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

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PUBLIC UTILITY COMMISSION  
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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  
RESEVOIR)

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PUBLIC UTILITY COMMISSION  
OF  
TEXAS

COMMISSION STAFF'S CLARIFICATION OF POSITION ON INTERIM RATES

TO THE COMMISSION AND HONORABLE ADMINISTRATIVE LAW JUDGE  
WILLIAM G. NEWCHURCH:

**Comes Now** the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest and files this, Staff's Clarification of Position on Interim Rates, and would show the following:

Some of the assertions made in the pleadings filed suggest to Staff that one of more of the parties may misunderstand Staff's position on the interim rates issue in this case. Out of an abundance of caution, Staff offers the following clarification of its position. Staff's clarification does not raise any additional facts or arguments, but is merely intended to clarify Staff's position.

This case is an appeal by the City of Dallas (Dallas) of a wholesale water rate set by the Sabine River Authority (SRA) to be charged to Dallas for Dallas' purchase of water for resale. In an appeal such as this one, the preliminary issue to be addressed is whether the rates appealed are set pursuant to contract.<sup>1</sup> Whether the rates charged are set pursuant to contract or not determines the Commission's scope of review of the rates on appeal.

If the rates appealed *are not* set pursuant to contract, then the Commission may set the rates based upon the selling entity's cost of service.<sup>2</sup> If the rates *are* set pursuant to contract, then the Commission may not modify the rates set pursuant to contract unless the Commission

<sup>1</sup> P.U.C. SUBST. R. 24.131.

<sup>2</sup> P.U.C. SUBST. R. 24.131(c), 24.134(c), & 24.135.

first finds that the rates “adversely affect the public interest.”<sup>3</sup>

If there is a dispute between the wholesale seller and purchasing retail water supplier as to whether the protested rates are set pursuant to contract, “the administrative law judge shall 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.”<sup>4</sup> In this case there is a dispute between the SRA and Dallas as to whether the protested rates are set pursuant to contract. Therefore, SOAH Order No. 5 abated this proceeding pending resolution of the contract dispute in District Court. The SOAH ALJ did not set interim rates prior to abating the case.

### **I. STAFF’S POSITION ON INTERIM RATES**

Staff’s position is that the Commission has the authority to set interim rates in this proceeding pursuant to Tex. Water Code (TWC) § 12.013(e),<sup>5</sup> 13.043(f)&(h),<sup>6</sup> and P.U.C. SUBST. R. 24.29(a).<sup>7</sup> As shown in Staff’s Response to City of Dallas’s Motion for Expedited Commission Establishment of Interim Rates, Staff recommended, without commenting on the merits of either parties’ case, that interim rates be set equal to the rates that took effect on November 2, 2014. The interim rate recommended by Staff is the rate set by SRA and appealed by Dallas in this case. Staff recommended that interim rates be set at the rate determined by SRA so that while this proceeding is being litigated, either before the Commission, SOAH, or a District Court, the current rates set by SRA would not be disturbed. However, in the event the Commission later changes those rates pursuant to a final order in this case, the final rates set by the Commission would be permitted to relate back to the implementation of interim rates.<sup>8</sup>

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<sup>3</sup> *Tex. Water Comm’n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied) (“The district court correctly concluded that the appropriate scope of appellate review under section 13.043(f) of the Water Code requires that the Commission first make a finding that the rates affected by a ‘decision of the provider’ adversely affect the public interest by being unreasonably preferential, prejudicial, or discriminatory.”); *see also* P.U.C. SUBST. R. 24.131(b) & 24.133 (detailing the Commission’s public interest standard).

<sup>4</sup> P.U.C. SUBST. R. 24.131(d).

<sup>5</sup> TWC § 12.013(e) (“The utility commission may establish interim rates and compel continuing service during the pendency of any rate proceeding.”).

<sup>6</sup> TWC § 13.043(h) (“The utility commission may, on a motion by the utility commission or by the appellant under Subsection (a), (b), or (f), establish interim rates to be in effect until a final decision is made.”).

<sup>7</sup> P.U.C. SUBST. R. 24.29(a) (“The commission may, on a motion by the commission staff or by the appellant under TWC, §13.043(a), (b), or (f), as amended, establish interim rates to remain in effect until a final decision is made.”).

<sup>8</sup> P.U.C. SUBST. R. 24.29(h)&(i).

Unless the Commission implements interim rates, rate changes brought on appeal pursuant to TWC § 13.043(f) apply prospectively. TWC § 13.043(f) does not authorize the Commission to establish the effective date of the Commission's rates at the original effective date of the rate change as the TWC does for appeals brought under TWC § 13.043(a) or (b).<sup>9</sup> However, pursuant to TWC § 13.043(h), the Commission may set interim rates to be in effect until a final decision is made.<sup>10</sup> Setting interim rates now would allow the Commission to authorize a true-up of the currently collected rates to the rates that may ultimately be determined by the Commission.<sup>11</sup> In other words, Staff's recommendation is to maintain the status quo until SRA's rates are either affirmed or modified by a District Court or by the Commission. And if the Commission ultimately sets the wholesale rates to be charged to the City of Dallas at some future point, the Commission would be permitted to true-up any differences between the rates ultimately approved and the rates currently being charged.

Although the Commission did not set interim rates in response to Dallas' request, the Commission confirmed its authority to set interim rates by referring the issue to SOAH and listing as an issue to be addressed: "*Should interim rates be established pursuant to TWC § 13.043(h)? If so, what is the appropriate interim rate?*"<sup>12</sup>

In SOAH Order No. 4, the ALJ ruled that he could and would set interim rates in this case as the protested rate did not appear to be set pursuant to contract.<sup>13</sup> However, once SRA made the affirmative allegation that the current rates were set pursuant to contract, the ALJ issued SOAH Order No. 5, abating this case without setting interim rates.<sup>14</sup> Staff has interpreted the ALJ's silence as to interim rates in SOAH Order No. 5 as an indication that the ALJ determined that interim rates should not be set before the contractual disputes are resolved. Staff does not interpret any of the SOAH ALJ's rulings to mean that the Commission lacks the authority to set interim rates prior to abatement; there has been no holding that the Commission

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<sup>9</sup> Compare TWC § 13.043(f), with TWC § 13.043 (a), (b), & (e). See also Commission Staff's Response to City Of Dallas's Motion For Expedited Commission Establishment of Interim Rates Under P.U.C. SUBST. R. 24.29(d) and (e) at 5.

<sup>10</sup> TWC § 13.043(h).

<sup>11</sup> P.U.C. SUBST. R. 24.29(h)&(i).

<sup>12</sup> Preliminary Order at 3.

<sup>13</sup> SOAH Order No. 4 Memorializing and Continuing Prehearing Conference at 6.

<sup>14</sup> SOAH Order No. 5 at 1.

lacks authority to set interim rates in this case. However, Dallas alleges that the ALJ's failure to set interim rates is based upon the ALJ's interpretation of P.U.C. SUBST. R. 24.131(d) as *precluding* interim rates prior to resolution of the contract dispute by a district court.<sup>15</sup>

Staff recommended setting interim rates to authorize the Commission to establish an effective date of interim rates, and permit the Commission to order refunds or surcharges of the difference between the interim rates and any rates that may ultimately set by the Commission.<sup>17</sup> However, setting interim rates is within the Commission's discretion, and therefore the SOAH ALJ's discretion when the matter is referred to SOAH, pursuant to P.U.C. SUBST. R. 24.29(a).<sup>18</sup> As such, the ALJ's decision to abate the case without setting interim rates is within the ALJ's discretion. SOAH Order No. 5 should therefore be upheld unless it is determined that the ALJ's basis for abating the case prior to setting interim rates is a misinterpretation of P.U.C. SUBST. R. 24.29 (a) and 24.131(d), rather than an actual weighing of the arguments and evidence presented.

## II. CONCLUSION

As stated in Staff's Response to the City of Dallas' Appeal of Order No. 5, Staff supports the ALJ's decision to abate the proceeding. Pursuant to P.U.C. SUBST. R. 24.131(d), "the administrative law judge shall 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."

As further stated in Staff's Response to the City of Dallas' Appeal of Order No. 5, P.U.C. SUBST. R. 24.29(a) provides the Commission discretion to set interim rates in this proceeding. The City of Dallas' appeal of the failure to set interim rates prior to abatement should be denied unless the ALJ based the denial of interim rates on a misinterpretation of P.U.C. SUBST. R. 24.131(d) as abridging the Commission's discretion under P.U.C. SUBST. R. 24.29(a) to set interim rates.

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<sup>15</sup> Dallas Reply to Staff's and SRA's Response to Dallas' Appeal of Order No. 5 at 1-2.

<sup>17</sup> P.U.C. SUBST. R. 24.29(h) & (i).

<sup>18</sup> P.U.C. SUBST. R. 24.29(a) ("The commission may, on a motion by the commission staff or by the appellant under TWC, §13.043(a), (b), or (f), as amended, establish interim rates to remain in effect until a final decision is made.").

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on February 20, 2015, in accordance with P.U.C. Procedural Rule 22.74.

Doug Brown *up permission*  
Douglas M. Brown  
*Stephen Mack*