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SOAH DOCKET NO. 473-15-1149.WS
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PUBLIC UTILITY COMMISSION
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PETITION OF THE CITY OF DALLAS § BEFORE THE STATE OFFICE
FOR REVIEW OF A DECISION BY §
THE SABINE RIVER AUTHORITY § OF
§
§ ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 4
MEMORIALIZING AND CONTINUING PREHEARING CONFERENCE

I. INTRODUCTION

The Public Utility Commission of Texas (PUC) referred this case to the State Office of Administrative Hearings (SOAH) on November 10, 2014, and issued a preliminary order on December 18, 2014. On January 6, 2015, the Administrative Law Judge (ALJ) held a prehearing conference, which the following parties attended:

PARTIES	REPRESENTATIVES
City of Dallas (Dallas)	Norman J. Gordon & Gwendolyn Hill Webb
Sabine River Authority (SRA)	Georgia N. Crump & Melissa A. Long
Staff (Staff) of the PUC	Stephen Mack & Jessica Morgan

II. RECESS

The prehearing conference was recessed. The ALJ will reconvene the prehearing conference at 10:00 a.m., January 22, 2015, at the William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas.

III. RULINGS AS REVISED

The ALJ has reconsidered and significantly revised several rulings during the prehearing conference. Those revised rulings and the bases for them are set out below. The ALJ now finds:

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- The PUC has jurisdiction to fix the rate for the raw water service that SRA provides to Dallas;¹
- No public-interest hearing is necessary because there currently is no contractual rate that would be impaired;
- A schedule should be set so that the ALJ may conduct a hearing on the merits and prepare a Proposal for Decision (PFD) and the PUC may finally determine the rate;
- The PUC has jurisdiction to set an interim rate until it finally determines the rate;²
- By referring the case to SOAH, the PUC has delegated to the ALJ the authority to set an interim rate;³ and
- The ALJ may and will set an interim rate using the process set out in 16 Tex. Admin. Code § 24.29(d) and (e); and
- The ALJ will abate the case if SRA or Dallas files a motion to abate in accordance with 16 Tex. Admin. Code § 24.131(d).

IV. FACTUAL BACKGROUND

SRA provides wholesale raw water to Dallas pursuant to a set of written contracts (collectively, "The Contract") that SRA has entered into with Dallas and Dallas's predecessors in interest.⁴ The Contract automatically renewed, effective November 1, 2014, for a 40-year term. The dispute concerns the rate Dallas must pay under the Contract during the new term. The Contract states:

The amount of compensation that [SRA] shall be entitled to receive during any renewal term (exclusive of [Dallas's] pro rata share of the Service Charge) shall be determined by mutual agreement between [Dallas] and [SRA], taking into account such price as is prevailing in the general area at the time for like contract sales of water of similar quality, quantity and contract period. . . . In the event that [Dallas] and [SRA] are unable to agree upon the amount of such compensation

¹ Tex. Water Code § 12.013.

² Tex. Water Code § 12.013(e).

³ 16 Tex. Admin. Code § 22.125(c).

⁴ Dallas Ex. 1, attach. A, B; SRA Ex. 1, attach. A, B, C.

prior to expiration of the term, the Texas Water Commission may establish interim compensation to be paid by [Dallas] to [SRA].⁵

When Dallas and SRA were not able to agree to the amount of compensation, SRA unilaterally began charging Dallas a new rate of \$0.5613 per 1,000 gallons payable on a “take or pay” basis on 131,860 acre-feet/per year.⁶ Dallas contends that the rate SRA set violates the terms of the Contract; is contrary to the public interest; and is unreasonably preferential, prejudicial, and discriminatory.

V. JURISDICTION

The PUC has jurisdiction to consider Dallas’s petition under Texas Water Code § 12.013, as alleged in the petition. That provision authorizes the PUC to fix reasonable rates for the furnishing of raw or treated water.

SRA objects to Dallas’s claim that the PUC also has jurisdiction under Texas Water Code § 13.043(f). That provision allows a “retail public utility” to appeal to the PUC a decision of a second “retail public utility” providing “water . . . service” to the first that affects the amount paid for the service. “Water service” is not defined, but SRA notes that the definitions of “[r]etail . . . water service”⁷ and “[w]holesale . . . water service”⁸ include only “potable water . . . service,” meaning service of drinkable water. This leads SRA to contend that the PUC’s jurisdiction under § 13.043(f) does not include Dallas’s appeal of the cost of the raw, non-drinkable, non-potable water that SRA provides. Because the PUC has jurisdiction under § 12.013, the ALJ sees no present need to determine whether the PUC also has jurisdiction under § 13.043(f). For that reason, the ALJ will not rule on the § 13.043(f) dispute at this time.

⁵ Dallas Ex. 1, attach. A at 21.

⁶ Dallas Ex. 1, attach. D.

⁷ Tex. Water Code § 13.002(20).

⁸ Tex. Water Code § 13.002(25).

VI. PUBLIC INTEREST

Despite the PUC's having jurisdiction to fix reasonable raw-water rates, the Texas Constitution prohibits any law impairing the obligation of contracts.⁹ However, a Texas agency does not violate the constitutional limitation when it reviews rates under authority granted by the legislature if the agency first finds that the rates adversely affect the public interest by being unreasonably preferential, prejudicial, or discriminatory.¹⁰ To implement that constitutional requirement, which is not reflected in the Texas Water Code, the PUC has adopted rules for hearings to determine whether the protested rate adversely affects the public interest.¹¹

During the prehearing conference, the ALJ determined that a public-interest hearing was necessary in this case, but on further reflection he concludes that it is not. It is true that the parties have entered into the Contract, but the Contract does not specify a rate for the new term, set out a specific methodology for determining the rate, or authorize SRA to unilaterally set the new rate. Instead, as quoted above, the Contract requires the parties to negotiate and mutually set a new rate. When the negotiations failed, SRA unilaterally adopted the new rate. SRA contends that it took into account the prevailing rate in the general area for like contract sales of water of similar quality, quantity, and contract period. While the Contract specifies that SRA and Dallas shall take the prevailing rate into account when setting the rate for the new term, the Contract does not say that Dallas would pay the prevailing rate or specify exactly how the new rate would be set. Under these circumstances, the ALJ now concludes that there is no current contractual rate, and no public-interest hearing is necessary because the PUC would not be impairing a contractual obligation by setting a rate.

VII. ABATEMENT

The ALJ recognizes that neither he nor the PUC has jurisdiction to determine and adjudicate the parties obligations under that Contract. If SRA and Dallas do not agree that the

⁹ Tex. Const. art. I, § 16.

¹⁰ See *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.--Austin 1994, writ denied).

¹¹ 16 Tex. Admin. Code §§ 24.131–134, .137.

rate is charged pursuant to a written contract, the ALJ must abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.¹² Abatement was discussed at the prehearing conference, but the ALJ found these arguments confusing.

Dallas does not seek abatement, at least not now. SRA argued at the prehearing conference that abatement was necessary and stated in its written response to the petition that it “does not agree that the rate was not set pursuant to contract.”¹³ However, SRA does not point to a provision in the contract setting the rate. Instead, it notes that the Contract requires the parties to mutually set the rate, and describes how SRA unilaterally set the rate. Moreover, as quoted above, SRA and Dallas specifically agreed in the Contract that the Texas Water Commission, whose authority under chapter 12 of the Texas Water Code has been transferred to the PUC, would set the rate if they could not agree.

Nevertheless, if either party contends that the rate SRA currently charges Dallas was set pursuant to contract, the ALJ will abate the case so that issue may be resolved by a court of proper jurisdiction. Any party seeking abatement for that purpose should file a motion to abate not later than January 20, 2015.

VIII. INTERIM RATE

Dallas asks the PUC to set an interim rate that would remain in effect until this case is finally decided, when a refund or surcharge would be ordered if the interim rate differs from the final rate. It proposes that the interim rate be the same as in effect prior to November 1, 2014, when SRA put into effect the rate that is the subject of this dispute. However, SRA contends that the PUC may not set interim rates until it first determines that the protested rate adversely affects the public interest.

¹² 16 Tex. Admin. Code § 24.131(d).

¹³ SRA Ex. 1 at 9.

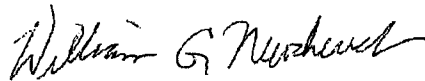
During the prehearing conference the ALJ agreed with SRA that an interim rate could not be set until the PUC first determined that the protested rate adversely affects the public interest. However, as set out above, the ALJ has now concluded that there currently is no contractual rate. Thus, there is no need for the PUC to determine whether the rate SRA charges Dallas adversely affects the public interest before setting rates, interim or final.

Moreover, the ALJ has determined that he may proceed to set interim rates using abbreviated procedures set out in the PUC's rules. The PUC has jurisdiction to set an interim rate until it finally determines the rate.¹⁴ By referring the case to SOAH, the PUC has delegated to the ALJ the authority to set an interim rate.¹⁵ The ALJ may and will set an interim rate using the process set out in 16 Tex. Admin. Code § 24.29(d) and (e)

IX. AGENDA FOR RECONVENED PREHEARING CONFERENCE

At the reconvened prehearing conference on January 22, 2015, the ALJ will: (1) hear oral arguments concerning the interim rate that should be set; (2) adopt a schedule for the case, including a hearing to finally determine the rates; (3) rule on any motions pending at that time; and (4) take other actions that may be necessary for the efficient and fair management of this case.

SIGNED January 9, 2015.



**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

¹⁴ Tex. Water Code § 12.013(e).

¹⁵ 16 Tex. Admin. Code § 22.125(c).