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# SABINE RIVER AUTHORITY'S RESPONSE TO CITY OF DALLAS' APPEAL OF SOAH ORDER NO. 5

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# SABINE RIVER AUTHORITY'S RESPONSE TO CITY OF DALLAS' APPEAL OF SOAH ORDER NO. 5

## TO THE HONORABLE PUBLIC UTILITY COMMISSION:

COMES NOW, the Sabine River Authority ("Authority" or "SRA") and files this response to City of Dallas' Appeal of State Office of Administrative Hearings ("SOAH") Order No. 5 ("Appeal") filed on February 2, 2015. Pursuant to P.U.C. PROC. R. 22.123(a)(4), this response is timely filed.

## I. INTRODUCTION

In its Appeal, the City of Dallas ("City" or "Dallas") makes numerous misstatements of facts and argues that its Appeal is the only alternative to throwing the parties into the "chaos" of the courts.[1] The City ignores the fact that proceedings brought under 16 Tex. Admin. Code Subchapter I, Wholesale Water or Sewer Service, have been routinely abated in order to have the parties resolve their contractual disputes in the courts.[2] The judicial system, rather than being chaotic, as alleged by the City, was purposefully and deliberately established by the founders of this country and state as the branch of government where contractual disputes are heard. In fact,

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[1] City of Dallas' Appeal of SOAH Order No. 5 ("Dallas' Appeal") at 5 (Feb. 2, 2015).

[2] *See*, for example, Second Petition of Travis County Municipal Utility District No. 12 Appealing Change of Wholesale Water Rates Implemented by West Travis County Public Utility Agency, City of Bee Cave, Texas, Hays County, Texas, and West Travis County Municipal Utility District No. 5, Docket No. 43081, SOAH Order No. 4 (Oct. 30, 2014) at 2-3 ("If the seller and buyer do not agree that the protested 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. . . The motion [to abate] is granted, and the case is abated.").

on January 30, 2015, the City itself chose to invoke the "chaos" of the courts by filing a petition against the Authority in Travis County District Court, seeking a declaratory judgment that the rates set by the Authority were not rates set pursuant to a written contract.[3]

It is again evident in the City's Appeal, as has been argued in every pleading the City has filed in this proceeding, that the City's goal is not merely to have interim rates established by the Public Utility Commission ("PUC" or "Commission"), but also to have the rate provisions of the Contract between the parties rewritten in a manner that is presumably more favorable to the City.[4] The Contract between the parties, which is the ***only*** document that governs the parties' relationship, was negotiated over 34 years ago. Since 1981, the City has known that a new rate would be effective on November 2, 2014, if the City opted to renew the Contract.[5] The City has also known for the entire period since 1981 that the new rate would ***not*** be a rate based on the Authority's cost of service ***nor*** on the Authority's "known budgetary requirements."[6]

The City's complaints about the rate thus have no foundation in the Contract, which specifies that the rate will be ***in addition to*** the operating and maintenance costs of the Authority related to the Lake Fork Reservoir, and they will be set based on the *"price as is prevailing in the general area at the time for like contract sales of water of similar quality, quantity and contract period."*[7] The City's attempts to have the Commission set cost of service-based rates amounts to a request, 34 years after the parties agreed to these provisions, that the Commission rewrite the Contract in a manner considered by the City to be more favorable to it.

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[3] Cause No. D-1-GN-15-000398, Travis County, 53rd Judicial District.

[4] The 1981 Water Supply Contract and Conveyance By and Among City of Dallas, Texas, Sabine River Authority of Texas, and Texas Utilities Generating Company, is described in detail in the Authority's Response to the City of Dallas' Original Petition and Request for Interim Rates (Dec. 2, 2014), and is attached thereto as Attachment C. Factual details about the contract are also discussed in the Authority's Response to City of Dallas' Motion for Expedited Commission Establishment of Interim Rates (Dec. 11, 2014).

[5] In fact, as long ago as 1995, the parties started discussing the rate that would be set in 2014.

[6] Dallas' Appeal at 6.

[7] Contract at § 6.02.

The fact that the City claims to have failed to budget for the impending expense is not the Authority's fault, nor is it justification for reversal of Order No. 5. Furthermore, whenever the City has identified the interim rate it is seeking, it is evident that the City would have the Authority provide the City water from Lake Fork Reservoir for ***free***.

The City has made no allegations that the Administrative Law Judge ("ALJ") exceeded his authority in abating the proceeding. Most importantly, ***the City does not contest the validity of Order No. 5.*** Instead, the City admits in its Appeal that the Commission's rule does not speak to the timing of abatement vis-à-vis setting interim rates;[8] therefore, there is no violation of the Commission's rule.

In addition, the City has correctly acknowledged on many occasions in its filed pleadings that the Commission's rule ***requires*** the proceeding to be abated. The City's appeal of Order No. 5 is merely an attempt to have the Commission do what it declined to do on December 18, 2014, when it adopted the Preliminary Order and delegated to the ALJ the decision as to whether to order interim rates. The fact that the ALJ declined to order interim rates prior to abating the case is clearly not a violation of the Commission's rules, nor does it evidence any improper action by the ALJ.

The Commission has previously declined to insert itself into the debate over interim rates. Commission Staff noted in its response to the City's initial request for interim rates that because the matter had already been referred to SOAH, the ALJ should make that determination.[9] In the Preliminary Order issued by the Commission on December 18, 2014, the Commission noted the City's request for interim rates, and directed the ALJ to address that issue, namely, should interim rates be established. In Order No. 5, the ALJ determined that interim rates should not be

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[8] Dallas' Appeal at 1.

[9] Commission Staff's Response to the City of Dallas' Motion for Expedited Commission Establishment of Interim Rates under P.U.C. SUBST. R. 24.29(d) and (e) at 5 (Dec. 12, 2014).

established. No new arguments have been presented by the City in its Appeal as to why the Commission should reverse its earlier decision, nor has the City alleged any error by the ALJ; therefore, the City's appeal of Order No. 5 should be denied.

## II. BACKGROUND

At the prehearing conference held in this matter at SOAH on January 6, 2014, the ALJ heard extensive arguments from the parties regarding the jurisdiction of the Commission and the appropriate process to be followed in this docket, including whether the Commission could modify contractual rates by establishing interim rates without first finding that the protested rates were adverse to the public interest.[10]

Germane to those arguments is the provision found at P.U.C. SUBST. R. 24.131(d), which specifically requires the ALJ to abate the proceedings "[i]f the seller and buyer do not agree that the protested rate is charged pursuant to a written contract." At the prehearing conference, the Authority argued that the rates were set pursuant to a written contract, and the City argued that they were not. These positions have been previously staked out by the parties in their filed pleadings, wherein both the Authority ***and the City*** asserted that the rule required the proceeding to be abated:

- ". . . If SRA does not agree that the rate is not set pursuant to a contract, the Administrative Law Judge in the case, after interim rates are set, should ***abate the case*** until the dispute over the question whether the rate is part of the contract has been resolved by a court of proper jurisdiction in accordance with PUC Subst. R. Sec. 24.131(d)."[11]

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[10] It is the Authority's position that the law does not allow any modification by the Commission of contract rates without a public interest finding. The Authority appealed Order No. 4 and the ALJ's determination that interim rates could be established without having made a public interest finding. The ALJ based his decision on his opinion that the protested rates were not set pursuant to a written contract. The Commission declined to hear the Authority's appeal, and the abatement of the proceeding pursuant to Order No. 5 has now resolved the issue.

[11] Original Petition for Review and Request for Interim Rates ("Original Petition") at 8-9 (Oct. 30, 2014) (emphasis added).

- " . . . if SRA does not agree that the rate is a rate not set pursuant to a contract, [the Commission should] ***abate the proceedings*** until the question of whether the rate is a rate set pursuant to a contract has been resolved by a court of proper jurisdiction..."[12]

- "The Public Utility Commission . . . should ***abate the Petition*** because the City alleges that the protested rates were not set pursuant to a written agreement, an allegation contested by the Authority."[13]

- "The Authority does not agree that the rate was not set pursuant to the contract. Therefore, as posited by the City, the provisions of P.U.C. SUBST. R. 24.131(d) require the ALJ to ***abate this proceeding***."[14]

- "Pursuant to the Commission's Rules, because of both the contractual claims and the fact that the parties do not agree whether the protested rates were set pursuant to a written contract, ***this docket must be abated***."[15]

- "Clearly, the Authority and the Petitioner disagree as to whether the rates were set pursuant to a written contract, therefore, the Commission's rules require the ***proceeding to be abated*** until any contract dispute is resolved elsewhere."[16]

- "The City's Petition has already been referred to SOAH, where the very first order of business should be to ***abate the proceeding***, as required by P.U.C. SUBST. R. 24.131(d). In light of the clear statement by the City that its claim is for breach of contract, and because the Commission is without authority to rewrite the terms of the 1981 Water Supply Contract, the Commission has no authority to set interim rates based on an alleged breach of contract claim."[17]

The ALJ issued Order No. 4 subsequent to the prehearing conference, and put the parties on notice that the proceeding would be abated "if SRA or Dallas files a motion to abate in

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[12] *Id.* at 10 (emphasis added).

[13] Sabine River Authority's Response to City of Dallas' Original Petition and Request for Interim Rates ("Authority Response") at 2 (Dec. 2, 2014) (emphasis added).

[14] *Id.* at 9 (emphasis added).

[15] *Id.* at 17 (emphasis added).

[16] Sabine River Authority's List of Issues at 3 (Dec. 2, 2014) (emphasis added).

[17] Sabine River Authority's Response to City of Dallas' Motion for Expedited Commission Establishment of Interim Rates at 5 (Dec. 11, 2014) (emphasis added).

accordance with 16 Tex. Admin. Code § 24.131(d)" by January 20, 2015.[18] The Authority filed its Motion to Abate on January 20, 2015, which was granted by Order No. 5 on January 21, 2015 (filed on January 22, 2015).

## III. RESPONSE TO REQUEST FOR INTERIM RATES

The City has completely failed to allege any error by the ALJ in issuing Order No. 5, and instead has used its appeal of Order No. 5 as a vehicle to reurge its request for interim rates. The City continues its erroneous litany of complaints regarding SRA's alleged violation of the Contract that it has included in previous filings with the Commission. The City also repeatedly argues that interim rates are warranted because SRA's rate is not based on the Authority's costs, and is not related to the operating and capital costs of the reservoir.[19] However, the Contract does not require the renewal rate be based on the Authority's costs, ***nor*** does it require that the rate match the Authority's operating and capital costs. To the contrary, the Contract requires the renewal rate to be determined taking into account the "prevailing rate." The City's complaint to the Commission is essentially that the City no longer likes the agreement it made in 1981, and would have the Commission completely re-write one of the fundamental provisions of this arms-length transaction. Such an activity is well beyond the scope of the Commission's jurisdiction.

Ultimately, the City's remedy is not to be found at the Commission, because the Commission has no jurisdiction to construe contracts or to adjudicate whether they have been breached. Hence, P.U.C. SUBST. R. 24.131(d) ***requires*** the ALJ to do as he has properly done – abate the proceedings and not make any findings on the contractual dispute.

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[18] Order No. 4 at 2 (Jan. 12, 2015).

[19] Dallas' Appeal at 6.

The City's arguments for interim rates, rehashed from its prior filings, still fall short. The City alleges that the SRA's rate is "unlawful" without providing any factual basis for that claim.[20] The City does not provide evidence of any other prices being charged in the area at the time for like contract sales of water of similar quality, quantity, and contract period to support its argument. Rather, the City merely claims that the City will be presented with an economic hardship because of the rates set by the SRA.[21] The City fails to note that the very language of the Contract gave notice to the City that there would be ***additional*** compensation due to the SRA during the renewal term of the Contract, starting on November 2, 2014. The City had 33 years to prepare and budget for the time when the additional compensation would be in place. The City's failure to prepare for this eventuality is not the Authority's fault, nor is it grounds for setting aside a valid order by the ALJ.

Neither the City, nor its wholesale and retail customers, will face the economic hardship alleged in its Appeal.[22] As detailed in the Authority's Response to Dallas' Petition, the public record demonstrates that the City's total operational budget dwarfs that of the SRA, and the rates adopted by the SRA amount to ***less than 1%*** of the City's total operating budget for Fiscal Year ("FY") 2014-2015.[23] The Authority's rate is well below the amounts the City expects to pay for projects identified in the City's "Long Range Water Supply Plan," which range up to $751/acre-foot, as compared to $183/acre-foot for the Lake Fork Reservoir water.[24]

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[20] *Id.*

[21] *Id.*

[22] *Id.* at 7-8.

[23] Authority Response at 14.

[24] *Id.* at 14-15.

It is axiomatic that any increased expenses will be borne by the City's retail and wholesale customers, yet the City has wholly failed to provide any information as to the rate impact on these customers. The City's unfounded assertion that Dallas' wholesale customers would have some right of action against the Authority for rates set by contract between Dallas and the Authority is simply incorrect as there is no privity of contract between such third parties and the Authority. Another red herring lobbed by the City is the specter of appeals filed by Dallas' customers because the Authority's rates are not based on the cost of service for Lake Fork water.[25] However, if Dallas has contracted to pay additional compensation to the SRA for the renewal term of the Contract, then Dallas' resulting expenses are clearly a part of Dallas' cost of service in providing both wholesale and retail water service to its customers.

According to the City of Dallas Comprehensive Annual Financial Report for Fiscal Year Ended September 30, 2013, which is publicly available on the City's website, as of September 30, 2013, the City had unrestricted cash and cash equivalents available in the amount of $631,820,000.[26] Dallas' allegations that the renewal rates will be financially ruinous to the City are unsupported and insupportable.

The City inexplicably continues to argue that an escrow account is necessary because the SRA will "not have any funds to repay Dallas for funds expended which are related to the unlawfully established Lake Fork water rate."[27] Besides having no basis in fact, this argument squarely contradicts the City's argument that the SRA does not need the additional funds for its operations.[28] If the City is correct, and the SRA does not need the funds for its operations, it is

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[25] *Id.* at 7-8.

[26] *See*, SRA's Response to City's Request for Expedited Interim Rates at Attachment B (Dec. 11, 2014), (excerpts from the City of Dallas Comprehensive Annual Financial Report for Fiscal Year Ended September 30, 2013.) The unrestricted cash amount of over $631 million is shown on page 13 of the Report.

[27] Dallas' Appeal at 9.

[28] *Id.* at 8.

completely illogical to also assume that the money collected from the City will be immediately spent without the possibility of ever being returned.

The City's arguments are an unfounded attempt to make the SRA seem fiscally irresponsible in order to bolster the interim rate argument, which in turn is offered to bolster the request to reverse Order No. 5. The SRA is fiscally sound and its expenditures are based on planned improvements and Board-directed policies. The City's unsupported suggestion that the Governor-appointed Board of Directors would squander funds received from the City under the renewal rates must be viewed as sheer speculation. The City's allegation that SRA would never be able to repay the City regardless of the outcome of the contested rate case hearing[29] is insupportable and not based on any understanding of the finances of the SRA.

## IV. CONCLUSION AND PRAYER

Order No. 5 is in complete compliance with the requirements of P.U.C. SUBST. R. 24.131(d). Under that rule, the ALJ had no choice but to abate the proceeding. The City has wholly failed to identify or allege any error committed by the ALJ in adopting Order No. 5; its Appeal is based solely on its preference that the ALJ would have made a determination on interim rates prior to abating the proceedings. However, the ALJ was under no obligation to do so, and his decision to abate without addressing interim rates does not violate the Commission's rule. Therefore, the City's Appeal of Order No. 5 should be denied.

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[29] *Id.* at 9.

Respectfully submitted,

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ATTORNEYS FOR SABINE RIVER AUTHORITY

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 9th day of February, 2015, to the parties of record.

GEORGIA N. CRUMP