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June 11, 2009

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUN 12 AM 10:06
CHIEF CLERKS OFFICE

Re: SOAH Docket No. 582-08-1700; TCEQ Docket No. 2008-0091-UCR; *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District; Before the State Office of Administrative Hearings*

Dear Ms. Castañuela:

Attached for filing is an original and eight (8) copies of Clear Brook City Municipal Utility District's Brief on the Merits of Certified Questions in the above captioned matter.

Please return a file-stamped copy for me in the enclosed self-addressed, stamped envelope

Thank you for your attention to this matter.

Very truly yours,


Paul C. Sarahan

/s/ AST
w/ permission

PCS/kyb
Enclosures

Ms. LaDonna Castañuela
June 11, 2009
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SOAH DOCKET NO. 582-08-1700
TCEQ DOCKET NO. 2008-0091-UCR

2009 JUN 12 AM 10: 06

PETITION OF RATEPAYERS
APPEALING RATES ESTABLISHED

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BY CLEAR BROOK CITY
MUNICIPAL UTILITY DISTRICT

BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE-

OF

ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 582-08-2863
TCEQ DOCKET NO. 2008-0093-UCR

APPEAL OF THE RETAIL WATER
AND WASTEWATER RATES OF THE

§
§
§
§
§

LOWER COLORADO RIVER
AUTHORITY

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 582-09-1168
TCEQ DOCKET NO. 2008-1645-UCR

PETITION OF WEST TRAVIS
COUNTY MUNICIPAL UTILITY

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§

DISTRICT NO. 3 FOR REVIEW OF
RAW WATER RATES

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**CLEAR BROOK CITY MUNICIPAL UTILITY DISTRICT'S
BRIEF ON THE CERTIFIED QUESTIONS**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, Clear Brook City Municipal Utility District (the "District") and files its Brief on the Certified Questions. Specifically, on May 1, 2009, the Administrative Law Judges in three proceedings pending before the State Office of Administrative Hearings ("SOAH") certified the following questions:

1. Is Texas Water Code section 49.2122 so inconsistent with Texas Water Code section 13.043(j) that the two statutory provisions cannot be harmonized?
2. Does Texas Water Code section 49.2122(b) create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious?
3. Does Texas Water Code section 49.2122(b) only create a presumption that customer classes established by a district are properly established absent a showing that the district action establishing the classes was arbitrary and capricious?
4. If the answer to Question No. 2 is YES, does Texas Water Code section 49.2122(b) require the petitioner to make an initial showing that the district's rate-setting action was arbitrary and capricious?
5. If the answer to Question No. 4 is YES, in the circumstance that there is no showing that the district action setting the rates was arbitrary and capricious and the rates are therefore presumed to be "properly established," is there any further inquiry required into whether the rates themselves are valid? If so, what is the standard under which the rates themselves must be judged?
6. If the answer to Question No. 2 is YES, is the petitioner required to make the initial showing the district's rate-setting action was arbitrary and capricious whether the rate affected is for retail service, wholesale service, or raw water?

On May 15, 2009, the Commission's General Counsel requested that these questions be set for the Commission's consideration and requested that any briefs regarding these questions be filed by June 12, 2009. The District provides its briefing on the questions as follows:

I. Overview

The questions before the Commission address the rate-setting powers of water districts in Texas and the procedures for appeals brought before the Commission by parties challenging these rate-setting actions. The Legislature made changes to these procedures in 2007, through its enactment of Texas Water Code section 49.2122. The questions before the Commission address issues raised by one or more of the parties in three pending proceedings regarding the effect of Texas Water Code section 49.2122 on appeals of water rate actions taken by water districts.

Water Utilities under Texas Law

There are three forms of water utilities that provide water and sewer services to customers in Texas: (1) municipal-owned utilities;¹ (2) water districts, including municipal utility districts and special law districts, such as river authorities; and (3) investor-owned utilities.² Each form of water utility has different powers and responsibilities. As a result, the Commission's appellate review also varies with respect to each form of water utility.

Municipal-Owned Utilities

The Commission has recently confirmed that the Commission does not have the power or jurisdiction to regulate or supervise the retail water rates or service of a utility owned and operated by a municipality, directly or through a municipally-owned corporation, within the municipality's corporate boundaries. *An Interim Order concerning the Administrative Law Judge's Certified Question in the Matter concerning the Petition of Flagship Hotel, Ltd., to Review the City of Galveston's Denial of a Request to Refund Past Due Water Bills*, TCEQ Docket No. 2007-0879-UCR, SOAH Docket No. 582-07-3473, *citing* TEX. WATER CODE §§ 13.042(f), 13.043(a), (b), 13.082. The Commission has appellate jurisdiction with respect to claims brought against municipal-owned utilities by customers located outside of the municipality's corporate boundaries. TEX. WATER CODE § 13.043(b)(3).

The Commission has authority to review rates charged by incorporated cities, towns or villages, counties, river authorities, water districts, and other special purpose districts for raw or treated water for any purpose mentioned in Texas Water Code chapter 11 or 12. TEX. WATER CODE § 12.013(a), (b).

¹ "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. TEX. WATER CODE § 13.002(13).

² An "investor-owned utility" is a retail public utility owned by an individual, partnership, corporation or homeowners association that provides water and sewer services. *See* TEX. WATER CODE § 13.002(19).

Water Districts

Municipal utility districts are political subdivisions of the state, governed by a board of five elected directors. TEX. WATER CODE §§ 49.101 - 49.105, 54.022, 54.101. A municipal utility district is authorized to provide many of the same services in the unincorporated area within its boundaries that a municipality provides in an incorporated area. The District is a municipal utility district that provides water and sewer service, but also provides many other services as authorized by statute. The District supplies water, collects and disposes of waste, and controls storm water. TEX. WATER CODE § 54.201. In addition, the District provides for police protection,³ fire protection and ambulance service,⁴ solid waste collection and disposal,⁵ and recreational activities.⁶

The District pays for all of these services through revenues generated from monthly service billings and maintenance and operations ad valorem taxes. A portion of the ad valorem taxes are levied for debt service for capital facilities, but a district may also pay for other service costs to varying degrees from maintenance and operations taxes. TEX. WATER CODE §§ 49.107, 54.601-54.604.

The Commission has appellate jurisdiction over municipal utility district rate increases upon the filing of an appeal within 90 days after the effective day of the rate change, by ten percent of the affected customers. These appeals are governed by Texas Water Code sections

³ A district may “contract for or employ its own peace officers with power to make arrests when necessary.” TEX. WATER CODE § 49.216.

⁴ A district is authorized to either maintain a fire department, enter into an agreement with two or more other water districts to operate a joint fire department, or enter into an agreement with another person to provide fire-fighting services. TEX. WATER CODE § 49.351.

⁵ A district is authorized to provide solid waste collection and disposal services to the District’s residents. TEX. WATER CODE § 49.213(c)(2), (6). The District does not provide and does not charge its non-residential customers for these services.

⁶ A district is authorized to “acquire recreational facilities and obtain funds to develop and maintain them.” TEX. WATER CODE § 49.464(b). Recreational facilities include parks, landscapes, parkways, greenbelts, sidewalks, trails, public right-of-way beautification, recreational equipment, including street and security lighting. TEX. WATER CODE § 49.462(1).

13.043(b), (j) and 49.2122. Through its passage of Texas Water Code section 49.2122, the Legislature recognized that water districts perform many of the same services as municipalities. As a result, the Legislature provided a more limited standard of appellate review of a water district's rate-setting action.

Investor-Owned Utilities

An investor-owned utility is a retail public utility owned by an individual, partnership, corporation or homeowners association, and provides only water and sewer services. Unlike municipal-owned utilities and municipal utility districts, an investor-owned utility is not authorized to provide other services such as police protection, fire protection, solid waste collection and disposal, and recreational activities. Its monthly billing covers only the costs of providing water and sewer services, and a reasonable rate of return on its investment. *See* 30 TEX. ADMIN. CODE §§ 291.31, 291.32. If it is located within a municipality's boundaries, an investor-owned utility is subject to the original jurisdiction of the municipality. Otherwise, the Commission has rate jurisdiction if the investor-owned utility provides service in an unincorporated area. TEX. WATER CODE § 13.042(a), (e).

Unlike municipalities or municipal utility districts, investor-owned utilities provide limited services and are not operated by elected officials or those appointed by elected officials. Investor-owned utilities are for-profit entities. Because investor-owned utilities lack the periodic check at the ballot box and are operated for profit, it is appropriate that investor-owned utilities are subject to greater scrutiny in appeals brought before the Commission.

Summary

Just as the services provided by municipal-owned utilities and municipal utility districts are more complex than those provided by investor-owned utilities, so are the revenue-generating mechanisms more complex in the case of municipal-owned utilities and municipal utility

districts. These entities have taxing authority, while an investor-owned utility must rely solely on monthly billings to generate the revenues necessary to operate its business. To analyze the reasonableness of an investor-owned utility's rate structure, one must look solely at its cost of providing water and sewer services and a reasonable rate of return. See 30 TEX. ADMIN. CODE §§ 291.31, 291.32.

In considering a municipal utility district's rate structure, one must consider the costs of all of the services provided by the district, not just the cost of providing water and sewer services. One must also consider the reserves necessary for prudent operations. Further, one must consider the district's revenue-generating mechanisms used to fund those services and reserves. For the District, this includes principally the revenue generated both from monthly service billings and from maintenance and operations ad valorem taxes. Texas Water Code section 49.2122 recognizes the complexities addressed by districts with respect to costs and revenues.

Texas Water Code Section 49.2122

In 2007, the Legislature enacted Texas Water Code section 49.2122, which states:

ESTABLISHMENT OF CUSTOMER CLASSES. (a) Notwithstanding any other law, a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate, including:

- (1) the similarity of the type of customer to other customers in the class, including:
 - (A) residential;
 - (B) commercial;
 - (C) industrial;
 - (D) apartment;
 - (E) rental housing;
 - (F) irrigation;
 - (G) homeowner associations;
 - (H) builder;
 - (I) out-of-district;
 - (J) nonprofit organization; and
 - (K) any other type of customer as determined by the district;
- (2) the type of services provided to the customer class;

(3) the cost of facilities, operations, and administrative services to provide service to a particular class of customer, including additional costs to the district for security, recreational facilities, or fire protection paid from other revenues; and

(4) the total revenues, including ad valorem tax revenues and connection fees, received by the district from a class of customers relative to the cost of service to the class of customers.

(b) A district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.

There are three abated rate cases pending the Commission's consideration of the certified questions involve the interpretation and application of Texas Water Code section 49.2122. The three cases are the first rate cases involving this relatively new statute that have been taken through the contested case hearing process. In each case, the parties have presented arguments to the Administrative Law Judge (the "ALJ") regarding the effect of Texas Water Code section 49.2122 on the proceedings.

Among other issues, the parties have contested the placement of the burden of proof on the parties under Texas Water Code section 49.2122; the effect of Texas Water Code section 49.2122 on Texas Water Code section 13.043(j); and the level of proof required under Texas Water Code section 49.2122 to show that a district acted "arbitrarily and capriciously." These cases represent cases of first impression, and the issues presented for the Commission's consideration are central to the proper disposition of these matters.

Status of Districts in Pending Proceedings

The pending proceedings involve a rate action taken by the District and two rate actions taken by the Lower Colorado River Authority ("LCRA"). The District and LCRA are each a "district" under Texas Water Code section 49.001. A "district" is "any district or authority created by authority of either Sections 52(b)(1) and (2), Article III, or Section 59, Article XVI, Texas Constitution, regardless of how created." TEX. WATER CODE § 49.001(1). The term "district" shall not include "any navigation district or port authority created under general or

special law, any conservation and reclamation district created pursuant to Chapter 62, Acts of the 52nd Legislature, 1951 (Article 8280-141, Vernon's Texas Civil Statutes), or any conservation and reclamation district governed by Chapter 36 unless a special law creating the district or amending the law creating the district states that this chapter applies to that district.” *Id.* The appellants in the three pending matters have not contested the District’s or the LCRA’s status as a “district” under Texas Water Code section 49.001.

II. Discussion

Question No. 1: Is Texas Water Code section 49.2122 so inconsistent with Texas Water Code section 13.043(j) that the two statutory provisions cannot be harmonized?

A. The District’s Position

By enacting Texas Water Code section 49.2122, the Legislature expressly stated that it intended Texas Water Code section 49.2122 to trump “any other law.” TEX. WATER CODE § 49.2122(a) (“Notwithstanding any other law, ...”). The plain language of Texas Water Code section 49.2122 establishes that a district may establish different charges among classes of customers that are based on any factor the district considers appropriate. *Id.* Further, a district is presumed to have weighed and considered appropriate factors in its rate-setting actions and to have properly established charges unless an appellant demonstrates that the district acted arbitrarily and capriciously in establishing these charges. TEX. WATER CODE § 49.2122(b).

In appeals brought under Texas Water Code section 13.043, “the commission shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly shall be just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customers.” TEX. WATER CODE § 13.043(j).

The Legislature has established, through Texas Water Code section 49.2122, that a district's rates are properly established in the absence of a showing that the district acted arbitrarily and capriciously. In doing so, the Legislature has established that such rates are "just and reasonable."

Based on this analysis, Texas Water Code section 49.2122 and Texas Water Code section 13.043(j) can be harmonized, so as to give effect to both statutory provisions. The District respectfully requests that the Commission answer Question No. 1, "No."

B. Background

With respect to this question, in the District's pending proceeding, the ALJ concluded that Texas Water Code section 49.2122 did not conflict with Texas Water Code section 13.043(j). *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. Based on this decision, the ALJ determined that the appellant had the burden of proof to show that the District acted arbitrarily and capriciously in setting the rates being appealed. *Id.*

The ALJ in *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates* determined that Texas Water Code section 49.2122(b) applies only to the process of a district's designation of classes of ratepayers. *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*, Order No. 3 at 12. The ALJ stated that such was not the situation presented in this proceeding. *Id.* Therefore, the ALJ did not determine whether Texas Water Code sections 13.043(j) and 49.2122 could be harmonized.

In *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, the ALJ found that the meaning of Texas Water Code section 49.2122(b) was ambiguous. *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River*

Authority, Order No. 3 at 2. He stated, “the ALJ cannot help but think that the Legislature would more clearly explain its meaning if it intended for LCRA and other districts to be immune from any rate appeals unless they were shown to be arbitrary and capricious.” *Id.* at 3. Therefore, the ALJ did not determine whether Texas Water Code sections 13.043(j) and 49.2122 could be harmonized.

C. Legal Analysis

In construing a statute, Texas courts place significant emphasis on the plain language of the statute. As the Texas Supreme Court has stated, “To give effect to the Legislature's intent, we rely on the plain and common meaning of the statute's words. It is a fair assumption that the legislature tries to say what it means, and therefore the words it chooses should be the surest guide of legislative intent.” *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d 481, 483 (Tex. 2008); *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008).

If a statute is not ambiguous, “a court must adopt the interpretation supported by the statute’s plain language unless that interpretation would lead to absurd results.” *Texas Prot. & Reg. Serv. v. Mega Child Care*, 145 S.W.3d 170, 177 (Tex. 2004). The United States Supreme Court has also stated that a court should not apply rules of construction to unambiguous language except under exceptional circumstances. *See Burlington N. R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461, 107 S. Ct. 1855, 95 L.Ed.2d 404 (1987). The first inquiry in interpreting a statute, therefore, is to determine whether the plain language of a statute is ambiguous.

The plain language of Texas Water Code section 49.2122 is clear and unambiguous. It states in subsection (a) that, “[n]otwithstanding any other law, a district may establish different charges ... among class of customers that are based on any factor the district considers

appropriate” including those factors set forth in Texas Water Code section 49.2122(a)(1)-(4). TEX. WATER CODE § 49.2122(a). In subsection (b), the statute provides that “a district is presumed to have weighed and considered appropriate factors and to have properly established charges ... absent a showing that the district acted arbitrarily and capriciously.” TEX. WATER CODE § 49.2122(b).

Texas Water Code section 49.2122(a) gives districts the authority to establish customer classes and to establish different rates for different customer classes, based on a consideration of one or more factors, as determined by the district. Further, unless an appellant can demonstrate that the district acted arbitrarily and capriciously in establishing the rates, Texas Water Code section 49.2122(b) establishes a presumption that the district weighed and considered appropriate factors in its rate-setting action and that the district’s rates are properly established, i.e., valid, just and reasonable.

It is presumed that an entire statute is intended to be effective and, in the event of a conflict between two provisions, the provisions shall be construed, if possible, so that effect is given to both. TEX. GOV’T CODE §§ 311.021(2), 311.026(a); *Acker v. Texas Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990). If the two provisions cannot be harmonized, the special or specific provision will prevail over the general provision unless the general provision is the later enactment and the manifest intent is that the general provision prevail. TEX. GOV’T CODE § 311.026(b); *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008); *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005).

Texas Water Code sections 13.043 addresses the validity of water rates established by a retail public utility, which includes a district.⁷ Texas Water Code section 49.2122 specifically addresses the validity of water rates established by a district. In this case, the two statutes can be

⁷ See TEX. WATER CODE § 13.002(19).

harmonized so as to give effect to both statutes. The general standard for review of rates is established under Texas Water Code section 13.043(j). “Rates shall not be unreasonably preferential, prejudicial or discriminatory but shall be sufficient, equitable, and consistent in application to *each class of customers.*” TEX. WATER CODE § 13.043(j) (emphasis added). This provision recognizes that there are valid reasons for rates to differ between classes of customers. That rates differ across customer classes of customers is not in itself justification for the Commission to modify the District’s rate structure.

The Legislature enacted Texas Water Code 49.2122 to specifically establish a standard of review for rates set by districts. A district’s rates are presumed to be properly established, and therefore are not unreasonably preferential, prejudicial or discriminatory, unless it is shown that the district acted arbitrarily and capriciously.

If the two provisions conflict, section 49.2122 trumps any other law, including Texas Water Code section 13.043(j). The Commission recognized this fact when it adopted an amendment to the provisions of 30 Texas Administrative Code section 291.41(i) to state, “To the extent of a conflict between this subsection and Texas Water Code § 49.2122, Texas Water Code § 49.2122 prevails.” In adopting this amendment, the Commission based its change on the plain language of Texas Water Code section 49.2122.⁸

TCR Highland Meadow Limited Partnership (“TCR”) and West Travis County MUD Nos. 3 and 5 have argued in their previously-filed pleadings regarding the certified questions that Texas Water Code section 49.002(a)⁹ should resolve any conflict between Texas Water Code sections 13.043(j) and 49.2122 in favor of Texas Water Code section 13.043(j). *TCR Highland*

⁸ 33 Tex. Reg. 5329.

⁹ Texas Water Code section 49.002(a) states, “this chapter applies to all general and special law districts to the extent that the provisions of this chapter do not directly conflict with a provision in any other chapter of this code or any Act creating or affecting a special law district. In the event of such conflict, the specific provisions in such other chapter or Act shall control.”

Meadow Limited Partnership's Brief in Response to the ALJ's Request for Answers to Certified Questions and Motion for Inclusion of an Additional Question, at 3; *West Travis County MUD Nos. 3 and 5's Response (sic) to the Administrative Law Judges' Request for Answers to Certified Questions*, at 12-13. However, applicable laws of statutory construction do not support their position.

Texas Water Code section 49.002(a) is a general provision applicable to all retail utilities and Texas Water Code section 49.2122 is a special or specific provision, applicable only to districts. In addition, Texas Water Code section 49.2122 is the provision of later enactment. If a general provision irreconcilably conflicts with a special provision, the special provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. TEX. GOV'T CODE § 311.026(b). Under this analysis, even if the statutes were irreconcilable and could not be harmonized, Texas Water Code section 49.2122 prevails over Texas Water Code section 49.002(a) and, therefore, over Texas Water Code section 13.043(j).

Finally, in this regard, Texas Water Code section 49.2122 specifies that its provisions apply “[n]otwithstanding any other law.” This mandate would further dictate that Texas Water Code section 49.2122 prevails over Texas Water Code section 49.002(a) and, therefore, over Texas Water Code section 13.043(j).

D. Conclusion

With respect to this question, Texas Water Code section 49.2122 can be harmonized with Texas Water Code section 13.043(j). Section 13.043(j) requires that a district's rates be just and reasonable. Section 49.2122 provides explicit authority for a district to establish classes of customers and creates a presumption that a district's rates are properly established, i.e., just and

reasonable, unless the appellant shows that the district acted arbitrarily and capriciously. In doing so, the statute shifts the burden of proof to the appellant. The two provisions are not in conflict such that they cannot be harmonized.

In the event that such a conflict exists, the Legislature has stated expressly that Texas Water Code section 49.2122 shall control, and the Commission has adopted a rule to this effect through its amendment of Texas Administrative Code section 291.41(i).

Based on the foregoing analysis, Texas Water Code section 49.2122 and Texas Water Code section 13.043(j) can be harmonized, so as to give effect to both statutory provisions. The District respectfully requests that the Commission answer Question No. 1, "No." In the event that the Commission does not determine that the two provisions can be harmonized, the District respectfully requests that the Commission determine that Texas Water Code section 49.2122 prevails over Texas Water Code section 13.043(j).

Question No. 2: Does Texas Water Code section 49.2122(b) create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious?

A. The District's Position

Under Texas Water Code section 49.2122(b), "a district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously." Absent a showing that the district action setting the rates was arbitrary and capricious, the plain language of Texas Water Code section 49.2122(b) creates a presumption that rates set by a district are properly established. The District respectfully requests that the Commission answer Question No. 2, "Yes."

B. Background

With respect to this question, in the District's pending proceeding, the ALJ concluded that Texas Water Code section 49.2122(b) created a presumption that the District's rates are just and reasonable. *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. Based on this decision, the ALJ determined that the appellant had the burden of proof to show that the District acted arbitrarily and capriciously in setting the rates being appealed. *Id.*

The ALJ declined to rule as to whether the appellant in *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates* must prove that LCRA acted arbitrarily and capriciously and stated that legislative history provided by the appellant suggested that Texas Water Code section 49.2122(b) applies only to the process of a district's designation of classes of ratepayers. *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*, Order No. 3 at 12. The ALJ stated that such was not the situation presented in this proceeding. *Id.*

In *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, the ALJ found that the meaning of Texas Water Code section 49.2122(b) was ambiguous. *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, Order No. 3 at 2. He concluded that Texas Water Code section 49.2122(b) does not require the appellants in that matter to prove that the LCRA acted arbitrarily and capriciously, and that the LCRA has the burden of proving its rates to be just and reasonable. *Id.* at 3.

C. Legal Analysis

The plain language of Texas Water Code section 49.2122(b) creates a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious. It states:

A district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.

As the ALJ noted in Order No. 6 in the *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, “charges” fall within the definition of “rate” in Texas Water Code section 13.002(17).¹⁰ *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 5. As stated above, in construing a statute, Texas courts place significant emphasis on the plain language of the statute. *See Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d at 483 (Tex. 2008); *Leland v. Brandal*, 257 S.W.3d at 206 (Tex. 2008).

If a statute is not ambiguous, “a court must adopt the interpretation supported by the statute’s plain language unless that interpretation would lead to absurd results.” *Texas Prot. & Reg. Serv. v. Mega Child Care*, 145 S.W.3d 170, 177 (Tex. 2004). The plain language of Texas Water Code section 49.2122(b) does shift the burden of proof in a rate appeal from the district to the appellant, as is discussed below, but that result cannot be termed “absurd.” In fact, such a result brings appeals brought under Texas Water Code section 13.043 in line with the more generally applicable rule that the burden of proof is on the moving party, rather than the respondent. *See, e.g.*, 30 TEX. ADMIN. CODE § 80.17(a).

¹⁰ “Rate” includes “every compensation, tariff, charge, fare, toll, rental, and classification or any of those items demanded, observed, charged, or collected whether directly or indirectly by any retail public utility for any service, product, or commodity described in [Texas Water Code section 13.002(23)] and any rules, regulations, practices, or contracts affecting that compensation, tariff, charge, fare, toll, rental, or classification.” TEX. WATER CODE § 13.002(17). Neither “rate” nor “charge” is a defined term in Texas Water Code chapters 11 or 12.

Bee Caves has asserted, “An affirmative response to Question No. 2 would dramatically change the law regarding the review of district set rates.” *Bee Cave’s Brief in Opposition to Request for Answers to Certified Questions*, at 6. Bee Caves further asserted that the Commission’s decision “could affect the jurisdiction of the Public Utilities (sic) Commission.” *Id.* at 6-7. West Travis County MUD Nos. 3 and 5 echo this concern. *West Travis County MUD Nos. 3 and 5’s Response (sic) to the Administrative Law Judges’ Request for Answers to Certified Questions*, at 5. Bee Caves also contended that the Commission’s analysis of Texas Water Code section 49.2122 should be subject to review and comment through a rulemaking proceeding. *Bee Cave’s Brief in Opposition to Request for Answers to Certified Questions*, at 7.

It is apparent that the Commission does not have the power or the inclination to rule on the jurisdiction of the Public Utility Commission. Further, the change in the law to which Bee Caves appears to be opposed was made by the Legislature, not by the Commission. No rulemaking is necessary beyond that already completed by the Commission through its amendment of 30 Texas Administrative Code section 291.41(i). The Commission’s rulemaking merely recognizes the statutory mandate from the Legislature.

Finally, Bee Caves agreed that Judge Newchurch’s ruling in the District’s pending matter “appears to be correct within the context of [the] case.” *Id.* at 1-2. Judge Newchurch determined that Texas Water Code section 49.2122(b) creates a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious. Bee Caves’ issues with respect to the applicability of Texas Water Code 49.2122 are more appropriately addressed in Question No. 6 below. Its arguments regarding the potential consequences of the Legislature’s enactment of Texas Water Code section 49.2122 cannot defeat the plain language of the statute itself.

West Travis County MUD Nos. 3 and 5 have contended that Texas Water Code section 49.2122(b) “is only intended to presume the appropriateness of the different charges, fees, rentals, or deposits established between each customer class by a district, not the justice and reasonableness of the costs and charges used to develop retail water and wastewater rates.” *West Travis County MUD Nos. 3 and 5’s Response (sic) to the Administrative Law Judges’ Request for Answers to Certified Questions*, at 6. The attempt to differentiate between the appropriateness of charges and the justice and reasonableness of charges is inconsistent with the Legislature’s enactment of Texas Water Code section 49.2122. As noted above, Texas Water Code sections 13.043(j) and 49.2122 can be harmonized and, to the extent that there is a conflict between Texas Water Code sections 13.043(j) and 49.2122, section 49.2122 prevails over section 13.043(j).

D. Conclusion

The plain language of Texas Water Code section 49.2122(b) establishes a presumption that, absent a showing that the district action setting the rates was arbitrary and capricious, rates set by a district are properly established. As a result, the District respectfully requests that the Commission answer Question No. 2, “Yes.”

Question No. 3: Does Texas Water Code section 49.2122(b) only create a presumption that customer classes established by a district are properly established absent a showing that the district action establishing the classes was arbitrary and capricious?

A. The District’s Position

Texas Water Code section 49.2122(a) authorizes a district to establish customer classes. However the effect of Texas Water Code section 49.2122 is, by its terms, not limited to the establishment of customer classes. Texas Water Code section 49.2122 (b) creates two presumptions. First, a district is presumed to have weighed and considered appropriate factors in

establishing its charges, fees, rentals, or deposits. In addition, a district is presumed to have properly established charges, fees, rentals, and deposits. In each case, this presumption is established “absent a showing that the district acted arbitrarily and capriciously.”

The District respectfully requests that the Commission answer Question No. 3, “No.”

B. Background

With respect to this question, in the District’s pending proceeding, the ALJ concluded that Texas Water Code section 49.2122(b) created a presumption that the District’s rates are just and reasonable. *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. The ALJ stated, “Water Code § 49.2122(b) provides that any rate factor, which would include a [customer] classification, and rate is presumed appropriate unless shown to be arbitrary and capricious....” *Id.* Based on this decision, the ALJ determined that the appellant had the burden of proof to show that the District acted arbitrarily and capriciously in setting the rates being appealed. *Id.* Under the ALJ’s analysis, the effect of Texas Water Code section 49.2122(b) is not limited to a presumption in favor of a district’s establishment of customer classifications.

In *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*, the ALJ stated that legislative history provided by the appellant suggested that Texas Water Code section 49.2122(b) applies only to the process of a district's designation of classes of ratepayers. *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*, Order No. 3 at 12. The ALJ stated that such was not the situation presented in this proceeding. *Id.*

In *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, the ALJ found that the meaning of Texas Water Code section 49.2122(b) was

ambiguous. *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, Order No. 3 at 2. He stated that the legislative history supported an interpretation that Texas Water Code section 49.2122(b) addressed only the establishment of different rates among customer classes and was not more generally applicable to all appeals of rates established by districts. *Id.*

C. Legal Analysis

Under subsection (a) of Texas Water Code section 49.2122, “a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate,” including the four factors expressly set forth in the subsection.

In its arguments to the ALJ, TCR has focused primarily on the Texas Water Code section 49.2122’s caption and argued that Texas Water Code section 49.2122 merely authorizes districts to establish customer classes. The Code Construction Act states, “The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.” TEX. GOV’T CODE § 311.024. TCR’s interpretation entirely disregards the plain language of Texas Water Code section 49.2122(a) which authorizes a district to “establish different charges, fees, rentals, or deposits among classes of customers”; and 49.2122(b), through which the Legislature established the two presumptions discussed above, and the requirement that the appellant must prove that the district acted arbitrarily and capriciously to defeat these presumptions. None of the other appellants has asserted such a narrow application of Texas Water Code section 49.2122.

Texas Water Code section 49.2122(a) authorizes districts to charge different rates to different customer classes. Different rates are the purpose for establishing different classes.

However, Texas Water Code section 49.2122(b) goes further to establish a presumption that a district has weighed and considered appropriate factors in its rate-setting action and that it has properly established its rate schedule.

As West Travis County MUD Nos. 3 and 5 have noted, Texas Water Code section 49.2122(b) does not include a limitation to “customer classes” as is included in Texas Water Code section 49.2122(a). West Travis County MUD Nos. 3 and 5 contend, “The mere absence of the phrase ‘customer classes’ in subsection (b) does not mean that this subsection should be isolated and then broadly applied to all rate reviews that do not involve disputes on customer classifications or allocations of cost among customer classifications.” *West Travis County MUD Nos. 3 and 5’s Response (sic) to the Administrative Law Judges’ Request for Answers to Certified Questions*, at 6.

The absence of the phrase “customer classes” in Texas Water Code section 49.2122(b) should not be presumed to be unintended. If the Legislature intended for Texas Water Code section 49.2122(b) to be limited to customer classes, it would have stated so. When the Legislature has used a term in one portion of a statute and excluded it in another, as the Legislature did here, the courts presume that the Legislature had a reason for excluding it and will not imply the term where it has been excluded. *Fireman’s Fund County Mut. Ins. Co. v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000); *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001); *CenterPoint Energy Houston Elec., LLC v. Gulf Coast Coalition of Cities*, 252 S.W.3d 1, 15 (Tex. App. – Austin 2008, pet. filed). If the plain language is clear, it is inappropriate to add language.

The Legislature’s omissions should be respected to the same degree as its express inclusions. When construing a statute, the court presumes that the Legislature intended a fair and

reasonable result, that the Legislature included each word in the statute for a purpose, and that the words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). In reading a statute, the courts give effect not only to the terms used but the terms that the Legislature chose not to use in construing a statute. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

The Legislature's decision to omit the phrase "customer classes" from Texas Water Code section 49.2122(b) indicates that the Legislature intended a broader application of the presumption than that advocated by the appellants in the pending proceedings. By omitting the phrase, the Legislature expressed its intent that the presumptions established in that subsection are to apply to all of a district's rate-setting actions.

D. Conclusion

Texas Water Code section 49.2122(a) authorizes a district to establish customer classes and to charge different rates between classes. Further, Texas Water Code section 49.2122(b) creates two presumptions. First, a district is presumed to have weighed and considered appropriate factors under Texas Water Code section 49.2122(a) in establishing its rates. In addition, a district is presumed to have properly established its rates. In each case, this presumption is established "absent a showing that the district acted arbitrarily and capriciously."

The District respectfully requests that the Commission answer Question No. 3, "No."

Question No. 4: If the answer to Question No. 2 is YES, does Texas Water Code section 49.2122(b) require the petitioner to make an initial showing that the district's rate-setting action was arbitrary and capricious?

A. **The District's Position**

By its terms, Texas Water Code section 49.2122(b) requires the petitioner to make an initial showing that the district's rate-setting action was arbitrary and capricious. As stated above, Texas Water Code section 49.2122(b) creates two presumptions: (1) that the district weighed and considered appropriate factors in establishing its charges or rates; and (2) that the district properly established its charges, or rates. To overcome these presumptions, a party must show that the district acted arbitrarily and capriciously. The burden of making such a showing naturally falls on the petitioner as the party seeking to overturn the district's action.

The District respectfully requests that the Commission answer Question No. 4, "Yes."

B. **Background**

In the District's pending proceeding, the ALJ stated, "Water Code § 49.2122(b) provides that any rate factor, which would include a [customer] classification, and rate is presumed appropriate unless shown to be arbitrary and capricious..." *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. Based on this decision, the ALJ determined that the appellant had the burden of proof to show that the District acted arbitrarily and capriciously in setting the rates being appealed. *Id.*

In *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*, the ALJ stated that legislative history provided by the appellant suggested that Texas Water Code section 49.2122(b) applies only to the process of a district's designation of classes of ratepayers. *Petition of West Travis County Municipal Utility District No. 3 for Review*

of Raw Water Rates, Order No. 3 at 12. The ALJ declined “to rule at this point on whether the [appellant] must prove that LCRA acted arbitrarily and capriciously, as purportedly required under section 49.2122 of the Texas Water Code. ... It is up to the [appellant] to decide whether it must also prove that LCRA was arbitrary and capricious to overcome the presumption found in section 49.2122(b), should its analysis of the legislative history later be found in error.” *Id.*

In *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, the ALJ agreed “with Appellants that §49.2122(b) does not require them to prove that [LCRA] acted arbitrarily and capriciously in establishing the rates at issue in this proceeding.” *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, Order No. 3 at 1. He concluded that Texas Water Code section 49.2122 governed differences among customer classes and was not applicable to all appeals of rates established by districts. *Id.*

C. Legal Analysis

Texas Water Code section 49.2122(b) creates two presumptions, as discussed above. These presumptions stand “absent a showing that the district acted arbitrarily and capriciously.” TEX. WATER CODE § 49.2122(b). The “showing” would be made, if at all, in the context of a rate appeal brought before the Commission and SOAH.

The parties to such a proceeding include the district that established the rate, the party appealing the rate, the Commission’s Executive Director, and the Commission Public Interest Counsel. 30 TEX. ADMIN. CODE § 80.109(a), (b)(1), (3). Although the Executive Director and the Public Interest Counsel are each authorized to introduce evidence and fully participate in the evidentiary hearing,¹¹ neither of these parties is assigned a burden of proof in these proceedings. 30 TEX. ADMIN. CODE § 80.17. It is evident that the district would not bear the burden of proving that it itself acted arbitrarily and capriciously in taking its rate-setting action. As a

¹¹ 30 TEX. ADMIN. CODE § 80.115.

result, logically, the party appealing the rate must bear the burden of proving that the district acted arbitrarily and capriciously. If this showing is not made, then the rate stands.

Because Texas Water Code section 49.2122(b) establishes presumptions which may only be overcome by showing that the district acted arbitrarily and capriciously, the burden of making such a showing falls on the appellant as the party seeking to overturn the district's action. If no showing is made, the rate stands. As the ALJ in the District's pending action noted, a district "has no obligation to prove anything unless [the petitioner] first shows that [the district] acted arbitrarily and capriciously." *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 9.

D. Conclusion

The plain language of Texas Water Code section 49.2122(b) creates two presumptions that may only be defeated by showing that the district acted arbitrarily and capriciously. The burden of making such a showing naturally falls on the appellant as the party seeking to overturn the district's action. If no showing is made, the rate stands.

The District respectfully requests that the Commission answer Question No. 4, "Yes."

Question No. 5: If the answer to Question No. 4 is YES, in the circumstance that there is no showing that the district action setting the rates was arbitrary and capricious and the rates are therefore presumed to be "properly established," is there any further inquiry required into whether the rates themselves are valid? If so, what is the standard under which the rates themselves must be judged?

A. The District's Position

Texas Water Code section 49.2122(b) creates a presumption that the district "properly established" its charges, or rates. If a district's rates are "properly established," the district has complied with the procedural and substantive requirements applicable to rate-setting. One of the

applicable substantive requirements is the requirement that the rate be just and reasonable. *See* TEX. WATER CODE § 13.043(j). Unless the appellant shows that the district acted arbitrarily and capriciously in setting the rates, the rates are “properly established” and no further inquiry by the Commission is necessary.

The District respectfully requests that the Commission answer Question No. 5, “No, there is no further inquiry required into whether the rates are valid. If the appellant does not prove that the district acted arbitrarily and capriciously in setting its rates, the rates are just and reasonable in accordance with Texas Water Code section 13.043(j) and the rates have been validly established.”

B. Background

In the District’s pending proceeding, the ALJ stated, “Water Code § 49.2122(b) provides that any rate factor, which would include a [customer] classification, and rate is presumed appropriate unless shown to be arbitrary and capricious...” *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. Based on this decision, the ALJ determined that the appellant had the burden of proof to show that the District acted arbitrarily and capriciously in setting the rates being appealed. *Id.* The ALJ noted that the District “has no obligation to prove anything unless TCR first shows that [the District] acted arbitrarily and capriciously.” *Id.* at 9. Further, the ALJ found that Texas Water Code section 49.2122(b) “relieves [the District] of the burden of proving its rates are just and reasonable, which it would otherwise have under Water Code § 13.043(j) and 30 TAC § 291.12, until TCR first shows that [the District] acted arbitrarily and capriciously.” *Id.* at 11.

Neither of the ALJs in the other proceedings addressed the issues raised by this certified question.

C. Legal Analysis

As set forth above, the ALJ in the District's pending concluded that Texas Water Code section 49.2122(b) "relieves [the District] of the burden of proving its rates are just and reasonable, which it would otherwise have under Water Code § 13.043(j) and 30 TAC § 291.12, until TCR first shows that [the District] acted arbitrarily and capriciously." *Id.* at 11. By definition, then, under the ALJ's analysis, if the appellant fails to carry its burden, there is no further inquiry required into whether the rates themselves are valid, and the rate order must be upheld.

Texas Water Code section 49.2122(b) creates a presumption that the district "properly established" its charges, or rates. As the Texas Supreme Court has stated, "To give effect to the Legislature's intent, we rely on the plain and common meaning of the statute's words. It is a fair assumption that the legislature tries to say what it means, and therefore the words it chooses should be the surest guide of legislative intent." *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d at 483 (Tex. 2008); *Leland v. Brandal*, 257 S.W.3d at 206 (Tex. 2008).

Because "properly established" is not a legal term of art, it is appropriate to rely on the common definitions of "properly" and "established." "Proper" is defined as "called for by rules or conventions; correct." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1117 (4th ed. 2002). "Establish" is defined as "to make firm or secure" or alternatively, "to introduce and put (a law, for example) into force." *Id.* at 478. Therefore, if the district has "properly established" its rates, it has correctly made and put those rates in force."

Because the rate order will have been determined to be "properly established," no further analysis is required. The district will have complied with the procedural and substantive

requirements applicable to rate-setting, one of which is the requirement that the rate be just and reasonable. *See* TEX. WATER CODE § 13.043(j). The rates are no longer subject to dispute.

D. Conclusion

If a district's rates are "properly established" the district has complied with the procedural and substantive requirements applicable to rate-setting. One of the applicable substantive requirements is the requirement that the rate be just and reasonable. *See* TEX. WATER CODE § 13.043(j). Unless the appellant shows that the district acted arbitrarily and capriciously in setting the rates, the rates are "properly established" and no further inquiry by the Commission is necessary.

The District respectfully requests that the Commission answer Question No. 5, "No, there is no further inquiry required into whether the rates themselves are valid. If the appellant does not prove that the district acted arbitrarily and capriciously in setting its rates, the rates are just and reasonable in accordance with Texas Water Code section 13.043(j) and the rates have been validly established."

Question No. 6: If the answer to Question No. 2 is YES, is the petitioner required to make the initial showing the district's rate-setting action was arbitrary and capricious whether the rate affected is for retail service, wholesale service, or raw water?

A. The District's Position

"A district is presumed ... to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously." TEX. WATER CODE § 49.2122(b). This provision is not limited to rates established as between classes, but applies generally to all rates established by districts, including "charges, fees, rentals, and deposits" set by a district. As a result, the presumptions established in Texas Water Code section 49.2122(b)

apply to any of a district's rate-setting actions, whether the action be in the context of retail service, wholesale service, or raw water service.

The District respectfully requests that the Commission answer Question No. 6, "Yes."

B. Background

In the District's pending proceeding, the ALJ concluded that the appellant was required to make the initial showing that the district's rate-setting action was arbitrary and capricious in an appeal involving retail water service. *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. The ALJ concluded that Texas Water Code section 49.2122(b) created a presumption that the District's rates are just and reasonable. *Id.* at 11. The ALJ stated, "Water Code § 49.2122(b) provides that any rate factor, which would include a [customer] classification, and rate is presumed appropriate unless shown to be arbitrary and capricious...." *Id.*

In *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, the ALJ concluded that Texas Water Code section 49.2122(b) does not require the appellants in that matter to prove that the LCRA acted arbitrarily and capriciously, and that LCRA has the burden of proving its rates to be just and reasonable. The ALJ determined that Texas Water Code section 49.2122 governed differences among customer classes and was not applicable to all appeals of rates established by districts.

In *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*, the ALJ determined that Texas Water Code section 49.2122(b) applies only to the process of a district's designation of classes of ratepayers. Therefore, the appellants were not required to prove that the LCRA acted arbitrarily and capriciously in setting its rates for raw water.

C. Legal Analysis

“A district is presumed ... to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.” TEX. WATER CODE § 49.2122(b). This provision is not limited to rates established as between classes, but applies generally to all rates established by districts, including “charges, fees, rentals, and deposits” set by a district, whether the rate-setting action is taken in the context of retail service, wholesale service, or raw water service.

In the District’s pending proceeding, the ALJ concluded that Texas Water Code section 49.2122(b) created a presumption that the District’s rates are just and reasonable. *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, Order No. 6 at 11. The ALJ stated, “Water Code § 49.2122(b) provides that *any rate factor*, which would include a [customer] classification, *and rate* is presumed appropriate unless shown to be arbitrary and capricious....” *Id.* (emphases added). The Executive Director agrees with this position and stated so in his Initial Brief in *Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates*.

As noted above, Texas Water Code section 49.2122(b) does not include a limitation to “customer classes” as is included in Texas Water Code section 49.2122(a). West Travis County MUD Nos. 3 and 5 contend, “The mere absence of the phrase “customer classes” in subsection (b) does not mean that this subsection should be isolated and then broadly applied to all rate reviews that do not involve disputes on customer classifications or allocations of cost among customer classifications.”

The absence of the phrase “customer classes” in Texas Water Code section 49.2122(b) should not be presumed to be unintended. If the Legislature intended for Texas Water Code

section 49.2122(b) to be limited to customer classes, it would have stated so. When the Legislature has used a term in one section of a statute and excluded it in another, the courts presume that the Legislature had a reason for excluding it and will not imply the term where it has been excluded. *Fireman's Fund County Mut. Ins. Co.*, 13 S.W.3d at 769; *Meritor Automotive, Inc.*, 44 S.W.3d at 90; *CenterPoint Energy Houston Elec., LLC*, 252 S.W.3d at 15.

When construing a statute, the court presumes that the Legislature intended a fair and reasonable result, that the Legislature included each word in the statute for a purpose, and that the words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d at 802. In reading a statute, the courts give effect not only to the terms used but the terms that the Legislature chose not to use in construing a statute. *Cameron*, 618 S.W.2d at 540.

As stated above, the Legislature's decision to omit the phrase "customer classes" from Texas Water Code section 49.2122(b) indicates that the Legislature intended a broader application of the presumption than that advocated by the appellants in the pending proceedings. By omitting the phrase, the Legislature expressed its intent that the presumptions established in that subsection are to apply to all of a district's rate-setting actions.

D. Conclusion

The presumptions established in Texas Water Code section 49.2122(b) are not limited to rates established as between classes, but apply generally to all rates established by districts, including "charges, fees, rentals, and deposits" set by a district. If the Legislature had intended to limit the application of Texas Water Code section 49.2122(b) to disputes on customer classifications or allocations of cost among customer classifications, it would have included the phrase "customer classes" within this subsection.

Courts presume that the words not included in a statute were purposefully omitted and will not imply the term where it has been excluded. Under the plain meaning of Texas Water Code section 49.2122(b), the presumptions established in Texas Water Code section 49.2122(b) apply to any of a district's rate-setting actions, whether the action be in the context of retail service, wholesale service, or raw water service.

The District respectfully requests that the Commission answer Question No. 6, "Yes."

Prayer

WHEREFORE, PREMISES CONSIDERED, Clear Brook City Municipal Utility District respectfully requests that the Commission answer the certified questions as follows:

1. Is Texas Water Code section 49.2122 so inconsistent with Texas Water Code section 13.043(j) that the two statutory provisions cannot be harmonized?

Commission Answer: "No."

2. Does Texas Water Code section 49.2122(b) create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious?

Commission Answer: "Yes."

3. Does Texas Water Code section 49.2122(b) only create a presumption that customer classes established by a district are properly established absent a showing that the district action establishing the classes was arbitrary and capricious?

Commission Answer: "No."

4. If the answer to Question No. 2 is YES, does Texas Water Code section 49.2122(b) require the petitioner to make an initial showing that the district's rate-setting action was arbitrary and capricious?

Commission Answer: "Yes."

5. If the answer to Question No. 4 is YES, in the circumstance that there is no showing that the district action setting the rates was arbitrary and capricious and the rates are therefore presumed to be "properly established," is there any further inquiry

required into whether the rates themselves are valid? If so, what is the standard under which the rates themselves must be judged?

Commission Answer: "No, there is no further inquiry required into whether the rates themselves are valid. If the appellant does not prove that the district acted arbitrarily and capriciously in setting its rates, the rates are just and reasonable in accordance with Texas Water Code section 13.043(j) and the rates have been validly established."

6. If the answer to Question No. 2 is YES, is the petitioner required to make the initial showing the district's rate-setting action was arbitrary and capricious whether the rate affected is for retail service, wholesale service, or raw water?

Commission Answer: "Yes."

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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CERTIFICATE OF SERVICE

I certify that a true copy of Clear Brook City Municipal Utility District's Brief on the Certified Questions was served on each of the persons listed on the Mailing List attached hereto, in accordance with TCEQ and SOAH rules, on June 12, 2009:

Paul Sarahan (By AST w/permissions)
PAUL C. SARAHAN

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West Travis County Municipal Utility District No. 3
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