

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 28, 2009

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

**RE: SOAH DOCKET NO. 582-09-4286; TCEQ DOCKET NO. 2009-0445-UCR;** Tara Partners' Petition requesting review of the City of South Houston's water and sewer rates.

Dear Ms. Castañuela:

Enclosed for filing in the above captioned matter you will find the Executive Director's Exceptions to the PFD in the above captioned matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross W. Henderson".

Ross W. Henderson  
Staff Attorney  
Environmental Law Division

cc:

Mailing list

**SOAH DOCKET NO. 582-09-4286  
TCEQ DOCKET NO. 2009-0445-UCR**

<b>PETITION BY RATEPAYER TARA</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>PARTNERS, LTD. REQUESTING</b>	<b>§</b>	
<b>REVIEW OF THE CITY OF SOUTH</b>	<b>§</b>	
<b>HOUSTON'S WATER AND SEWER</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>RATE INCREASE IN HARRIS</b>	<b>§</b>	
<b>COUNTY, TEXAS (CCN NOS. 11151</b>	<b>§</b>	
<b>&amp; 20449; APPLICATION NOS.</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>36444-A &amp; 36445-A).</b>	<b>§</b>	

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**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PFD**

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TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), and files these Exceptions to the PFD in the above-referenced matter. The Executive Director ("ED") raises the following exceptions to the Proposal for Decision (PFD): (1) Finding of Fact No. 4 erroneously states that the City's revised rates for water and sewer apply in the same manner to all of the City's outside of City customers; and (2) Conclusion of Law No. 3 incorrectly concludes that Petitioner does not satisfy the 10-percent requirement to establish jurisdiction to City's outside of city water rates. According to the list of 18 outside of city customers provided by the City, the Petitioner is the only customer classified as "outside city commercial residential" pursuant to the City's ordinance which is the subject of this appeal. As such, Petitioner is the only customer in its class of customers and the only customer subject to multiple residential unit charges for a single meter outside the City<sup>1</sup>.

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<sup>1</sup> See Exhibit 1. Petitioner's water service to the apartment is metered at the street with a single meter. According to the Ordinance 2009-01, the minimum base rate for water service for "commercial residential" users is \$12.00, times the number of units, times 62%. Whereas other users pay a different rate based strictly upon the meter size.

The Executive Director respectfully disagrees that the Petitioner has not met the requirements of Texas Water Code Section 13.043(c) to invoke the Commission's appellate rate jurisdiction over its outside city apartment units.

The generally accepted process for setting rates is to allocate certain fixed costs of a water system (such as fixed assets) to the minimum base charge and certain variable costs (such as costs that depend on the amount of water treated, ie chemicals) to the gallonage rates. The Executive Director generally recommends minimum base rates that correspond to the potential demand that a customer can have on the water system. The Executive Director generally subscribes to the established theory of allocation of fixed cost based on a meter size and not on the number of people who happen to be using the water from a meter. Accordingly, the Executive Director is interested in learning the City's methodology for creating its minimum base charge based on residential units and for the City to demonstrate that this methodology results in a just and reasonable rate allocation.

## **I. BACKGROUND**

The City of South Houston (the City) enacted Ordinance No. 2009-01, relating to "Water and Sewer Fees" on January 6, 2009.<sup>2</sup> Tara Partners, LTD. (Petitioner) timely filed an appeal of the City's rate changes on March 9, 2009. The TCEQ has records for previous rate ordinances: 823 (enacted December 20, 1988); 994 02-94 (enacted February 1, 1994); 2004-34 (enacted November 9, 2004); and 2005-09 (enacted March 22, 2005). Each one of these ordinances contains a provision repealing past ordinances to the extent that the old ordinance conflicts with the new.

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<sup>2</sup> Exhibit 1

## II. APPLICABLE LAW

Petitioner timely filed his petition pursuant to TEX. WATER CODE § 13.043(b)(3). That provision confers the Commission with appellate jurisdiction to review the rates of a municipally owned utility for the customers residing outside the corporate limits of the municipality. Such an appeal “must be initiated by filing a petition for review with the commission and the entity providing service within 90 days after the effective day of the rate change . . . The petition must be signed by the lesser of 10,000 or 10 percent of those ratepayers whose rates have been changed and who are eligible to appeal under Subsection (b) of this section.”<sup>3</sup>

## III. EXCEPTIONS

**A. Finding of Fact No. 4 erroneously states that the City’s revised rates for water and sewer apply in the same manner to all of the City’s outside of City customers.**

According to the City’s list of 18 outside of city customers, Petitioner is the only customer of its class “Outside City Commercial Residential User”. The 2009 Ordinance, which is the subject of this appeal, changed the minimum base rater for water over the previous 2005 Ordinance. In 2005, the minimum base rate for Commercial Residential customers was \$10.00 for each unit, whether units were occupied or vacant. The 2009 Ordinance amends the minimum base charge for Commercial Residential Users to “the number of units multiplied by 62% and multiplied by the minimum base rate of \$12.00.” The Executive Director acknowledges that the changes to the ‘per gallon’ charge is uniform for every outside city customer, however, Petitioner is in the only customer in the only class of customers to which change to the minimum base charge per residential units applies without regard to the size of the customers meter.

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<sup>3</sup> TEX. WATER CODE § 13.043(c).

The City argues that because it has so far chosen not to apply this minimum base charge to Petitioner, the base rates are not appealable. The ALJ seems to have misconstrued this statement to mean that the minimum rate base charge does not apply to Petitioner. Whether or not the City is actually charging the full rates authorized under the Ordinance is irrelevant to this proceeding. Petitioner is authorized under TEX. WATER CODE § 13.043(b)(3), to appeal the City's decision to enact the Ordinance which affects its rates. The City can change its mind about whether to charge the minimum base rate at any moment, but Petitioner's right to appeal expired 90 days after the City enacted the Ordinance. Next year's City Council and Mayor might opt to charge the full amount authorized under the Ordinance when it is beyond the reach of the Commission's review. If the hearing continues, the Commission must address the Ordinance as it affects Petitioner on its face, and not how it is applied in practice. Especially in light of the fact that the City believes it can charge the "minimum base rate."

**B. The ED disagrees with Conclusion of Law No. 3 which concludes that Petitioner does not satisfy the 10-percent requirement to establish jurisdiction to City's outside of city water rates.**

The Executive Director has in the past applied the 10-percent requirement to *each class of customers affected* rather than, as the City argues should be done, to *all customers affected* by the rate change. In this interpretation, each group that is separately affected has a right of appeal if 10 percent of that group petitions. The reason the ED has interpreted TWC § 13.043 in this manner is that a utility could otherwise shift the rate burden onto one class of customers and avoid rate review. For instance, in this case, the ALJ correctly finds that the per gallon charge is uniform across all classes of customers, however, Petitioner is the only customer subject to the residential unit charge. The other customers have a different portion of the rate burden.

Petitioner argues that his portion is unreasonable and burdensome. The other customers would not likely petition the rate change if they perceived they were not paying their fair share. Petitioner is 100% of the customers affected by the minimum base rate affecting his class of customers, as such, he should be able to appeal his rate change.

The Executive Director has followed this interpretation because it would be easy for a utility to charge unjust and unreasonable rates and avoid review. For instance a utility could institute a rate change that raises each residential user's rate by a nickel and each commercial user's rate by a thousand dollars per month. If there are more than 10 times the number of residential customers than commercial, the commercial customers would likely be unable to appeal an unreasonable rate.

The Executive Director acknowledges that the Commission has never before addressed this issue and would appreciate any guidance the Commission may provide.

**IV. CONCLUSION AND PRAYER**

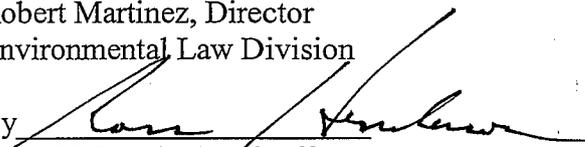
For the above reasons, the Executive Director respectfully requests that Commission find that the Commission has jurisdiction over the water rates in this matter and remand the matter back to SOAH for a hearing on the merits.

Respectfully Submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

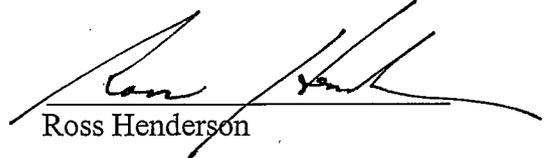
Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director  
Environmental Law Division

By   
Ross W. Henderson, Staff Attorney  
Environmental Law Division  
State Bar of Texas No. 24046055  
P.O. Box 13087; MC 173  
Austin, Texas 78711-3087  
Phone: (512) 239-6257

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of September, 2009, a true and correct copy of the foregoing document was filed with the Chief Clerk of the Texas Commission on Environmental Quality.

  
Ross Henderson

**MAILING LIST  
CITY OF SOUTH HOUSTON  
SOAH DOCKET NO.: 582-09-4286; TCEQ DOCKET NO.: 2009-0445-UCR**

STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

Richard Wilfong  
Administrative Law Judge  
SOAH  
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FOR THE PETITIONER

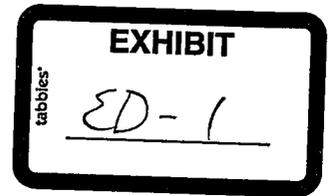
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ORDINANCE NO. 2009-01

AN ORDINANCE AMENDING CHAPTER 24, ARTICLE II, WATER AND SEWER FEES SERVICE CHARGES; AMENDING SECTION 24-21, AND AMENDING SECTION 24-22, WATER RATES, AND SECTION 24-23, SEWER RATES; PROVIDING AN EFFECTIVE DATE; PROVIDING A REPEALING CLAUSE; AND PROVIDING A SAVING CLAUSE.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SOUTH HOUSTON, TEXAS:

Section 1. That Chapter 24 of the South Houston Code of Ordinances, Article II, Water and Sewer Service Charges, Section 24-21, Classification and Definition of Water Users is hereby amended to read as follows:

Section 24-21. Classification and definition of water users.

(a) For the purpose of this article, all users of city water are classified as residential, commercial residential, commercial, outside-city residential and outside-city commercial.

(b) The definition of the following users is as follows:

- (1) "Residential User" shall be defined as a single family unit.
- (2) "Outside-City Residential" shall be defined as a single family unit outside the city limits of the City of South Houston, Texas, which meets the definition of a residential user.
- (3) "Commercial Residential User" shall be defined as all multi-family units containing two or more living units including trailer parks and apartment projects.
- (4) "Outside-City Commercial Residential User" shall be defined as all multi-family units containing two or more living units including trailer parks and apartment projects located outside the city limits of the City of South Houston, Texas, which meet the definition of Commercial Residential User.
- (5) "Commercial User" shall be defined as any water user who is a business for profit or non-profit.
- (6) "Outside-City Commercial User" shall be defined as a commercial business located outside the city limits of the City of South Houston, Texas, which meets the definition of commercial user.

Section 2. That Chapter 24, Article II, Water and Sewer Service Charges, Section 24-22 of the South Houston Code of Ordinances, entitled "Water Rates," Subsections 1 and 2, is hereby amended to read as follows:

Section 24-22 Water rates.

The monthly charge for water furnished by the City of South Houston, Texas, shall be as follows:

(1) Residential and Outside-City Residential User Rates are as follows:

The minimum base rate for water is \$12.00 per month. In addition to the base minimum charge, all water used will be charged at the following rate:

Residential Commodity Rate per 1,000 Gallons

0 - 6,000 gallons.....	\$ 1.91 per 1,000 gallons
6,001 - 12,000 gallons.....	\$ 2.30 per 1,000 gallons
12,001 gallons and over.....	\$ 2.50 per 1,000 gallons

(2) Commercial Residential User Rates are as follows:

The minimum base rate per month for water is the number of units multiplied by 62% and multiplied by the minimum base rate of \$12.00.

Commercial Residential and Outside-City Commercial User Commodity Rate per 1,000 Gallons

0 - 6,000 gallons.....	\$ 1.91 per 1,000 gallons
6,001 - 12,000 gallons.....	\$ 2.30 per 1,000 gallons
12,001 gallons and over.....	\$ 2.50 per 1,000 gallons

(3) Commercial and Outside-City Commercial User Rates are as follows:

The minimum base rate per month for water for Commercial and Outside-City Commercial rates shall be as follows:

(a) 5/8" Water Meter.....	\$12.00 per month
(b) 1" Water Meter.....	\$18.00 per month
(c) 1 1/2" Water Meter.....	\$32.40 per month
(d) 2" Water Meter.....	\$57.60 per month
(e) 3" Water Meter.....	\$126.00 per month
(f) 4" Water Meter.....	\$216.00 per month

Commercial User Commodity Rate per 1,000 Gallons

0 - 6,000 gallons.....	\$ 1.91 per 1,000 gallons
6,001 - 12,000 gallons.....	\$ 2.30 per 1,000 gallons
12,001 gallons and over.....	\$ 2.50 per 1,000 gallons

**Section 3.** That Chapter 24, Article II, Water and Sewer Service Charges, Section 24-23 of the South Houston Code of Ordinances, entitled "Sewer Rates," Subsections 1 and 2, is hereby amended to read as follows:

Section 24-23. Sewer Rates.

Each water user connected to the sewer shall pay to the City an additional sewer charge based upon water usage, as follows:

(1) Residential and Outside-City Residential Sewer User Rates shall be as follows:

The minimum base rate per month for sewer services is \$14.40. In addition to the minimum monthly base rate, an additional sewer service charge fee of \$2.35 per 1,000 gallons of water used will be charged to the Residential and Outside-City Residential Sewer User.

(2) Commercial Residential User and Outside-City Commercial Residential Rates shall be as follows:

The minimum base rate per month for sewer services is the number of units multiplied by 62% and multiplied by the minimum base rate of \$14.40. In addition to the minimum monthly base rate, a sewer service charge of \$2.35 per 1,000 gallons of water used will be assessed.

(3) Commercial and Outside-City Commercial User Rates shall be as follows:

The minimum base rate per month for sewer services for Commercial and Outside-City Commercial Users shall be as follows:

The rates shall be charged according to the size of the water meter, whether those units are occupied or vacant, as follows:

(a) 5/8" Water Meter.....	\$14.40 per month
(b) 1" Water Meter.....	\$21.60 per month
(c) 1 1/2" Water Meter.....	\$38.88 per month
(d) 2" Water Meter.....	\$69.12 per month

- (e) 3" Water Meter..... \$151.20 per month  
(f) 4" Water Meter..... \$259.20 per month

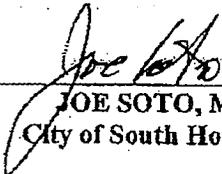
In addition to the minimum monthly base rate, a sewer service charge of \$2.50 per 1,000 gallons of water used will be assessed.

**EFFECTIVE DATE:** This Ordinance shall become effective upon its passage and approval.

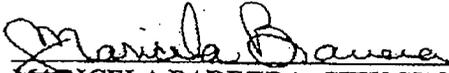
**REPEALING CLAUSE:** All ordinances or parts of ordinances, if any, that are inconsistent with or in conflict herewith shall be, and the same are hereby expressly repealed to the extent of such inconsistency or conflict only.

**SAVINGS CLAUSE:** That the City Council of the City of South Houston, Texas, does hereby declare that if any section, subsection, paragraph, sentence, clause, phrase, word or portion of this ordinance is declared invalid or unconstitutional by a court of competent jurisdiction it nonetheless would have passed and ordained any and all remaining portions of this ordinance without the inclusion of that section, subsection, paragraph, sentence, clause, phrase, word or portion which may be so found to be unconstitutional or invalid, and declares that its intent it so make no portion of this ordinance dependent upon the validity of any other portion thereof and that all the remaining portions shall continue in full force and effect.

**PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF SOUTH HOUSTON, TEXAS, ON THE 6<sup>TH</sup> DAY OF JANUARY 2009.**

  
\_\_\_\_\_  
**JOE SOTO, MAYOR**  
City of South Houston, Texas

**ATTEST:**

  
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**MARICELA BARRERA, CITY SECRETARY**  
City of South Houston, Texas