



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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CHIEF CLERKS OFFICE

June 12, 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

**RE: SOAH DOCKET NOS. 582-08-2863; 582-09-1168; 582-08-1700
TCEQ DOCKET NOS. 2008-0093-UCR; 2008-1645-UCR; 2008-0091-UCR**

Dear Ms. Castañuela:

Presented for filing herewith in connection with the above referenced dockets is the Lower Colorado River Authority's Brief in Consideration of Certified Questions. Seven additional copies are also provided for the Commission. Please return the additional file-marked copy to the courier.

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,

René F. Poteet
Paralegal

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

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PETITION OF RATEPAYERS § BEFORE THE STATE OFFICE
APPEALING RATES ESTABLISHED § CHIEF CLERKS OFFICE
§
BY CLEAR BROOK CITY § OF
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 BRIEF IN CONSIDERATION OF CERTIFIED QUESTIONS

COMES NOW, the Lower Colorado River Authority ("LCRA") and files this Brief in response to the Office of General Counsel's request of May 15, 2009 concerning 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 filed by three ratepayers, the City of Bee Cave and West Travis County Municipal Utility District Nos. 3 and 5 (collectively, the “Petitioners”), appealing the rates. On Jan. 28, 2008, the TCEQ assigned a docket to the petitions for a rate appeal and referred the case to the 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

administrative services to provide service to a particular class of

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/effluent irrigation rate set by LCRA's Board. This rate increase was the result of an action

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.

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 apartment complex's complaint related to the rates charged by Clear Brook City Municipal Utility District. 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.

D. TCEQ Administration

TCEQ has not established a procedure for the application of §49.2122 in these cases. For example, in *Clear Brook City Municipal Utility District*, the petitioners filed a petition similar to that filed in TCEQ Docket No. 2008-0093-UCR—as an appeal of rates set by the district. In *Clear Brook*, Judge Newchurch ruled that §49.2122 applies. The requirements for the petition were not any different. Clear Brook City Municipal Utility District raised its rates by a decision by their Board, just as LCRA did. There is no effective difference between these two

rate actions. It is inconsistent to apply §49.2122 in the *Clear Brook* case and their “classes of customers” but not allow the same review with the other cases at issue.

II. Proposed Answers to Certified Questions

A. Certified Questions Proposed by the ALJs

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?

Short Answer to No. 1: NO.

Section 13.043(j) provides:

“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 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. The commission shall use a methodology that preserves the financial integrity of the retail public utility. For agreements between municipalities the commission shall consider the terms of any wholesale water or sewer service agreement in an appellate rate proceeding.”²

TCEQ has promulgated rules that directly affect rate appeals through the Commission and that track Texas Water Code §13.043(j) language. Title 30, Chapter 291, Subchapter C was adopted to regulate “Rate-Making Appeals.” Section 291.41(i) regarding “**Appeal of Rate-making**

Pursuant to the Texas Water Code, §13.043” 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

² TEX. WATER CODE §13.043(j). (Emphasis added).

³ TITLE 30 TEX. ADMIN. CODE §291.41 (i).

The bolded language in 30 TAC 291.41 (i) tracks almost identically Texas Water Code §13.043, with the exceptions of “shall” and “must.” Clearly, §13.043(j) and Section 49.2122 can be harmonized or rather, reconciled to give effect to each statute. The Commission has provided for that harmonization in their rate-making appeals rules which provide that “to the extent of a conflict between this subsection and Texas Water Code, §49.2122, Texas Water Code, §49.2122 prevails.”

Through the Rules, TCEQ recognizes that §49.2122 provides an exception to the general test for rates as it may apply to a “district” under Chapter 49. Section 13.043 applies to a wide variety of “retail public utilities,” “utilities,” and “public utilities” which provide potable water service or sewer service including persons and corporations and other political subdivisions which are not “districts.” Texas Water Code Chapter 13 is the statute of more general application. Section 49.2122 is more specific and applies only to a subset of retail public utilities defined as “districts” under Chapter 49. In accordance with rules of statutory construction in the Code Construction Act, if a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.⁴ If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision.⁵

Section 49.2122 is also the statute enacted later in time. Again, in accordance with statutory construction rules, even if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.⁶

⁴ TEX. GOV'T CODE, Section §311.026 (a).

⁵ TEX. GOV'T CODE, Section §311.026 (b).

⁶ TEX. GOV'T CODE, Section §311.025 (a).

Texas Water Code §49.002, states that Chapter 49 applies to districts to the extent that the provisions of Chapter 49 do not “directly conflict” with any other provisions of the Water Code.⁷ Apparent from the statutory language in §49.002, the conflict must be a “direct” conflict, or it should involve two provisions that are irreconcilable with each other. In the example at issue, the presumption found in §49.2122 does not create an irreconcilable approach.

In addition, general rules of statutory construction suggest that, if two separate statutory provisions appear to be in conflict, a court would interpret them to give to each a construction that will reconcile the apparent conflict.⁸ In the construction of an act, if two statutes deal with the same subject matter, that is, they are considered in *pari materia*, care should be taken to ascertain a consistent purpose of the legislature. In order to carry out the intent of both enactments, both should be given effect, if possible.⁹ Although LCRA disagrees with previous statements by one of the ALJs that “arbitrary and capricious” means the same as “just and reasonable,” in this case, Chapter 13 and Chapter 49 are not in direct conflict and any perceived conflict can be reconciled as a procedural matter.

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?

Short Answer to No. 2: YES.

⁷ TEX. WATER CODE §49.002.

⁸ See e.g., *City of Westlake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 686 (Tex. Civ. App.—Waco 1980, no writ); *City of Fort Worth v. Bostick*, 479 S.W.2d 350, 351 (Tex. Civ. App.—Ft. Worth 1972, writ ref'd n.r.e.); *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 122 (Tex. App.—Dallas 1996, writ den'd).

⁹ *Reed v. State Dept. of Licensing and Reg.*, 820 S.W.2d 1 (Tex. App.—Austin 1991, no writ); This principle is embodied, in part, in the language of the code and statutory construction acts dealing with amendments to the same statutes at §§ 311.025 (b) and 312.014 (b), TEX. GOV'T CODE.

Section 49.2122 states the presumption in the language of the statute itself. There is no effective way to regard the presumption as non-existent. Under the plain language of §49.2122, a district's rates are presumed to have been properly established or set, unless the Petitioners show, *i.e.*, prove, that the district acted arbitrarily and capriciously.¹⁰ The statute includes a legislatively-created presumption and specifies the standard of proof that the Petitioners must provide to overcome that presumption.

The Code Construction Act provides that in interpreting a statute, when possible, effect must be given to every sentence, clause and word of the statute, so that no part of it is rendered superfluous.¹¹ In its review of the actions of the District, the Commission takes as true, based on the presumption required by Section 49.2122 (b), that the District weighed and considered appropriate factors and properly established the charges, fees, etc. However, the Petitioners are entitled to have their petition granted and for the Commission to "fix in its final order the rates the governing body should have fixed in the action from which the appeal was taken" if the Petitioners conclusively show that the District acted "arbitrarily and capriciously." If the Petitioners meet their burden, then the burden will shift to the District to prove that the rates at issue are just and reasonable. If the District at that point is not able to prove their rates are just and reasonable, the Commission can overturn the rates and set new rates.

MUD Nos. 3 & 5 emphatically rely upon §13.184 of the Water Code which states:

- (c) 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."¹² (Emphasis added.)

¹⁰ *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006).

¹¹ *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *City of Missouri City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 614 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also* TEX. GOV'T CODE § 311.021 (2).

¹² TEX. WATER CODE §13.184 (c); *see also MUD Nos. 3 & 5 Brief*, p. 4.

The MUDs' argument is irrelevant simply because §13.184 (c) does **not** apply to the cases at issue. Section 13.184 (c) provides that the “burden shall be on the **utility.**” However, LCRA is, as are Chapter 49 districts, a political subdivision of the state,¹³ **not** a “utility” as asserted by the Petitioners. Chapter 13 of the Texas Water Code specifically excludes political subdivisions from the definition of “utility”:

“‘[U]tility’ means any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, **other than** a municipal corporation, water supply or sewer service corporation, or **a political subdivision of the state**, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.”¹⁴ (Emphasis added).

As a political subdivision, the LCRA is not a utility for purposes of section 13.184 (c).¹⁵ 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. If the Petitioners meet their burden, the LCRA will then have the burden to prove that the rates at issue are just and reasonable.

¹³ Special District Local Laws Code §8503.001.

¹⁴ TEX. WATER CODE §13.002 (23).

¹⁵ TEX. WATER CODE §13.002(23).

A rebuttable presumption merely establishes the ground rules by which that review is conducted. Typically, in Texas appellate review, the burden is on the appellant to show that no basis supports the initial decision.¹⁶ Similarly, in this case, the Petitioners may make a showing of error by proof of an action that is arbitrary and capricious. The Legislature established this statutory rebuttable presumption defining the level of proof that the Petitioners must overcome. This elevated level of proof granted districts broad discretion in setting rates. A true presumption is simply a rule of law requiring the jury to reach a particular conclusion in the absence of evidence to the contrary.¹⁷ Many such presumptions exist in legislation in other areas.¹⁸ Any party opposing a retail rate change by a district thus may rebut the presumption by the admission of competent evidence that the actions of the governing Board were 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?

Short Answer to No. 3: NO.

The fact that Section 49.2122 is entitled “Customer Classes” does not restrict the application of subsection (b) to determinations of customer classes. As a matter of statutory

¹⁶ See *ISG State Operations, Inc. v. National Heritage Ins. Co., Inc.*, 234 S.W.3d 711 (Tex. App.— Eastland 2007), reh’g overruled, (Sept. 13, 2007) and review denied, (Feb. 22, 2008).

¹⁷ *Sudduth v. Commonwealth County Mutual Ins. Co.*, 454 S.W.2d 196, 198 (Tex. 1970).

¹⁸ See e.g. TEX. CIV. PRAC. & REM. CODE § 82.007—FDA approved warnings on medicine create presumption of adequate warnings in personal injury case; TEX. PROP. CODE § 426.008--recommendation by a third-party inspector on the existence of a construction defect constitutes a rebuttable presumption of the existence or nonexistence of a construction defect; TEX. FAM. CODE § 1.101--every marriage entered into in this state is presumed to be valid unless expressly made void or voidable by Chapter 6.

interpretation, the provisions of the Water Code are governed by the Code Construction Act.¹⁹

Section 311.024 of the Government Code states:

“HEADINGS. The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.”

The heading, therefore, does not affect the validity or application of subsection (b) to this case.

Under the Texas Code Construction Act, a presumption exists that an entire statute is intended to be effective.²⁰ When interpreting a statute, effect must be given to all words of a statute and, if possible, none of the statutory language should be treated as mere surplusage.²¹ The statute should be read on its face,²² and should not be given a narrow interpretation based on the specific circumstances. Although the caption of Section 49.2122 states, “Customer Classes,” subsection (b) is not restricted to just the determination of customer classes but applies to the establishment of all of the charges, fees, rentals, and deposits.

The statute states that the District may establish different charges, fees, etc., for separate classes, including commercial and residential, and 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.²³ To interpret this statute narrowly to apply only to a class of apartment buildings, as asserted previously by Petitioners, verges on the absurd. To argue that §49.2122 should be applied only to the action of the District in determining the classes, would require the statute to be rewritten. The statute does

¹⁹ Chapter 311, TEX. GOV'T CODE.

²⁰ TEX. GOV'T CODE § 311.021(2).

²¹ See *Continental Cas. Ins. Co. v. Functional Restoration Assoc.*, 19 S.W. 3d 393, 402 (Tex. 2000); see generally TEX. GOV'T CODE § 311.0221

²² TEX. GOV'T CODE § 311.021.

²³ TEX. WATER CODE § 49.2122.

not say “a district is presumed to have weighed and considered appropriate factors and to have properly established **classes of customers** absent a showing that the district acted arbitrarily and capriciously.”

The Supreme Court has widely held that while construing statutory language, the purpose is to determine and give effect to the Legislature’s intent.²⁴ Ordinarily when the Legislature has used a term in one section of a statute and excluded it in another, the Supreme Court presumes that the Legislature has a reason for excluding it and the term should not be implied where it has been excluded.²⁵ The Supreme Court has followed that standard in more recent case law by stating that it is also presumed that the Legislature included each word in the statute for a purpose and that words not included were **purposefully omitted**.²⁶ Section 49.2122(a) specifically references “classes of customers” in each individual subsection; however, the Legislature has chosen to leave “classes of customers” conspicuously absent from subsection (b), the subsection at issue. Therefore, §49.2122 of the Texas Water Code raises a rebuttable presumption of properly established rates in general and is not restricted to creation of specific classes of customers.

MUD Nos. 3 & 5 and the City of Bee Cave have argued that Section 49.2122 does not apply to their case because they claim that this is not a customer class case, but is a dispute regarding rates.²⁷ However, the setting of rates within different customer classes is exactly what the Petitioners dispute in that case. The rates at issue were raised by LCRA for both the

²⁴ *State v. Gonzalez*, 82 S.W. 3d 322, 327 (Tex. 2002); see also TEX. GOV’T CODE §312.005; *American Home Products Corp. v. Clark*, 38 S.W.3d 92, 95 (Tex. 2000).

²⁵ *Meritor Automotive, Inc. v. Ruan Leasing Company*, 44 S.W. 3d 86, 90 (Tex. 2001); see also *Fireman’s Fund County Mutual Insurance Co., v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000); see also *Cameron v. Terrell & Garrett, Inc.*, 618 S.W. 2d 535, 540 (Tex. 1981).

²⁶ *In the interest of M.N., A Child*, 262 S.W.3d 799, 802 (Tex. 2008).

²⁷ See *West Travis County MUD Nos. 3 & 5 Response to the Administrative Law Judges’ Request for Answers to Certified Questions* (“MUD Nos. 3 & 5 Response”), p. 1; see also *Bee Cave’s Brief in Opposition to Request for Answers to Certified Questions* (“Bee Cave’s Brief”), p. 3.

residential and commercial customers in the West Travis County Regional water system. LCRA used a Cost of Service Study to aid in the formulation of the rates, and charges were distributed between residential and commercial customers to meet the revenue requirements of the system as a whole. If the rates are modified in one class of customers, the cost requirements would shift on to one of the other classes. MUD Nos. 3 & 5 argue that they are appealing the “retail ratemaking for **all** customers...”²⁸ Assuming that to be true, then they are appealing the rates of both residential and commercial classes. Therefore, MUD Nos. 3 & 5 cannot argue that their protest is not a complaint based on any comparison of the retail water and wastewater rates assessed to other classes of LCRA customers, because the revenue requirement which affects one, potentially affects the other.²⁹

LCRA does not disagree with MUD Nos. 3 & 5 “that in determining the intent of a statute, the statute as a whole must be considered and not its isolated provisions, and no one provision will be given a meaning inconsistent with the other provisions although it might be susceptible of such a construction if standing alone.”³⁰ However, to interpret this statute narrowly and assert that §49.2122 should be applied only to whether the district arbitrarily and capriciously determined the classes, ignores the second clause of §49.2122 and thereby does not consider the statute as a whole.³¹ The Supreme Court presumes that the Legislature included each word in the statute for a purpose and that words not included were **purposefully omitted**.³²

MUD Nos. 3 & 5 and the City of Bee Cave have addressed the bill analysis for HB 2301, the source of §49.2122, stating the background and purpose of the bill and highlighting the

²⁸ See *MUD Nos. 3 & 5 Response*, p. 2.

²⁹ See *MUD Nos. 3 & 5 Response*, p. 2.

³⁰ See *Morrison v. Chan*, 699 S.W. 2d 205, 208 (Tex. 1985); *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978); see also *MUD Nos. 3 & 5 Response*, p. 3.

³¹ TEX. WATER CODE §49.2122 (b).

³² *In the interest of M.N., A Child*, 262 S.W.3d 799, 802 (Tex. 2008).

following phrase: “HB2301 would allow a district to establish different fees among classes of customers based on any factors the district considers appropriate.”³³ LCRA, a district, has established different fees among classes of customers based on the factors that LCRA has considered appropriate.³⁴ LCRA did, as the Petitioners suggest, use the authority granted by the Legislature to “establish differences in rates between customer classes.”³⁵ Representative Talton’s succinct description of the bill, quoted in Bee Cave’s Brief: “Members this just allows the districts, the water districts to do classes for billing rates,”³⁶ does not unequivocally abolish the application of §49.2122 in the case at issue. The statement in their brief that “Representative Talton intended only for his amendment to allow water districts to establish customer classes and create customer classes for billing rates,”³⁷ comports with what LCRA has accomplished and is what is challenged in this case.

MUD Nos. 3 & 5 rely upon the “Talking Points” for their contention that it is “Important in establishing equitable distribution of rates and taxes to customers, HB2301 does not allow for MUD’s to raise rates arbitrarily by requiring appropriate reasoning to be employed in restructuring rates between customer classes.”³⁸ Whether LCRA is “re-structuring” the rates or whether they “structure” their rates the first time, the scope of §49.2122 should **not** turn on the semantics of “talking points” submitted by an unidentified author. The “Talking Points,” whoever may have suggested them, should **not** and cannot replace the language found in the law. “Every word of a statute must be presumed to have been used for a purpose and every word excluded from a statute must also be presumed to have been excluded for a purpose, and only

³³ *MUD Nos. 3 & 5 Response*, p. 4; *see also Bee Cave’s Brief*, p. 2.

³⁴ *See Board Action 25, LCRA Board Agenda – August 2007 (Exhibit A in LCRA’s Initial Brief on this issue).*

³⁵ *MUD Nos. 3 & 5 Response*, p. 4; *see also Bee Cave’s Brief*, p. 2.

³⁶ *Bee Cave’s Brief*, pp. 2 and 3.

³⁷ *MUD Nos. 3 & 5 Response*, p. 5.

³⁸ *MUD Nos. 3 & 5 Response*, p. 4.

when it is necessary to give effect to clear legislative intent can a court insert additional words or requirements into a statutory provision.”³⁹ Changing the words of the statute is not necessary to give effect to the plain meaning of the statute on its face.

Even if the Commission determines that Section 49.2122(b) presumes only the validity of a customer class determination, the Petitioners have argued that their case does not involve a disagreement regarding rates for different classes of customers. However, the LCRA divided the rates in question for TCEQ Docket No. 2008-0093-UCR into separate classes. If a rate in one class changes, it will affect the rates of the other classes of customers. If Petitioners’ standard is adopted, then any petitioners who file a request to review rates of a district with the Commission, will always contend that “they aren’t complaining about the rate classes,” thereby making the statute ineffectual.

In TCEQ Docket No. 2008-1645-UCR, MUD No. 3, filed a petition with the TCEQ complaining about the rates set by the LCRA Board in accordance with a contract. Like the claims of MUD Nos. 3 and 5 and the City of Bee Cave in the retail rate case, MUD No. 3 did not mention anything about the “classes of customers” in its petition.⁴⁰ However, MUD No. 3 is arguing that it does not want to pay the same charges for raw water and effluent established for all of the customers in this system. MUD No. 3 wants to pay only for water and be accounted for as separate from the system. Essentially, MUD No. 3 is arguing that it should be established as a separate class of customer and have different rates set for it. This illustrates that, if the narrow interpretation that Section 49.2122(b) only applies to creation of customer classes is adopted, the issue can be manipulated to the point it is not effective under any circumstances.

³⁹ *Cameron v. Terrell & Garrett, Inc.*, 618 S.W. 2d 535, 540 (Tex. 1981).

⁴⁰ See the Petition of MUD No. 3 in TCEQ Docket No. 2008-1645-UCR.

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?

Short Answer to No. 4: YES.

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, a district is not an IOU or a "utility," for purposes of section 13.184 (c).⁴¹ Therefore, there is no statutory basis for placing the initial burden of proof on a district and, since the enactment of §49.2122(b), the Petitioners should carry the burden of proof to show that the acts of the District were arbitrary and capricious. If the Petitioners meet their burden, the District will then have the burden to prove the rates in question to be just and reasonable.

From a public policy standpoint, this makes sense. A district composed of elected or appointed public officials normally makes such a determination of the rates in a public forum, governed by laws such as the Open Meetings Act and Public Information Act. The

⁴¹ §13.002(23); Chapter 13 of the Texas Water Code specifically excludes political subdivisions from the definition of "utility": "[U]tility' means any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, **other than** a municipal corporation, water supply or sewer service corporation, or a **political subdivision of the state**, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others."

presumption is that, as a deliberative, public body, they used sound judgment to reach a decision in the public interest. The Legislature, by enacting §49.2122(b), acknowledges this public trust and demands that any challenge to that initial determination amount to more than just second guessing. For these reasons and the reasons set out in Answer to Question No. 3 above, as well as the reasons stated in Answer to Question No. 2, it is apparent that Section 49.2122(b) requires 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?

Short Answer to No. 5: NO.

The required presumption of Section 49.2122(b) is that the district weighed and considered appropriate factors in establishing the rates. Those factors would include whether the rates are reasonable, equitable, and consistent. Unless a petitioner can show that a district acted without any guiding principles in setting the rates, then there should not be any further inquiry into whether the rates themselves are “valid.” In other words, if the rates are properly established in the first place, they cannot be **invalid**.

6. If the answer to Question 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?

Short Answer to No. 6: YES.

Section 49.2122 applies to districts which establish rates. There is nothing in Section 49.2122 which states, implies, or concludes that it is only applicable to retail rates, wholesale rates, or raw water rates. When interpreting §49.2122, under the Texas Code Construction Act, a presumption exists that an entire statute is intended to be effective.⁴² When interpreting a statute, we should give effect to all words of a statute and, if possible, not treat any statutory language as mere surplusage.⁴³ The statute should be read on its face,⁴⁴ and should not be given a narrow interpretation based on the specific circumstances. If the statute is applicable to all “charges, fees, rentals, and deposits” established by the District, it would be applicable to all rates.

B. Certified Question Proposed by LCRA

LCRA proposes that this additional question be added:

What does “arbitrarily and capriciously” mean in the context of an appeal of a rate setting action taken by a district?

III. Prayer

WHEREFORE PREMISES CONSIDERED, the LCRA respectfully prays that the general counsel schedule the request for certified questions during a Commission meeting and 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?

NO.

⁴² TEX. GOV'T CODE § 311.021(2).

⁴³ See *Continental Cas. Ins. Co. v. Functional Restoration Assoc.*, 19 S.W. 3d 393, 402 (Tex. 2000); see generally TEX. GOV'T CODE § 311.0221.

⁴⁴ TEX. GOV'T CODE § 311.021.

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?

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?

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?

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?

NO.

6. If the answer to Question 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?

YES.

LCRA also prays that the Commission consider a seventh question:

What does "arbitrarily and capriciously" mean in the context of an appeal of a rate setting action taken by a district?

Respectfully submitted,

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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 12th day of June, 2009, to the persons listed below.

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