Control Number: 43674

Item Number: 30

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PUC DOCKET NO.43674
SOAH DOCKET NO. 473-15-1149.WS

PETITION OF THE CITY OF DALLAS FOR REVIEW OF A DECISION BY THE SABINE RIVER WATER AUTHORITY	§ § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

CITY OF DALLAS' RESPONSE TO SRA'S APPEAL OF SOAH ORDER NO. 4

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

The City of Dallas ("Dallas" or "City") files this Response to Sabine River Authority's ("SRA") Appeal of SOAH Order No. 4. SRA filed its Appeal of SOAH Order No. 4 on January 20, 2015. Pursuant to P.U.C. Proc. R. 22.123(a)(4), this Response is timely filed. On January 21, 2015 the Administrative Law Judge ("ALJ") issued SOAH Order No. 5 abating this case. The Appeal should be denied, and the Abatement ordered by the ALJ in SOAH Order No. 5 should be reversed until such time as Interim Rates are set.

I. FACTUAL AND PROCEDURAL BACKGROUND

Effective October 1, 1981 the City of Dallas and the Sabine River Authority signed an Agreement (attached to Dallas Petition as Exhibit "A") which assigned significant portions of the available water in the Lake Fork Reservoir to the City of Dallas. In exchange for that assignment, the City paid all the principal and interest on the Bonds sold to construct the reservoir, constructed all the works necessary to take the water from the lake at its sole expense, including metering equipment, and paid 74% of the Operation and Maintenance expense of the project each year since 1981. The 40 year renewal term began on November 2, 2014. The Agreement provides that a rate for the renewal term was to be agreed upon between the SRA and Dallas. Further, if an agreement could not be reached, that an Interim rate would be set by the

Texas Water Commission (now the PUC). On October 9, 2014, instead of asking the PUC to set interim rates as provided in the Agreement, without agreement by the City, SRA took unilateral action to attempt to set a rate.

Dallas filed this rate appeal case on October 30, 2014, prior to the claimed effective date of the "rate" sought to be imposed by SRA, specifically asking for interim rates to be set. On December 18, 2014, the Commission entered its Preliminary Order in the case directing the ALJ to address the issue of interim rates. A Prehearing Conference was held on January 6, 2015, after which Order No. 4was entered by the ALJ, indicating that he would set interim rates at the resumption of the Prehearing Conference on January 22, 2015. On January 20, 2015, SRA filed a Motion to Abate indicating that it is claiming that there is a dispute whether the rate sought to be charged is a rate set pursuant to contract within the meaning of P.U.C. SUBST. R. 24.131. In addition to its Motion to Abate, SRA also filed an Appeal of Order No. 4 on January 20, 2015. The SRA has consistently opposed any interim rate setting as a part of this proceeding, and has filed this Appeal of SOAH Order No. 4 in order to further stall and delay the setting of interim rates. It is Dallas' position that the appeal should be denied, and that the Commission should order the ALJ to set interim rates.

II. ISSUE OF FIRST IMPRESSION FOR THIS COMMISSION

This Appeal has an issue of first impression for this Commission. When there is a dispute between the parties in a water case regarding whether the rate is a rate set pursuant to a written contract, and the case is abated pursuant to P.U.C. SUBST. R. 24.131, should the Commission set interim rates to protect all parties prior to an abatement? In this case, SRA,

despite having committed in the Agreement to having the Commission set interim rates, has resisted the setting of interim rates in virtually every document filed in this case.

III. DISCUSSION

In its Appeal, SRA raises a number of issues none of which address or even mention all of the terms of the Agreement, and are based on principles of law which, even if correct, are inapplicable to the Agreement and the case.

A. The Purpose of P.U.C. SUBST. R. 24.131(d) is not to keep the Commission from adjudicating contract disputes, but rather to have the courts rule on the construction of the contract.

SRA spends considerable time claiming that Order No. 4 invalidates the contract, the Agreement between Dallas and SRA, because it claims that setting the ALJ's establishment of interim rates as specified in the Agreement somehow invalidates the contract. In support of its claim SRA cites *Fort Worth Independent School District v. City of Fort Worth*, 22 S.W.3d 831 (Tex. 2000). The proposition is that a contract is legally binding only if its terms are sufficiently definite to enable a court to understand the parties' obligations. The facts in this case are totally different. In *Fort Worth ISD*, the document was a letter to agree to a future revenue sharing, if there were a future contract between the City of Fort Worth and a third party. In this case, SRA ignores the specific terms of the Agreement it signed in 1981, which a) had a specific term, b) had specific renewal provisions, and, c) identified specific steps the Parties agreed should be taken by the regulatory authority if the parties could not agree upon the rate prior to the renewal term commencing, namely that interim rates were to be set by the Commission, until such time

as a final rate was determined.[1] Additionally, the Agreement provided that the Texas Water Commission (or its successor agency with jurisdiction) had continuing jurisdiction over the contract.[2] SRA's argument also misconstrues the contract and the ALJ ruling.

SRA's second argument insisting that the rate at issue in this rate appeal is set pursuant to a contract again misses the point. The question is not whether the contract provides a process for setting a rate, rather the question is whether the Agreement provides for the rate set by the SRA on October 9, 2014. SRA's proposition is that so long as there is a contract, any rate--no matter how set, is a rate set pursuant to contract. Not only does the argument not make sense, it is not supported by the authority cited by SRA. In *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority,* 286 S.W.3d 397 (Tex. App.—Corpus Christi, 2008, no pet.) cited by the SRA, the rate provisions of the contract provided that the rate would be set by the Guadalupe-Blanco River Authority.[3] Thus the case does not stand for the proposition asserted by SRA. In other words, is there a provision of the contract to which SRA can point that gives it the right to set rates unilaterally? SRA points to none, other than some of the language in the Agreement,

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[1] Sec. 6.02
[2] Sec. 9.09
[3] See 286 S.W.3d 397 at 400, 401

> 17. *Adjustment of Rates.*
>
> (a) The Firm Water Rate specified in this Water Purchase Contract may be adjusted by GBRA at any time and from time to time. If GBRA desires to adjust either rate, it shall, at least sixty (60) days prior to the first day on which such adjustment is proposed to become effective, give written notice of the proposed adjustment to the parties to this Water Purchase Contract.
>
> (b) The monthly charge to be paid for water delivery may be set and *401 adjusted by GBRA at any time and from time to time, provided that the basis for the rate established by GBRA shall be the cost of service [,] including the debt service requirements of GBRA which were incurred in connection with the financing of the water delivery system....
>
> (c) In the event of a disagreement between GBRA and any party over any adjustment proposed by GBRA to the Firm Water Rate ... applicable to that party, or over the setting or adjustment by GBRA of any delivery charge applicable to that party, GBRA and that party may apply by appropriate means to the TNRCC, or any agency succeeding to the rate-making jurisdiction of the TNRCC,[2] to establish a just and reasonable adjustment or charge.

but not the complete language. Consequently, SRA's argument that setting interim rates as specified in the Agreement somehow invalidates the agreement or impairs the obligations of contract is without merit.

B. Neither the rules nor the history of the rules are determinative on the issue.

SRA then argues that the applicability of P.U.C. SUBST. R. 24.131 means that any time there is a contract, no matter what the rate is that is sought to be imposed, and no matter what the process is, there must be a public interest finding. SRA attempts to bootstrap from a statement obviously intended to exclude some situations, to an argument it does not support. Effectively, SRA is arguing that any time a contract exists, there must be public interest finding. Dallas argues that where the parties have agreed that the statue regulatory authority has jurisdiction to set an interim rate in the event the parties are unable to agree on a rate, that the parties have agreed *a priori* that the public interest determination is satisfied. There is nothing in applicable law or regulations which would prevent the parties from reaching this agreement. To the contrary, SRA's argument that even in the face of the Parties' Agreement there must be further adjudication of the public interest is not supported anywhere in the history of the rules, case law or statute.

C. SRA's construction of the rules ignores the statute.

SRA's next argument (C on page 18) is that PUC SUBST. R. 24.29 and 22.125 does not apply to this proceeding. SRA's argument is that since, in its interpretation, the rules speak to cases involving appeals under Chapter 13, that interim rates cannot be set in this proceeding. That argument defies logic. Once again, SRA bootstraps a statement not germane to the issues to an

argument which ignores the law. In this case, the ALJ held that the Commission has jurisdiction pursuant to Chapter 12, specifically Tex. Water C. Ann. §12.013 (Vernon Supp. 2014). Specifically, with or without a rule referencing it, Tex. Water Code §12.013(e) permits the Commission to establish interim rates and compel continuing service during the pendency of any rate proceeding. Nowhere in SRA's appeal is Chapter 12 of the Water Code even mentioned. The question of whether the Commission can set interim rates in this action is founded in the provisions under which jurisdiction is assumed, whether the rules provide an exact mechanism or not. Finally, SRA points to the discussion in Project 43871, rules changes which have not yet been published, for the proposition that the rules on interim rates only apply to proceedings to under Chapter 13 of the Water Code. Once again those strawman rules, which are aimed at Class A, B, and C water utilities as would be defined if the strawman is adopted, have no bearing on the Commission's decisions and action under Chapter 12, specifically Section 12.013, which is the subject of the proceeding so far.[4]

IV. CONCLUSION

The ALJ's ruling in SOAH Order No. 4 was correct in so far as it addressed the ability of the Commission to set interim rates in this case pending other decisions. The Commission should DENY SRA's appeal.

[4] The ALJ has yet to rule whether there is jurisdiction for this appeal under Chapter 13.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, US mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the mailing list below on this 27th day of January, 2015.

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