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

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PETITION OF THE CITY OF DALLAS
FOR REVIEW OF A DECISION BY
THE SABINE RIVER AUTHORITY TO
SET WATER RATES (LAKE FORK
RESERVOIR)

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BEFORE THE PUBLIC UTILITY
COMMISSION OF TEXAS
2015 FEB 2 PM 2:52
PUBLIC UTILITY COMMISSION
FILING CLERK

CITY OF DALLAS' APPEAL OF SOAH ORDER NO. 5

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CITY OF DALLAS' APPEAL OF SOAH ORDER NO. 5

TO THE HONORABLE PUBLIC UTILITY COMMISSION:

COMES NOW, the City of Dallas ("City" or "Dallas") and files this appeal of State Office of Administrative Hearings ("SOAH") Order No. 5 in Docket No. 43674, *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority to Set Water Rates (Lake Fork Reservoir)* ("Petition"). SOAH Order No. 5 was signed by Judge William G. Newchurch ("ALJ") on January 21, 2015 and filed on January 22, 2015. Pursuant to P.U.C. PROC. R. 22.123(a)(2), this appeal is timely filed. In support of its Appeal, the City respectfully shows the following:

I. ISSUE OF FIRST IMPRESSION FOR THIS COMMISSION

The issue in this appeal is a question of first impression for this Commission. Since the Commission again assumed responsibility for water regulation on September 1, 2014 it has not been faced with the question of when in its process abatement must start. In SOAH order No. 5 the ALJ decided that the abatement should start upon the filing of a motion by the seller, in this case the Sabine River Authority ("SRA"). Specifically the City challenges the ALJ's Decision in Order No. 5 because the P.U.C. Subst. R. 24.131(d) does not specify or require the abatement at a time prior to the setting of interim rates, and because the failure to set interim rates by the Commission (or the ALJ) will likely result in extended litigation, considerable cost to the parties, and a denial of the rights created by the legislature.

II. FACTUAL LEGAL AND PROCEDURAL BACKGROUND

This case is an appeal filed by the City from a unilateral action of the SRA taken on October 9, 2014 to purportedly set rates for a 40 year renewal term of a Water Supply Contract and Conveyance (“Agreement”)¹ regarding water permitted to the City in Lake Fork Reservoir. The Agreement was executed in 1981 prior to the promulgation of the rules which appear to be guiding this proceeding. The Agreement provided that the parties were to agree upon a rate to be charged for the renewal period, and that if the parties did not come to an agreement, that interim rates could be set by the Texas Water Commission (now the PUC)² until such time as permanent rates were determined.

6.02 *The amount of compensation that the Authority shall be entitled to receive during any renewal term (exclusive of the City's pro rata share of the Service Charge) shall be determined by mutual agreement between the City and the Authority, 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. The City and the Authority agree to commence negotiations to determine the amount of such compensation at least one year prior to the expiration of the initial period and each successive forty (40) year term thereafter. In the event that the City and the Authority are unable to agree upon the amount of such compensation prior to the expiration of each such term, the Texas Water Commission may establish interim compensation to be paid by the City to the Authority. It is understood and agreed by the City and the Authority that the amount of compensation finally determined for each renewal term shall be applicable from and after the commencement of the then current term; if the interim compensation is greater than the amount of compensation finally determined, the Authority agrees to pay the City such overage within ninety (90)*

¹ The Agreement is attached to the Petition as Exhibit A.

² In 1991, the Legislature combined the Texas Water Commission and two other state agencies into the Texas Natural Resources Conservation Commission (TNRCC). See Act of July 30, 1991, 72nd Leg., 1st C.S., ch. 3, art. 1, 1991 Tex. Gen. Laws 4. In 2002, the Legislature changed the name of the TNRCC to the Texas Commission on Environmental Quality (TCEQ). See Act of June 15, 2001, 77th Leg., R. S., ch. 965, § 18.01, 2001 Tex. Gen. Laws 1985. In 2013, the Legislature transferred the water rate functions of the TCEQ to the PUC. See Act of May 13, 2013, 83rd Leg., ch. 170, § 2.07, 2013 Tex. Gen. Laws 725; Act of May 13, 2013, 83rd Leg., ch. 171, § 7, 2013 Tex. Gen. Laws 772.

days after such determination, and if the interim compensation is less than the amount of compensation finally determined, the City agrees to pay to the Authority such underage within ninety (90) days after such determination.³

The parties did not come to an agreement. Rather than seek interim rates at this Commission as provided in the Agreement, the SRA then took unilateral action of October 9, 2014 to set a rate that is approximately 900% higher than the City has been paying for Lake Fork water. SRA purported to increase the cost to the City from approximately \$3 million per year to approximately \$27 million per year. Since the filing of this appeal SRA has repeatedly denied this Commission's jurisdiction over the appeal, notwithstanding the provisions of Texas Water Code § 2.013 and resisted the setting of interim rates in each of its pleadings.⁴ In SOAH Order No. 4 the ALJ has held that the Commission has jurisdiction pursuant to Tex. Water Code §12.013, and deferred for later consideration the question of whether the Commission has jurisdiction pursuant to Chapter 13 of the Texas Water Code.

III. PROCEDURAL HISTORY

The City filed this Petition on October 30, 2014, asking for a review of the October 9, 2014 Action of the SRA and interim Rates. SRA filed its response on December 2, 2014 claiming that the Commission has no jurisdiction over the dispute, and further claiming that interim rates are not authorized because the Commission has no jurisdiction.⁵ On December 5, 2014, because the first prehearing conference had been delayed at the request of SRA,⁶ the City filed an Expedited Motion for Interim Relief. SRA filed its opposition to the request, again

³ Agreement at Section 6.02

⁴ SOAH Docket 473-15-1149.WS, PUC Docket No. 43674, *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority and Request to Set Water Rates (Lake Fork Reservoir)* ("Docket 43674") SRA Response to City of Dallas' Motion for Expedited Consideration of Interim Rates, December 11, 2014.

⁵ Docket 43674, Sabine River Authority Response to Dallas Petition, December 2, 2014.

⁶ SRA opposed a prehearing conference before the Preliminary Order.

claiming the Commission has no jurisdiction over the dispute, and that there is no entitlement to interim rates.⁷

In this case the SRA took its action on October 9, 2014 to attempt to set a rate which Dallas contends is not authorized by the Agreement, and which the City contends is not a rate set pursuant to contract. 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 in order to protect all parties prior to an abatement? 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 proceeding as well as in verbal statements to the ALJ.⁸ The Commission issued its Preliminary Order on December 18, 2014.⁹ The first prehearing conference was held on January 6, 2015, and recessed after which the ALJ issued SOAH Order No. 4.¹⁰ In SOAH Order No. 4 the ALJ found that the Commission has jurisdiction pursuant to Tex. Water Code §12.013, deferred any determination whether the Commission has jurisdiction under Tex. Water Code §13.043, and notified the parties that the Commission has the statutory and regulatory authority to set interim rates, and that the ALJ intended to set interim rates at the resumption of the prehearing conference on January 22, 2015.¹¹ On January 20, 2015 SRA filed its Motion to Abate¹². The ALJ signed SOAH Order No. 5 on January 2, 2015 (filed on January 22, 2015) cancelling the prehearing conference and abating the proceeding.

⁷ Docket 43674, SRA Response to City of Dallas' Motion for Expedited Consideration of Interim Rates, December 11, 2014

⁸ Transcript of Prehearing Conference January 6, 2015 at 26-28.

⁹ Docket 43674, Preliminary Order December 18, 2014.

¹⁰ SOAH Order No. 4, January 12, 2015.

¹¹ Id.

¹² Docket 43674, SRA Motion to Abate January 20, 2015.

Thus, although the City filed its petition on October 30, 2014 and, for more than 90 days later, the SRA has successfully delayed a decision on the first critical issue in the case, interim rates. If the Commission does not reverse the timing of the abatement, no interim rate decision may be made for some extended time, at least until such time as a court makes a decision concerning the issue of whether purported rate set by the SRA on October 9, 2014 without the agreement of the City of Dallas constitutes a rate set pursuant to contract, and appeals of that court decision are exhausted. In the meantime, the parties are left to attempt to determine the status quo, go to the courts for relief and potential chaos.

IV. DISCUSSION

Pursuant to Tex. Water Code §12.013, this Commission is charged with fixing reasonable rates for the furnishing of raw or treated water for any purpose. Under the provisions of that same statute the Commission has the power to establish interim rates. Although the rules contemplate abatement if there is an issue between the parties regarding whether the rate is set pursuant to contract, the Commission's rules do not specify or require an immediate abatement, although that is the interpretation given by SRA and the ALJ. If the Commission does not take action to exercise and enforce its jurisdiction over this dispute, it leaves the parties to either chaos or the lengthy delay associated with potential multiple court proceedings which after some period of time may work their way back to this Commission after some extended period of time. The orderly process, with fairness to both parties would be to set an interim rate pending the resolution of this dispute prior to abating the hearing process. With the setting of an interim rate, subject to refund or surcharge as appropriate, both sides are protected while the process of a determination whether the rate is a rate set pursuant to contract works its way through the courts.

The City contends that the very purpose of interim rates is to protect the rights and interests of the appellants while the rate appeal process proceeds. The concept is that the only issue to be determined by the courts is whether the purported rate is set pursuant to contract. Therefore, there is no reason for the interim rate question to be abated by during the parties' litigation in district court. While the city asserts that the SRA's action on October 9, 2014, which purported to set an arbitrary 900% rate increase, on its face, satisfied the issues to be decided by a public interest determination, the City acknowledges that the determination has yet to be made by the Commission. However, the corollary of the two (2) step process is that the rate change itself is "stayed" under Tex. Water Code, §12.013 (e) and is subject to refund to either party when the appeal is finally acted upon by the Commission under Tex. Water Code, §12.013 (f). Abating the 2-step process without the interim rate setting violates the protections provided to the appellants by the appeals process established by the Texas Legislature.

A. Effect of SRA Proposed Rate on Dallas and its Customers

The unlawful SRA rate should be reduced because it exceeds SRA's Lake Fork cost of service and has no cost basis. The imposition of the SRA rate could result in an unreasonable economic hardship for Dallas, because it so far exceeds the known budgetary requirements of SRA and was not part of an orderly budget process related to the capital and operating costs of Lake Fork. Pursuant to the Dallas City Charter, Chapter XI, Section 14, the only source of revenue for Dallas to pay the Lake Fork water rate is the rates paid by Dallas ratepayers. Dallas' ratepayers are legally bound to pay the cost of service for water supplied to them by Dallas from all sources, including Lake Fork. Therefore, if Dallas is forced to pay the extremely high rate set by SRA, then Dallas must make difficult choices to identify revenues to pay that rate within the

current fiscal year, possibly including deferral of scheduled capital improvements and/or imposition of a rate increase for Dallas' customers, at some time, to collect additional revenues. This rate increase would include wholesale customers who have the same right to appeal the SRA Lake Fork water rate to the Commission as Dallas. Both of these choices are untenable and would impose an unnecessary and therefore unreasonable economic hardship on Dallas.

Dallas has recently undertaken and adopted a Long Range Water Supply Plan to address demands within its service area for the next 50 years. Dallas' independent study was undertaken in accordance with the Region C Water Planning Group efforts mandated by the Texas Water Development Board under Texas Water Code, Chapter 16, "*Procedures Generally Applicable to Water Development*," Subch. C, "Planning." Dallas' capital improvements budget for Fiscal Year 2015 includes projects needed to continue to meet the demands of Dallas' customers for water service both now and into the future. While Dallas has determined that the expenditure of those funds in Fiscal Year 2015 is necessary to continue operating, maintaining and developing its water resources, some of Dallas' planned projects may have to be deferred to fund the Lake Fork water rate payments as set by SRA. If there were a legitimate cost of service basis for the SRA's rate increase, then the deferral of capital projects would be justified. But, where SRA has adopted no operating or capital budget in support of the Lake Fork water rate it set, then charging those rates to Dallas, and causing a deferral of Dallas' needed capital projects is unjustified and unfair to Dallas customers in addition to being unlawful.

Dallas has 27 customer communities, which depend wholly or partially on Dallas for their municipal water supply, including Dallas' Lake Fork water.¹³ Dallas contracts with these

¹³ (See, Paragraph 3, Affidavit of Terry S. Lowery attached to Docket 43674, Dallas Motion for Expedited Consideration of Interim rates) December 5, 2014

customers based on an annual determination of the cost of service, which it arrives at through an inclusive and participatory cost of service analysis. Consequently, the unlawfully-established Lake Fork water rate not only has an economic impact on Dallas and its Water Utilities Department, but also has an economic impact on all Dallas' service area and customers. Dallas and its customers are committed to lawful water rates based on cost of service; the imposition of an additional rate increase would be contrary to the relationship Dallas has established with its

Under the circumstances, the excessive rate proposed by SRA would impose an economic hardship on Dallas from both a regulatory and a financial standpoint, because payment of the unreasonable rate cannot be justified within Dallas' current budget or as a rate collected from Dallas' current customers. Considering the unnecessary and therefore unreasonable economic impacts of the unlawful SRA rate for Dallas' Lake Fork water, the Commission should impose an interim rate as quickly as possible pending resolution of this contested rate case.

B. Impact of Current SRA Set Rate on SRA

SRA would not be harmed if it did not collect the excessive rate from Dallas. All of its costs for the operation of Lake Fork, both capital and operation and maintenance are collected in the rate existing before the October 9, 2014 SRA rate action, and pursuant to SRA's Lake Fork budget. Dallas pays an amount equal to the percentage of its Lake Fork water entitlement under Permit No. 05-4669 as calculated in 1981 and agreed upon by the Parties.

As set forth in its annual Lake Fork budget, SRA has no need for the additional funds it seeks from Dallas in the current fiscal year. Although the Fiscal Year 2015 SRA budget is styled as an operating budget, it has typically included capital projects needed to be addressed in the current fiscal year. (*See*, Exhibit C, the Lake Fork Budget for the past 3 fiscal years.) For

example, SRA collected funds from Dallas in Fiscal Year 2012 to pay for repair and/or replacement of gates in the Lake Fork spillway. No other capital projects for SRA related to Lake Fork have been adopted to date for Fiscal Year 2015. Therefore, although SRA has imposed the Lake Fork water rate effective for Fiscal Year 2015, there is no budgetary justification or need for the additional \$24,117,215.93 rate increase.

At the same time, if SRA is allowed to collect this rate from Dallas, and to use this rate for expenditures as yet unplanned and unjustified, then Dallas fears that SRA will never be able to return all or any portion of the rates which are determined to have been unjust and unreasonable. As stated in the Lake Fork Contract:

Water Supply Facilities Agreement, Exhibit I to the Lake Fork Contract.

Section 6.04. The Corporations [now Dallas] recognize that the Authority's only assured source of funds to pay the expenses of operation and maintenance of the Facilities will be from the payments of the Service Charges to be made by The Corporations pursuant to this Agreement, and that the Authority shall not be expected or required otherwise to provide for any part of the Service Charge from other sources, unless and until the Authority sells the Authority's water to other parties.

SRA has now sold its 26% share of Lake Fork water to other customers at rates which are considerably lower than the rate it proposes to charge the City of Dallas. The rates reflected in the rate schedule for Lake Fork Water adopted by the SRA for 2015 are attached to the Affidavit of Terry Lowery as Attachment "C." SRA will not have any funds to repay Dallas for funds expended which are related to the unlawfully established Lake Fork water rate. Accordingly, Dallas has a reasonable concern that once SRA collects the unlawful and excessive rates from Dallas and its Board of Directors authorizes expenditure of those funds, SRA would never be in a position to repay Dallas regardless of the outcome of this contested rate case hearing. Interim

rates at the former level should be imposed to guard against this possible outcome. Any interim rate amount should be placed in escrow, pending the outcome of this contested rate case.

V. SUMMARY AND CONCLUSIONS

There is a need for interim rates, given the tremendous increase sought from the City by SRA, the Commission should take up the City's appeal, and after consideration reverse SOAH Order No. 5 and order the ALJ to consider and decide the issue of interim rates prior to abating the case.

Under the terms of the Lake Fork Contract Dallas has paid over the past 33 years all of the capital costs and 74% of the operating costs of the Lake Fork Project. (*See*, Terry S. Lowery Affidavit, at Paragraphs 5, 6, and 7) Specifically, Dallas has paid the entire principal and all of the interest on the bonds that were outstanding, or issued by SRA for the Lake Fork Project. In addition, the annual Service Charge calculation for the project includes capital improvements maintenance and capital additions for the project. Further, under the terms of the Contract, the annual Service Charge has Dallas paying 74% of all operation and maintenance expense for the Lake Fork Project. The Service Charge includes all of the direct operation and maintenance expense of the Project, an allocated amount for administrative and general expense of the Sabine River Authority and capital improvement projects on a cash basis.

Wherefore, premises considered the City prays that the Commission Grant this Appeal, and upon consideration reverse SOAH Order No. 5 and order the ALJ to consider the issue of interim rates prior to abating the case.

Respectfully submitted,

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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, U.S. mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the mailing list below on this 2nd day of February, 2015.

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