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SOAH DOCKET NO. 473-16-3113.WS
PUC DOCKET NO. 45711

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PETITION OF KEMPNER WATER §
SUPPLY CORPORATION TO REVISE §
RATES FOR WHOLESALE WATER §
SERVICE IN THE CITY OF §
LAMPASAS §

PUBLIC UTILITY COMMISSION

OF TEXAS

FILED CLERK

COMMISSION STAFF'S RESPONSE TO SOAH ORDER NO. 4

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest and files this Response to SOAH Order No. 4.

I. BACKGROUND

On March 9, 2016, Kempner Water Supply Corporation (Petitioner) petitioned the Commission to find that the rates and certain terms described in a wholesale water supply contract between Petitioner and the City of Lampasas (Respondent) adversely affect the public interest and are not just and reasonable and are discriminatory, and to set interim rates until such time that the Commission may revise the price and certain terms. This case is highly unusual because, ordinarily, a wholesale supplier would set rates and the purchaser would appeal those rates to the Commission. Here, Kempner is the water supplier, and is appealing the rates it charges the City of Lampasas.

On March, 14, 2014, this proceeding was referred to the State Office of Administrative hearings (SOAH). SOAH Order No. 4 instructed Staff to file a response to the Respondent's motion to dismiss or abate by May 5, 2016. In Respondent's motion filed on March 30, 2016, Respondent requested that this matter be dismissed for want of jurisdiction or abated until the district and appellate court dispute is resolved.¹

II. RESPONSE AND RECOMMENDATION

Staff recommends that the Commission has jurisdiction over this matter pursuant to Tex. Water Code § 12.013 (TWC), and therefore should not be dismissed, but, instead, the matter

¹ Response of the City of Lampasas to Kempner's Original Petition and Request For Interim Rates and Motion to Dismiss or Alternatively Abate at 3 (AIS Item No. 9, filed March 30, 2016).

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should be abated until the contractual dispute is resolved in the district and appellate courts. Staff offers the following analysis in support of its position:

The Commission has those powers that the Legislature expressly confers upon it and those implied powers that are reasonably necessary to fulfill the express functions or duties given to it by the Legislature.² Petitioner argues that the Commission has jurisdiction over this matter pursuant to TWC §§ 11.036(b), 12.013, 13.001, 13.041(a), and 13.043(b).³

A. TWC § 11.036(b)

TWC § 11.036(b) authorizes the Texas Commission on Environmental Quality (TCEQ) to regulate the terms of contracts for the supply of storm water, floodwater, or rainwater that is conserved or stored as authorized by Chapter 11 of the Texas Water Code. TWC § 11.036 makes mention of only the “Commission” and makes no mention of the “Utility Commission.”⁴ TWC § 11.002(1) defines “Commission” as the Texas Natural Resource Conservation Commission, or what is now known as the TCEQ. TWC § 11.002(21) defines the “Utility Commission” as the Public Utility Commission of Texas. Therefore, the Commission has no jurisdiction under that section of the statute, and Staff has been presented with no valid argument that the section should be interpreted otherwise.

B. TWC § 13.001

TWC § 13.001 sets out the policy and purpose of Chapter 13, over which the Commission has jurisdiction. TWC § 13.001 states that the “purpose of this chapter is to establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities.”⁵ Although Kempner is a retail public utility, the rates and services that are the subject of the appeal are wholesale rates and services. However, the definition of a retail public utility is not limited to retail service. Instead, a retail public utility is defined, in part, as a “water supply corporation . . . controlling in this state facilities for providing

² *Railroad Comm’n of Texas v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992); *Atchison*, 609 S.W.2d at 643; see also *City Public Service Board of San Antonio*, 53 S.W.3d at 315-16; *GTE Southwest, Inc.*, 901 S.W.2d at 407; *Kawasaki Motors v. Motor Vehicle Comm’n*, 855 S.W.2d 792, 797 (Tex. App.—Austin 1993, writ denied).

³ Original petition and Request for Interim Rates at 2-3 (AIS Item No. 1, filed March 9, 2016).

⁴ TWC § 11.036(d).

⁵ TWC § 13.001(c).

potable water service or sewer service, or both, for compensation.”⁶ As such, TWC § 13.001 could arguably grant the Commission general jurisdiction over this case.

Other provisions of Chapter 13 weigh against the Commission assuming jurisdiction over this case under Chapter 13. For instance, Water Supply Corporations are exempt from the rate setting authority of Chapter 13, Subchapter F.⁷ TWC § 13.043 grants the Commission specific authority to review appeals of wholesale rates. However, as will be discussed below, TWC § 13.043 is not applicable to this case.

C. TWC § 13.041(a)

As the title of TWC § 13.041 indicates, this section articulates the general jurisdiction of the Commission. TWC § 13.041(a) states “[t]he utility commission may regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation.” However, Kempner, as a water supply corporation, does not fall under the definition of a “water and sewer utility.”⁸ Therefore, TWC § 13.041(a) does not grant the Commission jurisdiction over this case.

D. TWC § 13.043

In the Commission’s Preliminary Order, the Commission stated it does not have jurisdiction over this matter pursuant to TWC § 13.043(b) or § 13.043(f), because the Petitioner is neither a ratepayer nor the receiver of water or sewer service, as required by those provisions respectively.⁹ Therefore, this section does not grant the Commission jurisdiction over this case.

E. TWC § 12.013

TWC § 12.013 gives the Commission the jurisdiction to fix reasonable rates and establish interim rates if necessary. Nothing in the language of this section precludes the Commission from taking up this matter under this section’s authority.

Respondent argues that TWC § 12.013(d) precludes jurisdiction because it limits the Commission’s jurisdiction to matters where water is furnished by incorporated cities, towns, or

⁶ TWC § 13.002(19).

⁷ TWC § 13.181(a).

⁸ TWC § 13.002(23).

⁹ Preliminary Order at 2 (AIS Item No. 16, filed April 25, 2016).

villages.¹⁰ However, the subsection precludes the Commission from fixing rates for cities furnishing water, except where the city is furnishing water to another political subdivision on a wholesale basis. If the Respondent were providing water to the Petitioner, who is not a political subdivision, TWC § 12.013(d) would apply. In this case, Kempner is supplying water, not the City of Lampasas.

Respondent argues that the *City of Dallas* is distinguishable from this case because “Dallas was seeking relief as a ratepayer not as an entity subject to the Commission’s regulatory authority.”¹¹ Respondent goes on to argue that Sabine was not “attempting to subject the City of Dallas to Commission regulation,” as it argues the Petitioner is here. However, the limitation of TWC § 12.013(d), as interpreted by the Respondent, would have applied to Dallas exactly as the Respondent argues it should apply to itself. Neither the Commission nor SOAH found that TWC § 12.013(d) precluded the Commission’s jurisdiction over the *City of Dallas*, and Respondent should not be heard to say that it limits the Commission’s jurisdictions over this matter. Simply changing the movant in the matter does not limit the Commission from hearing a wholesale water dispute that involves a municipality.

F. Abatement

Staff contends that the availability of TWC § 12.013(d) to the Petitioner does not mean this case is ripe for the Commission or SOAH to adjudicate. Pursuant to 16 TAC § 24.131(d), the case must be abated if the customer and provider do not agree that the rate is charged pursuant to a contract. While the Petitioner claims it does not dispute that the contested rate is charged pursuant to a contract and the Respondent agrees, Petitioner is engaged in an ongoing district court case that has yet to reach final resolution. Additionally, the Petitioner has been very clear that it intends to appeal the district court’s final ruling. As such, it appears as though Petitioner is still litigating as to whether the rate is charged pursuant to contract. Furthermore, if the Commission or SOAH were to conduct a hearing on the merits before the resolution of the district court case, or its appeal, the presiding officer would be unable to determine the public interest factors that are necessary to the relief that the Petitioner seeks. The SOAH

¹⁰ Response of the City of Lampasas to Kempner’s Original Petition and Request For Interim Rates and Motion to Dismiss or Alternatively Abate at 7 (AIS Item No. 9, filed March 30, 2016).

¹¹ *Id.* at 8.

Administrative Law Judge noted the very same predicament in *City of Dallas*.¹² Therefore, Staff recommends that the case be abated until the district court dispute, and any resulting appeal, is resolved.

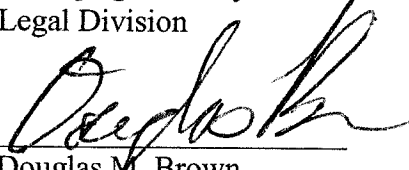
III. CONCLUSION

For the reasons stated above, Staff recommends that Commission has jurisdiction over this matter, and therefore should not be dismissed, but, instead, the matter should be abated until the contractual dispute is resolved in the district and appellate courts.

Respectfully Submitted,

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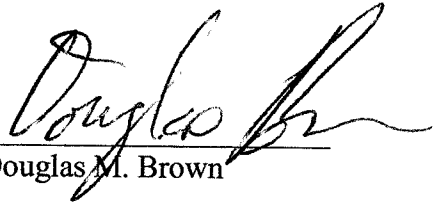
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¹² SOAH Order No. 8 at 2 (AIS Item No. 50, issued on April 3, 2015).

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this May 5, 2016 in accordance with 16 TAC § 22.74.



Douglas M. Brown