

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 21, 2011

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

Re: SOAH Docket No. 582-11-5999; TCEQ Docket No. 2011-0737-UCR; In Re:
Petition Appealing the Retail Water Rates and Tariff Provisions of the South
Buda Water Control and Improvement District No. 1

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 October 11, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than October 21, 2011.

This matter has been designated **TCEQ Docket No. 2011-0737-UCR; SOAH Docket No. 582-11-5999**. 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, appearing to read "Travis Vickery".

Travis Vickery
Administrative Law Judge

TV/lis
Enclosures
cc: Mailing List

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STYLE/CASE: SOUTH BUDA WCID NO. 1

SOAH DOCKET NUMBER: 582-11-5999

REFERRING AGENCY CASE: 2011-0737-UCR

STATE OFFICE OF ADMINISTRATIVE
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ADMINISTRATIVE LAW JUDGE
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SOAH DOCKET NO. 582-11-5999
TCEQ DOCKET NO. 2011-0737-UCR

PETITION APPEALING THE RETAIL	§	BEFORE THE STATE OFFICE
WATER RATES AND TARIFF	§	
PROVISIONS OF THE SOUTH BUDA	§	OF
WATER CONTROL AND	§	
IMPROVEMENT DISTRICT NO. 1	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

Ratepayers of South Buda Water Control and Improvement District No. 1 (District) appealed a January 11, 2011 increase in their water bill to the Texas Commission on Environmental Quality (TCEQ or Commission). After this case was referred to the State Office of Administrative Hearings (SOAH), the District filed a motion to dismiss, which appellants opposed. For the reasons set forth below, the Administrative Law Judge (ALJ) grants the motion and issues this proposal for decision.

II. BACKGROUND AND PROCEDURAL HISTORY

On August 11, 2009, the District's Board of Directors (Board) adopted an order (Order) setting water rates for ratepayers. On January 11, 2011, the Board adopted an order amending the Order (Amended Order) to add a \$12.00 per month solid waste disposal and recycling fee (Disposal Fee) that the previous manager had failed to collect. The Board decided to charge the Disposal Fee in the water bill to avoid collecting sales tax, which would have been necessary had the fee been separately charged. This was the only change to the Order and the District's water rates remained unchanged.¹

On April 11, 2011, 62 District customers forming 18 percent of the District's total number of ratepayers (Ratepayers) filed an Original Petition Appealing Retail Water Rates and

¹ District's Motion to Dismiss at Ex. A.

Tariff Provisions of the District (Appeal). The Ratepayers appealed impact fees and water service rates, which include a monthly minimum charge, volume charge, Disposal Fee, and a fire hydrant meter fee. The Appeal asserted that the District is composed of 330 total retail connections, including 329 single-family connections and one multi-family connection.²

On May 27, 2011, SOAH received from the Commission, a request to docket the Appeal for a hearing at SOAH. On June 10, 2011, the Commission issued a notice of hearing to the District's customers. The District filed the motion to dismiss on July 8, 2011.

A preliminary hearing was held on July 18, 2011, in Austin, Texas. At the hearing, the ALJ determined that proper notice had been given based on the Executive Director's (ED) Exhibits A through C, which were admitted for the limited purpose of establishing notice and jurisdiction, subject to the District's motion to dismiss.³ The ALJ also set a briefing schedule for the parties to respond to the motion to dismiss. Numerous responses and replies were filed to the motion.

III. DISCUSSION

A. Legal Background

The Appeal was filed pursuant to TEX. WATER CODE (Water Code) § 13.043(b)(4), which reads:

(b) Ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water, drainage, or sewer rates to the commission:

(4) a district or authority created under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution that provides water or sewer service to household users . . .

² ED Ex. A.

³ ED Ex. A, B, and C. Exhibits were attached to the motion to dismiss and a supplement to the motion. No objections to the exhibits were filed. The exhibits offered by the District are admitted and described in the ALJ's attestation submitted with this proposal for decision and proposed order. In addition to the statutory parties to this docket, the following individual ratepayers were admitted as parties: Jeri Ovalle, Marianne Framme, and Karen Mehler.

Water Code §§ 13.043(c) and (j) also govern such appeals:

- (c) An appeal under Subsection (b) of this section 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.

* * *

- (j) 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.⁴

B. Argument and Analysis

The District argues that this matter should be dismissed on two grounds. First, the District argues that January 11, 2011 change in rates only involved the addition of the Disposal Fee. The District asserts that under Water Code § 13.043(b)(4), the Commission lacks jurisdiction to hear the Appeal, because the change had no impact on water, drainage, or sewer rates. The District's second argument is that while more than 10 percent of ratepayers initially supported the Appeal, enough ratepayers have since withdrawn their signatures, that the Commission no longer has jurisdiction under Water Code § 13.043(c). As explained below, the ALJ grants the motion to dismiss only on the first ground.

1. The Commission lacks jurisdiction over the Disposal Fee

As for the motion's first ground, the Ratepayers respond that once a change is made to a water bill, the Commission acquires jurisdiction over all services reflected in the bill, regardless of the specific change made. The ALJ disagrees. Water Code § 13.043(b)(4) clearly states that

⁴ The Commission's rules, found at 30 TEX. ADMIN. CODE §§ 291.41(c)(4), 291.41(b), and 291.42, also govern the Appeal.

the basis for an appeal must be a change in water, drainage, or sewer rates. The Disposal Fee does not fall into any of those categories and could have been separately charged, for which there is no doubt that the Commission would lack jurisdiction.

The ALJ also disagrees that the addition of the Disposal Fee to the water bill suddenly opened up for review all of the District's rates charged in the bill. Water Code § 13.043(c) limits the Commission's jurisdiction to appeals filed within 90 days after the effective date of a rate change. The Ratepayers appealed impact fees and water service rates, including a monthly minimum charge, volume charge, the Disposal Fee, and a fire hydrant meter fee. Yet, the only change to the District's bill that falls within the 90-day period is the Disposal Fee. The ALJ declines to extend Water Code §§ 13.043(b)(4) and 13.043(c)'s limited grant of jurisdiction beyond the clear language of those provisions.

Finally, Ratepayers point out that Water Code § 13.043(j) states "the commission shall ensure that *every* rate made, demanded, or received by any retail public utility . . . shall be just and reasonable."⁵ Subsection (j), however, is limited to "an appeal under this section" and Water Code § 13.043(b)(4) is specifically limited to appeals dealing with changes in water, drainage, or sewer rates. The ALJ concludes that the general reference to "rates" in Water Code § 13.043(j) is necessarily limited to the types of rate changes described elsewhere in Section 13.043.⁶ The ALJ finds that the Commission lacks jurisdiction to hear an appeal of the Disposal Fee or any rate change that occurred before January 11, 2011.

2. Once acquired, the Commission retains jurisdiction even if enough ratepayers later withdraw their signatures such that fewer than 10 percent of ratepayers remain in the case.

As for the second ground in the motion to dismiss, the District argues that under Water Code § 13.043(c), the Commission lacks jurisdiction because after the Appeal was filed, 49 of 62 original appellants withdrew their support for the Appeal, reducing the number of remaining

⁵ Water Code § 13.043(j) (emphasis added).

⁶ Ratepayers made other arguments regarding the adequacy of the notice of hearing, revenue and budgetary matters. The ALJ, however, does not find these matters to be necessary in reaching the findings in this proposal for decision.

Ratepayers to less than 10 percent of all ratepayers.⁷ The ALJ finds that so long as 10 percent of the ratepayers initially support an appeal, the later withdrawal of such support does not deprive the Commission of jurisdiction.

The ED, Ratepayers, and the Office of Public Interest Council (OPIC) argue that under Water Code § 13.043(c), as long as 10 percent of affected ratepayers initially sign a petition requesting an appeal, the Commission has jurisdiction. The ALJ agrees. Water Code § 13.043(c) requires that an appeal be “initiated” by at least 10 percent of affected ratepayers. That is what occurred here. Furthermore, as argued by the ED, Ratepayers, and OPIC, it is often the case that after an appeal has been properly filed, fewer than 10 percent of affected ratepayers attend the prehearing conference, become parties, or participate in the case. If the District were correct on this point, then the Commission would lack jurisdiction on a wide range of rate cases. However, there is one distinction between this case and the average rate case, and that is the unusual fact that 49 of the 62 signers of the Appeal actually withdrew their support for the Appeal. Nevertheless, Water Code § 13.043(c) uses the term “initiated” in reference to the number of appellants required to convey jurisdiction on the Commission. As a result of that statutory language, the ALJ finds that the withdrawal of support by enough customers such that less than 10 percent remained did not deprive the Commission of jurisdiction over the Appeal.⁸

C. Conclusion

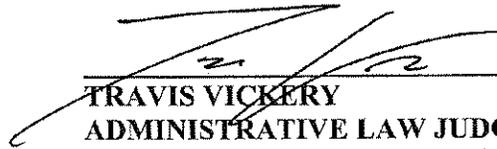
The ALJ concludes that the Commission lacks jurisdiction to hear the Appeal, because the District’s January 11, 2011 rate increase was for a solid waste disposal and recycling fee and not water, drainage, or sewer rates. The ALJ also concludes that the withdrawal of support by a

⁷ Some briefing addresses the context behind the withdrawal of support by 49 of the original Ratepayers. While the context of the withdrawal is somewhat helpful, it lacks comprehensive evidentiary support and is not a necessary element for the ALJ in reaching his conclusions. Nevertheless, the ALJ takes official notice of the briefing filed in this matter, in the event the Commission considers such context relevant and wishes to discuss it at the agenda considering this proposal for decision.

⁸ There has been the suggestion that some of the original signatures for the Appeal may have been fraudulently obtained. There is, however, inadequate evidence to support this assertion. The ALJ only mentions it, because the issue came up in briefing and at the preliminary hearing.

number of ratepayers after enough had signed the petition to initiate the Commission's jurisdiction, did not deprive the Commission of jurisdiction over the Appeal.

SIGNED September 21, 2011



**TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An Order Dismissing the Petition Appealing the
Retail Water Rates and Tariff Provisions of
South Buda Water Control and Improvement District No. 1
for Lack of Jurisdiction
TCEQ Docket No. 2011-0737-UCR
SOAH Docket No. 582-11-5999**

On _____, the Texas Commission on Environmental Quality (Commission) considered the Proposal for Decision (PFD) presented by Travis Vickery, 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. On August 11, 2009, South Buda Water Control and Improvement District No. 1's (District) Board of Directors (Board) adopted an order (Order) setting water rates for District ratepayers.
2. On January 11, 2011, the Board adopted an order amending the Order (Amended Order) to add a \$12.00 per month solid waste disposal and recycling fee (Disposal Fee). The Disposal Fee was the only change to the rates set by the Order. All other charges collected under the District's tariff remained unchanged, including charges for water service.

3. On April 11, 2011, 62 District ratepayers (Ratepayers) filed an Original Petition Appealing Retail Water Rates and Tariff Provisions of the District (Appeal). The Ratepayers appealed impact fees and water service rates, which included a monthly minimum charge, volume charge, the Disposal Fee, and a fire hydrant meter fee. The Ratepayers consisted of 62 District customers, forming 18 percent of the District's total number of customers.
4. On May 27, 2011, SOAH received from the Commission, a request to docket the Appeal for a hearing at SOAH.
5. The Commission issued a notice of hearing to District customers on June 10, 2011.
6. On July 8, 2011, the District filed a motion to dismiss the Appeal for lack of jurisdiction.
7. On July 18, 2011, a preliminary hearing was held at SOAH in Austin, Texas. At the hearing, the ALJ determined that proper notice had been given based on the Executive Director's (ED) Exhibits A through C, which were admitted for the limited purpose of establishing notice and jurisdiction, subject to the District's motion to dismiss. The ALJ set a briefing schedule for the parties to respond to the motion to dismiss.
8. The Ratepayers did not file an appeal with the Commission within 90 days of the date of the Order or the effective date of the rate either increasing or setting the District's impact fees or water service rates, including a monthly minimum charge, volume charge, and fire hydrant meter fee.
9. The Appeal was filed within 90 days of the effective date of the Disposal Fee set in the Amended Order.
10. The Disposal Fee set in the Amended Order did not include charges for water, drainage, or sewer services.

11. After the Appeal was filed, 49 of 62 original Appellants withdrew their support for the Appeal, reducing the number of remaining Appellants to less than 10 percent of all District ratepayers.

II. CONCLUSIONS OF LAW

1. Pursuant to TEX. WATER CODE (Water Code) § 13.043, the Commission and SOAH have jurisdiction to determine whether the Commission has jurisdiction to decide the issues presented by the Ratepayers.
2. 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.
3. Pursuant to Water Code § 13.043(b)(4) and 30 TEX. ADMIN. CODE § 291.41(c)(4), customers of the District may appeal to the Commission any water, sewer, or drainage rates enacted by the District as an authority created under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution that provides water or sewer service to household users.
4. Water Code § 13.043(c) and 30 TEX. ADMIN. CODE §§ 291.41(b) and 291.42, provide that customers of the District may initiate an appeal under Water Code § 13.043(b)(4), by filing a petition for review with the Commission and the entity providing service within 90 days after the effective day of a rate change. A petition for review must be signed by the lesser of 10,000 or 10 percent of the customers whose rates have been changed.
5. With regards to the Appeal, the rates appealable under Water Code § 13.043(j) are water, sewer, or drainage rates, as enumerated in Water Code § 13.043(b)(4).

6. Pursuant to Water Code § 13.043(c) and 30 TEX. ADMIN. CODE §§ 291.41(b) and 291.42, the Ratepayers satisfied the 10 percent requirement to initiate an Appeal of the Amended Order.
7. Because the Amended Order only added the Disposal Fee to the District's tariff, the Commission lacks jurisdiction to hear the Appeal under Water Code § 13.043(b)(4) and 30 TEX. ADMIN. CODE § 291.41(c)(4).
8. Because the Ratepayers failed to appeal the District's current water rates within 90 days of the effective date of the establishment of, or any change in those rates, the Commission lacks jurisdiction to hear the Appeal under Water Code § 13.043(c) and 30 TEX. ADMIN. CODE §§ 291.41(b) and 291.42.
9. 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 Appeal was sent to the District and its customers, including the Ratepayers.

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 Appeal is dismissed for lack 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.
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 the Ratepayers, the District, 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

**Bryan W. Shaw, Ph.D., Chairman
For the Commission**