

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 8, 2009

CHIEF CLERKS OFFICE

2009 SEP -8 PM 4:31

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-09-4286; TCEQ Docket No. 2009-0445-UCR; In Re:
Petition by Tara Partners, Ltd. For Review of City of South Houston Water and
Sewer Service Rates

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 28, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than October 8, 2009.

This matter has been designated **TCEQ Docket No. 2009-0445-UCR; SOAH Docket No. 582-09-4286**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Richard R. Wilfong".

Richard R. Wilfong
Administrative Law Judge

RRW/sb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: CITY OF SOUTH HOUSTON
SOAH DOCKET NUMBER: 582-09-4286
REFERRING AGENCY CASE: 2009-0445-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ RICHARD WILFONG**

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bcoy@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ROSS W HENDERSON
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6257 (PH)
(512) 239-0626 (FAX)
rhenders@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

GEORGIA CRUMP
LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
816 CONGRESS AVENUE, SUITE 1900
AUSTIN, TX 78701-2478
(512) 322-5800 (PH)
(512) 472-0532 (FAX)
gcrump@lglawfirm.com

CITY OF SOUTH HOUSTON

MATTHEW NICKSON
ATTORNEY AT LAW
1300 MCGOWEN
HOUSTON, TX 77004
(713) 655-8880 (PH)
(713) 621-1449 (FAX)
mpnickson@gmail.com

TARA PARTNERS, LTD.

xc: Docket Clerk, State Office of Administrative Hearings

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

2009 SEP -8 PM 4:31

**PETITION BY TARA PARTNERS LTD.
FOR REVIEW OF CITY OF SOUTH
HOUSTON WATER AND SEWER
SERVICE RATES**

§
§
§
§
§

**BEFORE THE STATE OFFICE OF CHIEF CLERKS OFFICE
OF
ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

Tara Partners, Ltd. (Petitioner) seeks review by the Texas Commission on Environmental Quality (Commission) of final water and sewer service rates enacted by the City of South Houston (City). Petitioner contends that the rates for the portion of the service it receives outside the City's corporate limits, are neither just and reasonable, nor reasonably related to the cost of provision of water and sewer service, and are discriminatory. This Proposal for Decision (PFD) concerns only the water rate portion of the case. The sewer rate portion was severed and remains pending at the State Office of Administrative Hearings (SOAH). The Administrative Law Judge (ALJ) recommends that the Commission find that it has no jurisdiction to consider the portion of the petition concerning water rates and dismiss it.

II. PROCEDURAL HISTORY

On March 5, 2009, Petitioner filed with the Commission its petition for review of the new water and sewer rate ordinance passed by the City effective January 6, 2009. On June 9, 2009, SOAH received the request for docketing and notice of hearing from the Commission. A preliminary hearing was convened on July 7, 2009, at the SOAH hearing facilities in Austin, Texas, before ALJ Richard R. Wilfong. Petitioner appeared through attorney Matthew Nickson; City appeared through attorney Georgia Crump; and the Commission's Executive Director (ED) appeared through attorney Ross Henderson. The ED offered exhibits ED-A (Petition), ED-B (Mailing List), and ED-C (Notice Affidavit) that were admitted without objection. The ED and City raised a question as to whether

Petitioner satisfied the jurisdictional requirements of TEX. WATER CODE ANN. (Code) § 13.043(b)(3) and (c). By Order No. 1 dated July 9, 2009, the ALJ established a briefing schedule concerning the threshold jurisdictional issue and required the City to identify all outside-the-city customers by location and rate class, and confirm the applicable rate classification for Petitioner. After all parties timely filed briefs, the ALJ issued Order No. 2 on August 4, 2009, remanding the water rate portion of the proceeding to the ED and dismissing that portion of the proceeding from the SOAH docket based on a finding of lack of jurisdiction. On August 31, 2009, the ALJ issued Order No. 3 vacating Order No. 2 because he concluded it was more appropriate to issue a PFD and proposed order for adoption by the Commission.

III. JURISDICTION

The threshold issue is whether the Commission has jurisdiction pursuant to Code § 13.043(b)(3) and (c). Specifically, whether Petitioner, the sole signatory on the petition for review, constitutes 10 percent of the ratepayers whose rates have been changed.

IV. DISCUSSION

In summary, Code § 13.043(b)(3) provides that ratepayers of a municipally owned utility, that reside outside the corporate limits of the municipality, may appeal water or sewer rates enacted by the municipality to the Commission. Code § 13.043(c) provides that the petition for review must be signed by the lesser of 10,000 or 10 percent of the ratepayers whose rates have been changed.

In accordance with Order No. 1, City provided the affidavit of its Water Administration Billing Department Chief Billings Clerk showing that Petitioner is one of 18 outside-the-city water ratepayers and one of 10 outside-the-city sewer ratepayers who are appropriately classed with Petitioner.

City argues that Petitioner fails to satisfy the 10-percent requirement because it is the only signatory out of 18 water ratepayers in its class, thus “the Commission does not have jurisdiction over at least the water rate portion of this proceeding.”

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.” Then, relying on authorities holding that statutes relating to right of appeal should be liberally construed, the ED concludes that 1.8 should be rounded down to one rather than require at least two signatories that would equate to 11 percent which is more than the statute requires. Petitioner joins the ED’s position and makes the further argument that the statute is ambiguous. City argues in response that the term “10 percent” is clear and unambiguous, and therefore, is not subject to interpretation. City concludes that simply stated, 5.56 percent is not 10 percent, and thus does not satisfy the 10-percent jurisdictional requirement.

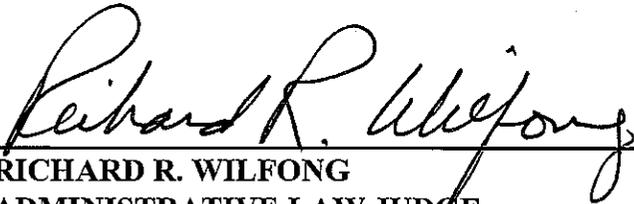
The ALJ reads Code § 13.043(c) as requiring that a minimum of 10,000 or 10 percent of the affected ratepayers must sign a petition for review in order to establish the Commission’s jurisdiction to hear a rate review. One cannot be simply deemed to be 10 percent of 18 because with mathematical certainty one is only 5.56 percent of 18. 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.

V. CONCLUSION

Petitioner has failed to show that the petition for review has been signed by the lesser of 10,000 or 10 percent of the affected ratepayers. Thus, the ALJ recommends that the Commission dismiss the petition for review of the City’s water rates due to lack of jurisdiction. Accordingly, the

ALJ recommends that the Commission adopt the attached proposed order, including Findings of Fact and Conclusions of Law.

SIGNED September 8, 2009.



RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An Order Dismissing the Petition of Tara Partners, Ltd.
For Review of the City of South Houston
Water Rates for Want of Jurisdiction
TCEQ Docket No. 2009-0445-UCR
SOAH Docket No. 582-09-4286**

On _____, the Texas Commission on Environmental Quality (Commission) considered the Proposal for Decision (PFD) presented by Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Tara Partners, Ltd. (Petitioner) is one of only 18 outside-of-city customers of water service provided by the City of South Houston (City).
2. Petitioner is one of 10 outside of city customers of sewer service provided by City.
3. City enacted revised rates for water and sewer service by ordinance effective on January 6, 2009.
4. City's revised rates for water and sewer service apply in the same manner to all of City's outside of city customers.
5. On March 5, 2009, Petitioner filed with the Texas Commission on Environmental Quality (Commission) its petition for review of the City's revised water and sewer rates.

6. On June 9, 2009, the SOAH received the request for docketing and notice of hearing from the Commission.
7. On June 2, 2009, Notice of Hearing was mailed by the Commission to Petitioner and City.
8. On July 7, 2009, a preliminary hearing was convened at the SOAH hearing facilities in Austin, Texas.
9. At the preliminary hearing the City and the Executive Director (ED) raised an issue as to whether Petitioner satisfied the jurisdictional requirements of TEX. WATER CODE ANN. (CODE) § 13.043(b)(3) and (c) regarding its appeal of City's water rates.
10. City contends that Petitioner fails to satisfy the 10-percent requirement for Commission jurisdiction to hear an appeal of City's water rates because Petitioner is only one of 18 water ratepayers in its class, and one is only 5.56 percent of 18.
11. The Commission's jurisdiction to review the City's out-of-city sewer rates is not disputed, and that portion of the petition was severed and remains pending at SOAH.

II. CONCLUSIONS OF LAW

1. The Commission and SOAH have jurisdiction to determine whether the Commission has jurisdiction to decide the issues presented by Petitioner.
2. Code § 13.043(b)(3) provides that ratepayers of a municipally owned utility, that reside outside the corporate limits of the municipality, may appeal water or sewer rates enacted by the municipality to the Commission. Code § 13.043(c) provides that the petition for review must be signed by the lesser or 10,000 or 10 percent of the ratepayers whose rates have been changed.

3. Petitioner does not satisfy the 10-percent requirement to establish Commission jurisdiction to review City's outside of city water rates. TEX. WATER CODE ANN. § 13.043(c).
4. Petitioner does satisfy the 10-percent requirement to establish Commission jurisdiction to review City's outside of city sewer rates. TEX, WATER CODE ANN. § 13.043(c).
5. As required by TEX. GOV'T CODE ANN. § 2001.052, 1 TEX. ADMIN. CODE § 155.51, and 30 TEX ADMIN. CODE § 80.6, notice of the hearing on the petition requesting the review of City's out of city water and sewer rates was sent to Petitioner and City.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law. TEX. GOV'T CODE ANN. ch. 2003.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Petition of Tara Partners, Ltd., requesting review of the out-of-city water rates of the City of South Houston is dismissed for want of jurisdiction.
2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.
3. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

4. The Commission's Chief Clerk shall forward a copy of this Order to Tara Partners, Ltd., the City of South Houston, the ED and the Office of Public Interest Counsel.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Buddy Garcia, Chairman
For the Commission**