's Motion to Dismiss. PIC stated that it agreed with Donna's position that TCEQ did not have jurisdiction over Donna's rates or utility service because Donna is a municipally owned utility providing service to a customer wholly within its corporate limits.

A preliminary hearing was held before SOAH ALJ Gary W. Elkins on June 13, 2006. The following entities appeared and were admitted as parties:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro Robert Drinkard
ED	Paul Tough Todd Galiga
PIC	Mary Alice McKaughan

At the preliminary hearing, the parties presented oral argument on the motion to dismiss and offered their positions on the best procedural approach to addressing the motion in the context of Victoria's Petition. All of the parties agreed that a Commission ruling on the motion to dismiss should first be obtained. Should the ALJ recommend granting the motion and the Commission adopt the recommendation, the case would be ripe for appeal following a required motion for rehearing. Should the ALJ recommend denying the motion, the ruling could be challenged before the Commission via certified question. The Commission's ruling then would determine whether the case would proceed to a hearing on the merits.

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<sup>2</sup>The full title of Donna's request for relief was "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Objection to and Conditional Answer to Applicant's Complaint."

After hearing argument on the motion to dismiss, the hearing closed. However, the ALJ concluded that the only change in circumstances occurring between the Commission's order in the 2003 case and Victoria's petition in this case was a Texas Thirteenth Court of Appeals decision issued in the same factual dispute before the ALJ in this case. Citing *City Of Galveston v. Flagship Hotel, Ltd.*,<sup>3</sup> the Thirteenth Court concluded that "the TCEQ has exclusive appellate jurisdiction to review orders or ordinances of the City."<sup>4</sup>

Based on the intervening decision by the Thirteenth Court, the ALJ issued an order on August 10, 2006 asking the parties to submit briefs, by August 25, 2006, addressing the binding effect on the Commission, if any, of the Thirteenth Court's decision. Victoria, Donna, and the ED submitted briefs in response to the order.

### III. SUMMARY OF RECOMMENDATION

This dispute presents a confusing procedural history. Ultimately, it is clear from the parties' written and oral arguments that in the 2003 case the Commission considered the same jurisdictional challenge and arguments in the same factual dispute between these two parties. The Commission concluded, via final order, that it had no jurisdiction over the dispute.

The ALJ concludes that the Thirteenth Court's decision on the Commission's jurisdiction has no effect on the issue of the Commission's jurisdiction over the pending rate dispute between Victoria and Donna. Consequently, as later discussed in more detail, the Commission should rely on its earlier order in arriving at the same conclusion in this case: that it has no jurisdiction over the pending rate dispute. Also of note is the fact Victoria filed the Petition in this case notwithstanding the Commission's dismissal of the 2003 case with prejudice to refile.

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<sup>3</sup> 73 S.W.3d 422, 427 (Tex. App.-Houston [1st Dist.] 2002, no petition).

<sup>4</sup> *City of Donna, Texas v. Victoria Palms Resort, Inc.*, Cause No. 13-03-375-CV (August 4, 2005).

#### IV. HISTORY OF DISPUTE BETWEEN VICTORIA AND DONNA

The following is a background summary of the dispute that led to Victoria's petition in this case.

In 2003, Victoria filed a lawsuit in Hidalgo County District Court against Donna, alleging that Donna was operating a faulty water meter that resulted in overcharges to Victoria for both water and sewer services provided by the city. The suit also challenged an increase in Donna's water rates. In response, Donna filed a plea to the jurisdiction, arguing that jurisdiction lay not with the court but with the Commission. The Hidalgo County District Court took the jurisdictional challenge under advisement. Victoria then filed a complaint with the Commission to challenge the same rates. The district court denied Donna's plea to the jurisdiction and ruled that the case should proceed to trial. Donna appealed the ruling to the Thirteenth Court of Appeals.

Meanwhile, Donna joined the Commission's Executive Director in challenging the complaint Victoria had filed with the Commission. In a plea to the jurisdiction, Donna argued that the Commission had no jurisdiction over a rate and billing dispute between Victoria and Donna. The Commission referred the case to SOAH, where it was assigned to ALJ William Newchurch. As a result, the billing and rate dispute was pending simultaneously before both SOAH, via the Commission, and the Hidalgo County District Court.<sup>5</sup>

In a final order issued by the Commission in May 2004, it agreed with ALJ Newchurch's conclusion that it did not have jurisdiction over the dispute between Victoria and Donna. Victoria sent a copy of the decision to the Thirteenth Court of Appeals in Corpus Christi, which disagreed with the Commission. The Court found that the Commission had exclusive appellate

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<sup>5</sup> Victoria explains that even though it believed jurisdiction was actually in the district court rather than with the Commission, it felt it had to "cover its bases" by filing the complaint with the Commission following Donna's challenge to the district court's jurisdiction.

jurisdiction over the rate dispute and that the Hidalgo County District Court had jurisdiction over the billing portion of the dispute, which amounted to a breach of contract action. Upon concluding that the Commission's and Court of Appeals' rulings combined to leave it without a forum to challenge Donna's water and sewer rates, Victoria filed a motion for rehearing in the Thirteenth Court.

Around the same time, Donna had the case moved to federal district court, and Victoria responded by requesting that the case be remanded to state court. The federal district court denied Victoria's request and ruled that because the case had been pending at the appellate level while in state court, it was being referred to the Fifth Circuit Court of Appeals. In the meantime, the Thirteenth Court of Appeals had denied Victoria's motion for rehearing.

In what Victoria described as the confusion of not knowing where things lay at that point, it filed a petition for a writ with the Texas Supreme Court. The Supreme Court granted the writ, at which time Donna submitted a letter to it stating that the case was also pending in the federal judiciary. The Texas Supreme Court responded by saying it was abating the case pending action in the federal courts.

According to Victoria, as it now stands Donna's appeal of the Thirteenth Court's denial of its plea to the jurisdiction is now pending review in the Fifth Circuit. The Fifth Circuit has asked the parties to brief the issue of whether it has jurisdiction over the dispute.

Ultimately, when Donna implemented new rates in October 2005, Victoria filed the petition underlying this proceeding. The only difference between this case and the 2003 dispute before ALJ Newchurch, Victoria explains, is the existence of the Newchurch PFD, the resulting Commission decision in which it found it had no jurisdiction over the dispute, and the Thirteenth Court's decision concluding that the Commission has exclusive jurisdiction to review orders or ordinances of the City.

## V. PARTIES' ARGUMENTS

### A. Victoria's Position

In its brief, Victoria remained steadfast in its position that the Commission has jurisdiction to review Donna's orders and ordinances. It reiterated the jurisdictional arguments considered in the 2003 case and added that no appellate court had issued a ruling consistent with Donna's position.

Regarding the issue framed by the ALJ in his request for additional briefing—the extent to which the Thirteenth Court's decision is binding on the Commission—Victoria argues that under the “law of the case” doctrine the Thirteenth Court's decision is controlling. In support of this position, Victoria cited the Texas Supreme Court's conclusion in *Hudson v. Wakefield*<sup>6</sup> that a ruling by an appellate court on a question of law will ordinarily be regarded as the law of that case in all subsequent proceedings in that case. The Court noted that the doctrine applies as long as the facts of the case on remand are substantially the same as they were in the prior proceeding.<sup>7</sup>

Victoria also points out that four separate appellate courts have concluded the Commission has exclusive appellate jurisdiction over water service disputes between a municipality and its customers, pursuant to TEX. WATER CODE ANN. § 13.042(d).<sup>8</sup> It added that the law of the case doctrine lends additional support to the conclusion that the decision of the Thirteenth Court is

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<sup>6</sup> *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).

<sup>7</sup> *Id.*

<sup>8</sup> Victoria cited the following four cases in support of this assertion: *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422, 427 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2002, no pet); *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 562-563 (Tex. App.—Texarkana, 2003, reh'g overruled 2003, pet. denied); *City of Donna v. Victoria Palms Resort, Inc.* 2005 WL 1831593 (Tex. App.—Corpus Christi 2005, reh'g overruled, pet. filed 2005, pet. abated 2006); and *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336 (Tex. App.—Ft. Worth 2005, no pet.).

controlling over its dispute with Donna.

**B. Donna's Position**

Donna argues that the opinion of the Thirteenth Court of Appeals is no more binding on the Commission than were either of two opinions from the Houston or Texarkana Courts of Appeals in the 2003 case. Furthermore, Donna asserts, neither *res judicata* nor *stare decisis* operate to bind the Commission to the Thirteenth Court's opinion regarding the Commission's jurisdiction. Instead, only the decisions of the Travis County District Courts, the Third Court of Appeals, and the Texas Supreme Court have a binding effect on a state administrative agency under the Administrative Procedure Act (APA).<sup>9</sup> None of those bodies has ever held that the Commission has jurisdiction over a water or sewer rate dispute, Donna adds.

Donna also points out that unlike this dispute, which is purely a rate challenge, Victoria's lawsuit in Hidalgo County District Court alleged that it had been over-billed for water by Donna as the result of a faulty water meter. Consequently, a rate dispute between the parties was never before either the District Court or the Thirteenth Court. Donna argues that consistent with the ALJ's conclusion in the 2003 case, any analysis by Thirteenth Court regarding the jurisdiction of the Commission over a rate dispute would be pure dicta, thus having no binding effect on the Commission.

**C. Executive Director's Position**

The ED echoes Donna's position: the Commission is not bound by the opinion of the Thirteenth Court because an appellate court's decisions bind only those lower courts within its appellate district, and the Commission's decisions are appealable only to Travis County District Court, the Third Court of Appeals, and the Texas Supreme Court.

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<sup>9</sup> TEX. GOV'T CODE ANN. ch. 2001 (2006).

## VI. ANALYSIS

Just as the ALJ concluded in the 2003 case before the Commission—that the Commission is not bound by the decisions of the Houston or Texarkana Courts of Appeal—the ALJ in this case concludes that the Commission likewise is not bound by the decision of the Thirteenth Court of Appeals. It is free to reach a different conclusion.

The “law of the case” doctrine cited by Victoria does not apply. The doctrine states,

Questions of law that are decided on appeal to **the court of last resort** will govern the case throughout its subsequent stages, including a retrial and a subsequent appeal.<sup>10</sup> (Emphasis added.)

Victoria mis-states the doctrine by seemingly expanding its application to the courts of appeal. Because the Texas Supreme Court—the Court of last resort—has not ruled on the Commission’s jurisdiction in this case, the doctrine does not act to bar Commission action on the dispute between Victoria and Donna. Furthermore, the Thirteenth Court has no jurisdiction over Commission decisions under the APA. Instead, as argued by Donna and the ED, such decisions are appealable to Travis County District Court and the Third Court of Appeals. This has not occurred.<sup>11</sup>

Likewise, *res judicata* does not bind the Commission to the decision of the Thirteenth Court. Although *res judicata* prohibits the re-litigation of a court’s judgment in a subsequent suit between the same parties or their privies, the Commission was not a party to the case at the Thirteenth Court of Appeals and, thus, did not have the opportunity to present argument on the issue of jurisdiction.<sup>12</sup>

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<sup>10</sup> 3 TEX. JUR. 3D *Appellate Review* § 850 (1999).

<sup>11</sup> At the preliminary hearing, Victoria represented that it appealed the Commission’s 2004 order to Travis County District Court but dismissed the appeal before it could be taken up by the court.

<sup>12</sup> *Hammonds v. Holmes*, 559 S.W.2d 345 (Tex. 1977).

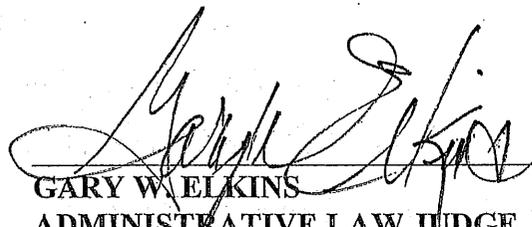
The doctrine of *stare decisis* likewise finds no application to this dispute. The doctrine dictates that once the Texas Supreme Court announces a proposition of law, the decision is generally considered binding precedent on lower courts unless the Supreme Court overrules the earlier decision.<sup>13</sup> The ALJ is unaware of an announcement by either the Supreme Court or the Third Court of Appeals relating to the disputed jurisdictional issue.

Thus, the Commission is the only decision-making body that both has the authority under the APA to make a determination on its jurisdiction over this rate dispute and has exercised that authority, and its order was not appealed. Of added significance was the Commission's decision to dismiss the 2003 case with prejudice to refiling.

#### VII. CONCLUSION AND RECOMMENDATION

The ALJ concludes that the Thirteenth Court's August 4, 2005 Memorandum Opinion has no legal impact on either the Commission's prior jurisdictional ruling in the 2003 case or on this dispute pending between Victoria and Donna. Thus, the Commission should again dismiss Victoria's petition, as reflected in the Proposed Order, with prejudice to refiling.

Signed October 12, 2006.

  
GARY W. ELKINS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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<sup>13</sup> *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964).

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER dismissing the complaint and petition of Victoria Palms Resort, Inc. challenging water and sewer rates that it has been and is being charged by the City of Donna, Texas; TCEQ DOCKET NO. 2005-2091-UCR; SOAH DOCKET NO. 582-06-1766

On \_\_\_\_\_ the Texas Commission on Environmental Quality (Commission or TCEQ) considered a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Objection to and Conditional Answer to Applicant's Complaint, filed by the City of Donna, Texas (Donna). The motion was filed in response to the Original Complaint of Victoria Palms Resort, Inc. (Victoria), seeking a declaration from the Commission that rates being charged by Donna for water and sewer service are unfair, unjust, unreasonable, and a violation of Donna's tariff and the Texas Water Code. Donna's motion to dismiss was presented to the Commission with a Proposal for Decision by Gary W. Elkins, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Victoria was represented by J.W. Dyer, Donna was represented by Ricardo J. Navarro, the Executive Director (ED) was represented by Paul Tough, and the Public Interest Counsel (PIC) was represented by Mary Alice McKaughan.

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

1. Pursuant to its First Amended Complaint and Petition for Review (Petition) dated June 26, 2006, Victoria challenges water and sewer rates adopted by Donna and asks the Commission to declare them unjust, unreasonable, and a violation of Donna's tariff and the Texas Water Code.
2. After Donna implemented new water rates in October 2005, Victoria filed its Original Complaint on November 22, 2005.
3. On March 20, 2006, the Commission's Chief Clerk (Chief Clerk) referred the Original Complaint to SOAH for a hearing.
4. On May 15, 2006, the Chief Clerk mailed a Notice of Hearing to Victoria, Donna, the ED, and the PIC.
5. On May 31, 2006, Donna filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Objection to Applicant's Complaint, challenging Victoria's Original Complaint as beyond the scope of the Commission's jurisdiction and as the same request for relief previously argued by the parties, addressed in a Proposal for Decision by an Administrative Law Judge, and decided by the Commission in a final order.
6. On June 13, 2006, the ALJ held the noticed hearing, at which the following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro Robert Drinkard
ED	Paul Tough Todd Galiga
PIC	Mary Alice McKaughan

7. At the June 13, 2006 hearing, all parties were given the opportunity to present oral argument on Donna's motion to dismiss. The hearing closed that day.
8. On August 10, 2006, the ALJ issued an order reopening the hearing and asking the parties to file briefs by August 25, 2006 on a limited issue. Victoria, Donna, and the ED submitted briefs.
9. In TCEQ Docket No. 2003-0697-UCR [SOAH Docket No. 582-04-0252], the Commission issued an order granted summary disposition on a claim by Victoria involving the same issues and the same parties that are before it in this case. The order was dated May 14, 2004.
10. In the May 14, 2004 order granting summary disposition, the Commission concluded it had no jurisdiction to review either a billing or a sewer rate dispute between Victoria and Donna.
11. The May 14, 2004 order granting summary disposition dismissed, with prejudice to refiling, the portions of Victoria's petition asking the Commission to review the billing and sewer rate dispute between Victoria and Donna.
12. Based on the conclusion that TCEQ Docket No. 2003-0697-UCR (2003 case) involved the very same issues and the same parties that are before the Commission in this case, and

because the Commission issued a final order in the 2003 case addressing those issues, the ALJ's PFD in this case recommended that the Commission dismiss the Petition with prejudice to refiling.

## II. CONCLUSIONS OF LAW

1. Based on the above Findings of Fact and pursuant to TEXAS WATER CODE ANN. (Water Code) § 5.311 and TEXAS GOV'T CODE ANN. (Gov't Code) §§ 2003.021 and 2003.047, the SOAH ALJ has jurisdiction to prepare a proposal for decision (PFD) on Donna's motion to dismiss.
2. The Commission, like any state agency, has only the specific powers conferred on it by statute in clear and precise language. *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
3. Absent a specific exception in the Water Code, the Commission has no jurisdiction of any kind over a municipally owned utility's rates or services within the municipality's corporate limits. Water Code § 13.042(f).
4. Based on the above Findings of Fact and Conclusions of Law, the Commission previously ruled that had it no jurisdiction to review Donna's water and sewer rates.
5. Based on the above Findings of Fact and Conclusions of Law, the Petition should be dismissed.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. Victoria Palms Resort, Inc.'s First Amended Complaint and Petition for Review is dismissed with prejudice to refiling.
2. All motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
3. The Chief Clerk of the TCEQ shall forward a copy of this Order to all parties.
4. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of that portion shall not affect the validity of the remaining portions of the Order. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Kathleen Hartnett White, Chairman

Dear Sir,

I am writing to you regarding the matter of the contract.

The contract was signed on the 15th of the month.

I am sorry that I cannot provide you with the details.

I will be in touch with you again soon.

Thank you for your patience.

Yours faithfully,

John Doe

John Doe & Co.

123 Main Street

London, UK

Phone: 020 1234 5678

Email: john.doe@jdoe.co.uk

Website: www.jdoe.co.uk

I hope this information is helpful.

Best regards,

John Doe

John Doe & Co.

123 Main Street

London, UK

Phone: 020 1234 5678

Email: john.doe@jdoe.co.uk

Website: www.jdoe.co.uk

I am sure you will be satisfied.

Thank you very much.

Yours sincerely,