



May 6, 2009

Via Hand Delivery

Ms. LaDonna Castañuela – MC 105
Office of the Chief Clerk-Attn: SOAH Docket Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

Docketing Division
State Office of Administrative Hearings
300 W. 15th Street, Room 504
P.O. Box 13025
Austin, Texas 78711-3025

RE: **SOAH DOCKET NOS. 582-08-1700; 582-08-2863; 582-09-1168**
TCEQ DOCKET NOS. 2008-0091-UCR; 2008-0093-UCR; 2008-1645-UCR
Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority

Dear Docketing Clerks:

Presented for filing herewith in connection with the above referenced matter is the Lower Colorado River Authority's Reply to the Administrative Law Judges' Request for Certified Questions. Please return the file-marked copy to me. Eleven additional copies are also provided herewith.

By copy of this letter and according to the certificate of service, all parties of record have been served.

Thank you for your service.

Sincerely,

A handwritten signature in black ink that reads "René F. Poteet". The signature is written in a cursive, flowing style.

René F. Poteet
Paralegal

SOAH DOCKET NO. 582-08-1700
TCEQ DOCKET NO. 2008-0091-UCR

2009 MAY -6 PM 3:16

PETITION OF RATEPAYERS § BEFORE THE STATE OFFICE
APPEALING RATES ESTABLISHED § CHIEF CLERKS OFFICE
§ OF
BY CLEAR BROOK CITY §
MUNICIPAL UTILITY DISTRICT § ADMINISTRATIVE HEARINGS

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

APPEAL OF THE RETAIL WATER § BEFORE THE STATE OFFICE
AND WASTEWATER RATES OF §
THE LOWER COLORADO RIVER § OF
AUTHORITY §
§ ADMINISTRATIVE HEARINGS

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

PETITION OF WEST TRAVIS § BEFORE THE STATE OFFICE
COUNTY MUNICIPAL UTILITY §
DISTRICT NO. 3 § OF
§
FOR REVIEW OF RAW § ADMINISTRATIVE HEARINGS
WATER RATES

**LCRA'S REPLY TO THE ADMINISTRATIVE LAW JUDGES' REQUEST FOR
ANSWERS TO CERTIFIED QUESTIONS**

COMES NOW, the Lower Colorado River Authority ("LCRA") and files this Reply to the Administrative Law Judges' ("ALJs") Request for Answers to Certified Questions.

Pursuant to Section 80.131, Title 30 of the Texas Administrative Code, the LCRA will show the following:

I. Background

A. Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority (TCEQ Docket No. 2008-0093-UCR)

LCRA is a conservation and reclamation district of the State of Texas and included in the definition of “District” for purposes of Chapter 49, Texas Water Code. In August 2007, the LCRA Board of Directors approved new water and wastewater rates for the West Travis County Regional system. These water and wastewater rates were divided into retail, wholesale, residential and commercial classes. Petitions were signed by two ratepayer groups, the City of Bee Cave and West Travis County Municipal Utility District Nos. 3 and 5 (collectively, the “Petitioners”), and filed with the TCEQ appealing the rates. On Jan. 28, 2008, the TCEQ assigned a docket to the petitions for a rate appeal and referred the case to State Office of Administrative Hearings (“SOAH”).

After instruction from the administrative law judge (ALJ), the parties filed briefings and responses regarding the applicability of Texas Water Code §49.2122¹ to the case. The judge

¹ Section 49.2122 states: in its entirety:

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

denied the applicability of §49.2122 and LCRA filed a Motion for Reconsideration of the ALJ's determination. The Motion for Reconsideration was denied. The application of §49.2122 has been at issue in two other cases currently pending before the TCEQ. Section 49.2122 has been construed differently by all three ALJs. On May 1, 2009, the ALJs filed a Request for Answers to Certified Questions with the Commission.

B. Petition of West Travis County Municipal Utility District No. 3 for Review of Raw Water Rates (TCEQ Docket No. 2008-1645-UCR)

On October 9, 2002, LCRA and West Travis County Municipal Utility District No. 3 (MUD No. 3) entered into a "Raw Water Supply Agreement for Recreational, Pleasure, and Water Quality Purposes." The contract provided that MUD No. 3 would pay reasonable rates as set from time to time by the LCRA Board of Directors. Subsequently, on December 19, 2003, LCRA and MUD No. 3 entered into a "Raw Water Supply and Facilities Construction Agreement." These contracts were entered into under the condition that MUD No. 3 would divert water from the existing raw water supply line, which serves the treatment plants, in order to obtain raw water for irrigation purposes.

On October 3, 2008, MUD No. 3 filed a request with TCEQ to review the raw water rate increase by LCRA's Board, requesting the TCEQ review the raw water/effluent irrigation rate

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.

increase effective October 1, 2008. This increase was the result of an action taken in August 2008 by the LCRA Board of Directors that increased the price of raw water/treated effluent irrigation water sold to nine customers through individual contracts. MUD No. 3 is one of the nine customers.

The ALJ requested briefs on procedural issues, which needed to be addressed before a procedural schedule could be set. Section 49.2122 was one of the issues briefed in the procedural issues. The ALJ denied the applicability of Section 49.2122, as well as LCRA's Motion for Reconsideration of the issue. On May 1, 2009, the ALJ joined in the Request for Answers to Certified Questions with the Commission.

C. Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District ("Clear Brook") (TCEQ Docket No. 2008-0091-UCR)

The ratepayers in TCEQ Docket No. 2008-0091-UCR filed a petition with the Commission under the same guidelines and rules as the ratepayers in TCEQ Docket No. 2008-0093-UCR. The petition was a complaint regarding the District and their rates which were divided into classes, just like LCRA. The background for Clear Brook is more detailed and described further in the briefings by Clear Brook. LCRA is not a party in the Clear Brook case.

II. LCRA Supports the ALJs' Position that the Commission Should Address the Certified Questions

A. Three Different Orders from Three Different ALJs

All three cases at issue have separate orders. After reading the orders together, the LCRA feels that the Commission could give guidance as to whether §49.2122 of the Texas Water Code is applicable to the cases at hand as well as provide direction on the burden of proof and the standard to be used in determining appropriate rates. The Petitioners in TCEQ Docket

Nos. 2008-0093-UCR and 2008-1645-UCR have argued that neither of the cases apply to Texas Water Code §49.2122 due to the legislative history behind the statute. All parties agree that LCRA is defined as a district per Chapter 49.²

The Commission has adopted rules which clarify that in retail rate cases involving districts, §49.2122 applies. Section 291.41 (i) states:

(i) In an appeal under this section, 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 is just and reasonable. Rates must not be unreasonably preferential, prejudicial, or discriminatory but must be sufficient, equitable, and consistent in application to each class of customers. The commission shall use a methodology that preserves the financial integrity of the retail public utility. To the extent of a conflict between this subsection and Texas Water Code, §49.2122, Texas Water Code, §49.2122 prevails.³ (Emphasis added).

Although TCEQ has established a rule making to address §49.2122 which is applicable to the retail case at hand, they have not established a procedure by allows the district to establish whether the court should apply §49.2122. For example, in *Clear Brook City Municipal Utility District*, the case in which Judge Newchurch ruled that §49.2122 applies, the Petitioners filed a petition with the TCEQ in the same manner which the Petitioners filed in both TCEQ Docket Nos. 2008-0093-UCR and 2008-1645-UCR. The requirements for the petition were not any different. TCEQ classifies all three cases under the heading “UCR” or “Utility Certification and Rates.” *Clear Brook City Municipal Utility District*, raised its rates by a decision by their Board, just like LCRA. There is no differentiation of these rate increases.

It is arbitrary to decide, without a hearing, that §49.2122 should apply to the *Clear Brook City Municipal Utility District* case and their “classes of customers” but not allow

² Tex. Water Code §40.001(1).

³ Note: Although LCRA is **not** defined as a “water and sewer utility”, a “public utility” or a “utility” by the Texas Water Code (See TEX. WATER CODE §13.001 (23)), **LCRA is defined as a “retail public utility.”** (See TEX. WATER CODE §13.001 (19) which states: “‘Retail public utility’ means any person...political subdivision...operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.”)

the same review with TCEQ Docket Nos. 2008-0093-UCR and 2008-1645-UCR. If this standard is allowed to remain, the petitioners, who will **never** want §49.2122 to apply, will simply just argue that “they aren’t complaining about the rate classes”, and the ALJ will ignore §49.2122, thereby making the rule ineffectual.

B. Burden of Proof in Question

The answers to the Certified Questions presented by the ALJs clarify the burden of proof in district rate cases. The burden of proof in any district rate case turns on whether Texas Water Code §49.2122 is applicable.

LCRA acknowledges that for rate changes proposed by an Investor Owned Utility (“IOU”), it is well established that the utility carries the burden of proof. Section 13.184(c) of the Texas Water Code does address burden of proof in regard to a “utility”:

“in any proceeding involving any proposed change of rates, the burden of proof shall be on **the utility** to show that the proposed change, if proposed by **the utility**, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable.” (Emphasis added).

However, as a political subdivision, the LCRA is not an IOU or a “utility”, for purposes of section 13.184 (c).⁴ Therefore, there is no statutory basis for placing the initial burden of proof on the LCRA and since the enactment of §49.2122(b), the Petitioners should carry the burden of proof to show that the acts of the LCRA Board were arbitrary and capricious.

C. Order of Presentation in Question

Without knowing which party carries the burden of proof, the procedural schedule cannot be determined. Historically, in rate cases, the party who holds the burden of proof, files pre-filed

⁴ §13.002(23); Tex. Water Code..

testimony before the other parties. If §49.2122 is applicable, the testimony filings should not be nearly as arduous and time-consuming for all parties.

D. Other Districts Are Interested in the Issue at Hand

LCRA has heard from other districts around Texas that are interested in the applicability of §49.2122, including Guadalupe Blanco River Authority. Without knowing how the Commission stands on the issue, it allows parties involved in district rate case hearings to be in flux. If the Commission does not answer the ALJs' questions, no target exists for which the parties can solidify their case.

III. PRAYER

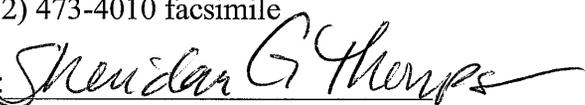
WHEREFORE PREMISES CONSIDERED, the LCRA prays that the Commission GRANT the Administrative Law Judges' Request for Answers to Certified Questions.

Respectfully submitted,

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By: 
Sheridan G. Thompson

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on all parties of record in this proceeding by hand-delivery, First Class Mail, or facsimile transmission on this 6th day of May, 2009, to the persons listed below.

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