

SOAH DOCKET NO. 582-09-4286  
TCEQ DOCKET NO. 2009-0445-UCR  
AUSTIN, TEXAS

PETITION BY RATEPAYER TARA § BEFORE THE TEXAS COMMISSION  
PARTNERS, LTD. FOR REVIEW §  
OF CITY OF SOUTH HOUSTON § ON  
WATER AND SEWER SERVICE §  
RATES ADOPTED JAN. 6, 2009 § ENVIRONMENTAL QUALITY

**PETITIONER'S BRIEF IN EXCEPTION TO THE ADMINISTRATIVE LAW  
JUDGE'S PROPOSAL FOR DECISION**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW TARA PARTNERS, LTD., the Petitioner in the above-styled and numbered rate appeal, by and through its counsel of record, Matthew Paul Nickson, and hereby files its exceptions to the Administrative Law Judge's September 8, 2008 Proposal for Decision, and requests vacatur of the Administrative Law Judge's dismissal upon jurisdictional grounds of the Petitioner's water rate appeal:

**STATEMENT OF THE COURSE OF PROCEEDINGS**

1. Petitioner Tara Partners, Ltd. is the owner of Tara Hall Apartments. Tara Hall Apartments is a multifamily commercial residential complex that receives water and sewer services from the City of South Houston.<sup>1</sup> Petitioner is partially located outside the City of South Houston (and within the City of Houston); 76 of Tara Hall's 171 units are located outside the City of South Houston.
2. On January 6, 2009, the City of South Houston enacted new water and sewer service rates. A copy of the applicable City Ordinance (No. 2009-1)—setting forth the new, complained-of rate schedule—is on file with the Commission and with the State

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<sup>1</sup> The City operates a municipally owned utility. *See* TEX. WATER CODE § 13.002(13).

Office of Administrative Hearings (SOAH). The Ordinance divides City water and sewer customers into six classes: (1) “Residential User”; (2) “Outside-City Residential [User]”; (3) “Commercial Residential User”; (4) “Outside-City Commercial Residential User”; (5) “Commercial User”; and (6) “Outside-City Commercial User” classes. City Ordinance at p. 1 (internal quotation marks omitted).<sup>2</sup> Under the Ordinance, the City can charge apartment complexes like Petitioner a monthly water base rate and a monthly sewer base rate per apartment unit, regardless of whether the unit is occupied and regardless of the fact that Petitioner’s entire complex is only serviced by two meters.<sup>3</sup> Thus, Petitioner contends that the City’s water and sewer Ordinance permits the assessment of fees which are, in part, de facto taxes, and which do not reasonably relate to the costs of provision of service.<sup>4</sup> Therefore, Petitioner has timely appealed the City’s January 6, 2009 water and sewer ordinance to this Commission.<sup>5</sup> The Commission, in turn, has on April 7, 2009 referred the Petitioner’s appeal to the SOAH.

3. At a preliminary SOAH hearing had in Austin on July 7, 2009, the City expressed concern that the Commission lacked jurisdiction over the Petitioner’s appeal. The City invoked the requirement in Texas Water Code section 13.043(c) that ten percent of outside water and sewer ratepayers must sign a valid petition in order to confer Commission jurisdiction. The City questioned whether Petitioner, the only signatory upon the rate petition the subject of this action, accounts on its own, singularly, for ten percent of the City’s outside water and sewer ratepayers. Presiding Administrative Law

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<sup>2</sup> There is no provision in the City’s sewer rates for outside commercial residential users. This appears to be an oversight.

<sup>3</sup> The City is not presently assessing per-unit base charges against Petitioner.

<sup>4</sup> Briefing regarding the legality of City practices, including discussion of the past transfer by the City of water and sewer funds into the City’s general revenue fund (a matter regarding which the Petitioner hopes to conduct discovery), can be supplied at the Commission’s request.

<sup>5</sup> It is undisputed that Petitioner’s superseding petition was filed with the Commission about March 13, 2009, and duly served upon the City.

Judge (ALJ) Richard R. Wilfong ordered briefing and the submission of evidence on the issue.

4. City records filed by the City during briefing indicate that—as of January 6, 2009, the date of enactment of the City’s new water and sewer rate ordinance—Petitioner was one of eighteen outside City water customers and one of ten outside City sewer customers. A copy of the City’s spreadsheet memorializing this information, as well as an accompanying affidavit from a City billing clerk, is on file with the Commission and with the SOAH.<sup>6</sup>

5. After briefing by the parties, the ALJ issued a written order providing that the Commission possesses jurisdiction over Petitioner’s sewer rate appeal. *See* Order No. 2: Remand of Water Rate Portion of Proceeding and Dismissal (hereinafter, the Order of Dismissal). The ALJ held that, because Petitioner, standing alone, makes up less than ten percent of the City’s outside water customers, the Commission cannot exercise jurisdiction over the Petitioner’s water rate appeal. *Id.* at p. 2 (“Since the Petition is only signed by Petitioner it is only signed by 5.56 percent of those [outside water] ratepayers. Simply stated, 5.56 percent is not 10 percent, and thus does not satisfy the ten percent jurisdictional requirement.”).

6. The ALJ recommended that the Commission dismiss the Petitioner’s water rate appeal. The ALJ remanded the appeal to the Commission for this purpose. Petitioner subsequently filed both a motion for rehearing with the Commission, and a motion with the ALJ for certification of the ALJ’s dismissal order to the Commission. In response, the ALJ dissolved his dismissal order and instead issued a substantively identical Proposal for Decision. Petitioner hereby excepts to the ALJ’s Proposal; requests that the

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<sup>6</sup> Petitioner filed a copy of the spreadsheet as part of its August 24, 2009 Application for Rehearing.

Proposal be dissolved; and asks also that the Commission remand the Petitioner's water rate appeal for plenary consideration on the merits.<sup>7</sup>

#### SUMMARY OF ARGUMENT

7. Petitioner excepts entirely to the ALJ's Proposal for Decision. See 30 TEX.ADMIN.CODE § 80.257. The ALJ's determination therein that the Commission lacks jurisdiction over Petitioner's water rate appeal proceeds from an erroneous interpretation of Texas Water Code section 13.043(c). The Commission must reverse the ALJ because the ALJ has endorsed a rule which erects an unwarranted barrier to invocation of the Commission's appellate jurisdiction. The ALJ's ruling constricts the right to administrative redress of utility customers who, more often than not, cannot vote for the municipal officials who fix their rates.

8. The ALJ's reasoning is based on the simple premise that, because the Petitioner constitutes less than ten percent of outside water customers, the Petitioner cannot satisfy the ten percent requirement (at section 13.043(c) of the Texas Water Code). See Proposal for Decision at p. 3. While logical on the surface, the ALJ's holding is untenable in light of: (A) the persuasive force of the Executive Director's "rounding" rule, and (B) the substantive and equitable justifications underlying the Petitioner's view that the number of eligible section 13.043 ratepayers must be determined on a "per class" basis—a view which avoids an absurd alternative construction, and which goes unaddressed in the ALJ's Proposal for Decision. In the latter connection, in his (now vacated Order of Dismissal) the ALJ acknowledged the Executive Director's and Petitioner's argument that the jurisdictional percentage assigned to the Petitioner should be measured with

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<sup>7</sup> Because the ALJ's Proposal for Decision is substantively identical to his Order of Dismissal, this brief and application is very similar to the Petitioner's Application for Rehearing, filed with the Commission on August 24, 2009.

reference to the number of outside ratepayers within the Petitioner’s rate classification (which, Petitioner asserts, consists of other commercial residential ratepayers). *See* Order of Dismissal at pp. 1–2. The ALJ did not, however, ever explicitly decide whether all eighteen of the City’s outside water ratepayers are commercial residential ratepayers, or even whether the “per class” approach is appropriate. *See also* Proposal for Decision at pp. 1–4.<sup>8</sup> Hence, assuming arguendo that the ALJ’s rejection of rounding is correct, the ALJ’s order still fails to adequately justify dismissal.

9. The issues raised by this appeal are novel and important. *Cf.* Proposal for Decision at p. 3 (“The ED acknowledges that ‘there is no guidance in case law or the Commission’s rules on how to handle a situation where rounding must occur to determine the best threshold for jurisdiction in a rate appeal.’”). They are worthy of this Commission’s considered review. The Commission should set the Petitioner’s exceptions upon its docket and, after notice of hearing and hearing had, reject the ALJ’s construction of Texas Water Code section 13.043(c). The Commission should then hold that Petitioner has successfully perfected its appeal of both the City’s sewer and water service rates.

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<sup>8</sup> Nevertheless, the ALJ’s proposed Finding of Fact No. 4 states that “City’s revised rates for water and sewer service apply in the same manner to all of City’s outside of city customers.” Proposed TCEQ Order (annexed to the Proposal for Decision) at p. 1.

ARGUMENT AND AUTHORITIES

**A. In an apparent case of first impression, the ALJ’s refusal to adopt the Executive Director’s “rounding” requirement erects an extra-statutory enhancement of the ten percent requirement at section 13.043(c) of the Texas Water Code.**

10. The ALJ’s Proposal for Decision concludes that—in situations in which (Texas Water Code) section 13.043(c) rate appellants do not satisfy the law’s ten percent requirement, and could not satisfy it without simultaneously exceeding it—the jurisdictional prerequisite ought not be treated as having been met. *See* Proposal for Decision at p. 3. The ALJ thereby rejects the position advanced by the Executive Director, who argued below that section 13.043(c) should not be construed to actually require that the Petitioner adduce more than ten percent of eligible signatures in order to perfect its appeal. In his brief to the ALJ, the Executive Director explained his reasoning as follows:

The City provided a list of customers the City determined would meet the criteria of Tex. Water Code § 13.043(b) in its “Affidavit of Notice to Customers[.]” – in other words, a list of customers of the City who reside outside the corporate limits of the City. The list includes 18 separate customers including Petitioner. The City argues that “ten percent [of 19 customers] is 1.9, therefore the Petition must be signed by at least two affected outside-city ratepayers in order for the Commission to have jurisdiction.”

The Executive Director disagrees with this analysis. Ten percent of eighteen customers is 1.8. There is no such thing as 1.8 customers under the law. A fraction of a person cannot petition the Commission, and therefore, the City jumps to the conclusion that the Petitioner's burden has now been raised to 2 customers or eleven percent of the affected customers by rounding the fractional person up to the nearest whole number. There is no guidance in case law or the Commission's rules on how to handle a situation where rounding must occur to determine the base threshold for jurisdiction in a rate appeal. Since the rule is a barrier to appeal, it should be interpreted liberally in favor of the customers. Requiring a petitioner to have signatures from eleven percent of the ratepayers increases the burden beyond what the statute requires. The Executive Director's interpretation does not conflict with TEX. WATER CODE § 13.043(b)(3), because the statute gives no guidance how to calculate ten percent when rounding must occur.

*See* Executive Director's Brief on Jurisdiction at pp. 4–5 (citations omitted). The Commission should endorse the Executive Director's approach to section 13.043(c), repudiating the ALJ's alternative reading. The Texas Supreme Court has held that ambiguities in statutes affecting appellate rights must be construed in support of the parties invoking appellate jurisdiction. "It is our policy to construe rules reasonably but liberally, when possible, so that the right to appeal is not lost by creating a requirement not absolutely necessary from the literal words of the rule." *See Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993) (tendering of a motion for new trial without the filing fee

was sufficient to extend the post-judgment deadline for perfecting an appeal, though the filing fee was not paid and the motion was not file-marked until the period for timely filing the motion had passed) (emphasis added) (citations omitted). In this vein, the ten percent requirement at section 13.043(c)—which is unclear in its application and which governs a right of appeal<sup>9</sup>—should be interpreted favorably to the appellant Petitioner.

11. An important parallel is to the manner in which the U.S. Supreme Court has held that, when the time period for perfecting an appeal expires on a weekend or legal holiday, the effective deadline must be extended through the end of the next business day. *See Jones & Laughlin Steel Corp. v. Gridiron Steel Co.*, 382 U.S. 32, 32–33 (1965). The rule exists notwithstanding the fact that the time periods for perfecting appeals, set forth at 28 U.S.C. § 2107, are “mandatory and jurisdictional.” *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003) (citing *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978)) (internal quotation marks omitted).<sup>10</sup> Thus, instead of constricting the thirty day requirement (which, facially, is no more ambiguous than a ten percent requirement) by requiring that notices of appeal be filed on the last business day within the applicable periods for perfecting appeals, the U.S. Supreme Court, like the Executive Director, hews to an interpretation of a jurisdictional appellate statute which

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<sup>9</sup> Though the burden of proof and persuasion lies with the ratemaker (at least insofar as establishing a prima facie case is concerned), a section 13.043(c) proceeding is nevertheless considered to be an appeal. *See* TEX. WATER CODE § 13.043(e). Presumably, the original proceeding consists of the legislative deliberation (and vote) of the governing body of the municipally owned utility—herein, the City Council of the City of South Houston.

<sup>10</sup> Rule 6(a)(1)(C) of the Federal Rules of Civil Procedure independently requires tolling a deadline which expires on a weekend or legal holiday over to the next business day. It is nonetheless important to recall that the Rules of Civil Procedure are more akin to (mandatory) interpretive directives than to statutes, since the Rules Enabling Act requires that the Rules not enlarge, modify, or abridge substantive rights, and—per the U.S. Supreme Court—that they not alter the scope of federal jurisdiction. *See* 28 U.S.C. § 2072; *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (“But in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941), we observed that federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. *Id.*, at 10, 61 S.Ct., at 425.”). Thus, the force of *Jones & Laughlin Steel Co.* does not depend exclusively upon the mandate of any Federal Rule.

favors appealability. *See also Houston v. Lack*, 487 U.S. 266, 274–75 (1988) (opinion by Justice Brennan that, notwithstanding contrary language in Rules 3 and 4 of the Federal Rules of Appellate Procedure, in civil habeas appeals involving pro se prison inmates, filing occurs when the inmates deliver their court papers to the appropriate prison officials); *but see Kinnard v. Carnahan*, 25 S.W.3d 266 (Tex.App.—San Antonio 2000, no pet.).<sup>11</sup>

12. The literal text of section 13.043(c) does not foreclose the Executive Director’s interpretation. The idea of ten percent (or of thirty days for perfecting an appeal in a U.S. Court, for that matter) is conceptually simple enough—on its face. Nevertheless, in its application to human beings—who, in many contexts, cannot be split (as indicated by the Judgment of King Solomon)—the ten percent provision can (as here) become ambiguous and avail itself of alternative glosses. That is, for purposes of ascertaining the sufficiency under section 13.043(c) of Petitioner’s rate petition, the percentage which Petitioner represents to the number of outside water customers: (1) can be left as is, at 5.56 per cent (even though doing so endorses a construction which will effectively require—in instances involving small cities—that more than ten percent of outside-ratepayers sign onto a rate appeal, an unwelcome heightening of section 13.043(c)’s jurisdictional floor), or (2) it can be “rounded up” in order to avoid interpreting section 13.043(c) to ever require that more than ten percent of outside ratepayers sign onto a rate appeal. Resolution of the dilemma—which is a true difficulty of law application that reveals that section 13.043(c) is not “clear and unambiguous”—must be informed by the structure and policy goals of chapter thirteen of the Water Code. *See* TEX. GOV’T CODE § 311.023.

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<sup>11</sup> The ALJ’s methodology is diametrically opposite. *See Proposal for Decision* at p. 3 (“Where it is impossible to have less than a whole number, 2 of the 18 ratepayers are required to satisfy the at least 10-percent requirement to establish Commission jurisdiction.”).

The same are respectfully submitted to favor that interpretation which confers appealability upon the Petitioner, *see Jamar*, 868 S.W.2d at 319, as appealability facilitates review on the merits, which in turn facilitates respect for the administrative process and best ensures that rates are just and reasonable. *Cf.* TEX. WATER CODE §§ 13.001, 13.181–192.

13. Thus, the Commission should abjure the ALJ’s rejection of the Executive Director’s “rounding” methodology.

**B. The ALJ erred by failing to properly address the relevance of the “per class” approach to Petitioner’s rate appeal.**

14. Section 13.043(c) of the Texas Water Code specifies that “the lesser of 10,000 or 10 percent of those ratepayers whose rates have been changed” must subscribe to a valid rate appeal. The City’s list of outside water ratepayers indicates that: there is one commercial residential payer (Tara Partners); twelve commercial payers of other types; four residential payers; and, one Church. Before the ALJ, the Executive Director and the Petitioner argued that Petitioner’s jurisdictional percentage should be measured by reference to other customers of a like class.<sup>12</sup> The City disagreed, positing that the phrase “10 percent of those ratepayers whose rates have been changed” is clear and unambiguous, and requires that—in ascertaining the jurisdictional sufficiency of a petition—the number of signatories be compared with the total number of outside ratepayers writ large. *See, e.g., Reply Brief of the City of South Houston* at p. 2. In his Order of Dismissal, the ALJ declined to pass directly upon the question, addressing it solely by describing the parties’ arguments. Order of Dismissal at pp. 1–2. Further, though the ALJ’s Proposal for Decision makes no real reference to the controversy, his

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<sup>12</sup> In this case, there are no other outside commercial residential ratepayers.

proposed Finding of Fact No. 4 erroneously asserts that “City’s revised rates for water and sewer service apply in the same manner to all of City’s outside of city customers.” Proposed TCEQ Order (annexed to the Proposal for Decision) at p. 1. A crux of this appeal is that City’s water and sewer rates do not apply in the same manner to other classes of customers, since only customers like apartment complexes can be forced to pay excessive monthly base rate charges which are wholly divorced from the actual occupancy of their livable units, and from the number of their meters. Therefore, because Petitioner is the City’s only outside commercial residential customer, the ALJ’s Proposal for Decision is fatally flawed.

15. Rejection of the “per class” approach facilitates a perverse and absurd result, and the Commission must construe section 13.043(c) of the Texas Water Code so as to avoid the same. As the Texas Supreme Court recently reiterated in *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009), a statute must never be read to countenance an absurdity:

Where text is clear, text is determinative of [legislative] intent. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (“[W]hen possible, we discern legislative intent from the plain meaning of the words chosen.”); *see also Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). This general rule applies unless enforcing the plain language of the statute as written would produce absurd results. *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

*Entergy*, 282 S.W.3d at 437 (emphasis added). The City’s theory of section 13.043(c) permits municipally owned utilities to create class and rate structures which adversely

affect (and are only unlawful as to) discrete minority segments of the rate-paying population (i.e., apartment complexes and, necessarily, their tenants). These segments of the population will have a difficult time—owing to the City’s rate structure—in collecting signatures from other ratepayers who are not prejudiced by the City’s fees, and who may be openly hostile or apathetic about challenging the fees. In other words, though it is the goal of the American judicial system to provide protection for all kinds of minority groups (including economic minorities), the City’s approach to section 13.043(c) allows its utility to “divide and conquer” the ratepaying population.

16. As mentioned above, in this rate appeal, the City’s base rate structure is alleged to be unconstitutional and unlawful as to customers like Tara Hall, which only has two meters but which—under the City’s contested Ordinance—can be charged base rates for all 171 units (76 of which are outside the City).<sup>13</sup> The base rate structure is not problematic as to the typical homeowner or business having one or two meters.<sup>14</sup> As a general matter, the City should not be allowed to create ratepayer classifications; discriminate against some ratepayers (in accordance with a rate classification system of its own choosing); and then successfully mount the defense that the outside ratepayers against whom the City has discriminated against (commercial residential and/or outside commercial residential customers), cannot rely upon their classification status (which the City created, and which the City treats prejudicially) in fixing the type and number of eligible ratepayers against which their signature(s) must be measured. Otherwise, the City will have found a way to deprive outside ratepayers, who generally cannot vote in

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<sup>13</sup> One can imagine a situation in which rates for over 90% of outside ratepayers are actually decreased in order to defeat section 13.043(c) jurisdiction—an abuse which the City’s interpretation of the statute would enable and countenance.

<sup>14</sup> Moreover, under Commission rules, Tara Hall is but one ratepayer. The tenants themselves cannot be counted as additional ratepayers. *See* 30 TEX.ADMIN.CODE § 291.3(38).

municipal elections, from availing themselves of administrative relief.<sup>15</sup> *See Entergy*, 282 S.W.3d at 437 (citation omitted); TEX. GOV'T CODE § 311.023 (“In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other factors the: (1) object sought to be attained . . . [and] (5) consequences of a particular construction.”).<sup>16</sup> Such an injustice and absurdity cannot be tolerated.

17. Thus, should the Commission reject the Executive Director’s “rounding” rule, the Commission should nevertheless vacate the ALJ’s Proposal for Decision on account of the ALJ’s failure to reckon with rate classifications in determining the set of ratepayers against which Petitioner’s signature should be compared.

#### CONCLUSION AND PRAYER

Wherefore, on account of all the foregoing reasons, the Commission should reject the Administrative Law Judge’s Proposal for Decision, and should vacate and remand the Administrative Law Judge’s dismissal for want of jurisdiction of the Petitioner’s water rate appeal.

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<sup>15</sup> In addition, commercial residential customers will be affected more adversely by the City’s new graduated volumetric rates for water because the commercial residential customers will surely use greater amounts of water (for what are mostly their tenants’ residential needs). *Cf. Reply Brief of the City of South Houston* at p. 12 n.24 (comparing the City’s old and new water service ordinances).

<sup>16</sup> As the City essentially noted below, the Code Construction Act has been revised by the Texas Supreme Court, such that the Code is only applicable where a statute is neither clear nor unambiguous. *See Initial Brief of the City of South Houston* at p. 5 & nn. 10–11 (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)).

Respectfully submitted,

Date: September 28, 2009

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 28, 2009, a true and correct copy of the above and foregoing document was served upon the following individuals or counsel of record:

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