

Control Number: 45711



Item Number: 7

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SOAH DOCKET NO. 473-16-3113.WS
P.U.C. DOCKET NO. 45711

2016 MAR 24 PM 2:41

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

§
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§
§
§

BEFORE THE PUBLIC UTILITY COMMISSION
FILING CLERK

STATE OFFICE OF
ADMINISTRATIVE HEARINGS

THE CITY OF LAMPASAS'S
LIST OF ISSUES

The City of Lampasas ("City") is a party to the Wholesale Water Supply Contract ("Contract") that is the subject of the petition filed by Kempner Water Supply Corporation ("Kempner") in this docket, and therefore a party to this proceeding. Pursuant to the Order of Referral by the Public Utility Commission ("Commission" or "PUC") issued on March 14, 2016, the City respectfully submits this List of Issues that should or should not be addressed in the above-described proceeding.

I. ISSUES TO BE DETERMINED

A. Jurisdiction

Petitioner Kempner has asserted jurisdiction under several provisions of the Texas Water Code. The City contends that none of them apply to this proceeding. But, before determining whether the Commission has jurisdiction, the Commission should first decide whether Kempner has waived any right to seek review of the Contract between it and the City because Kempner has already elected to litigate the meaning and the public interest and public policy aspect of the Contract in the district court in Lampasas County. That district court lawsuit has been ongoing since September 2013 – over 2 1/2 years – and the arguments and issues Kempner raises here have already been raised in the district court. Kempner has thus far lost on partial summary judgment rulings by the district court but the matter is still pending. Because the Commission, at most, has only primary jurisdiction of Kempner's and the City's dispute over this Contract, that jurisdiction is waivable. The City contends the Commission should decline jurisdiction because Kempner chose to participate in – and in fact filed counterclaims in – litigation over these issues in the district court. This issue constitutes a threshold legal and/or policy issue that should be briefed for purposes of a preliminary order.

With respect to the many statutes Kempner cites for Commission jurisdiction, none of them applies here. The City will set out in its Response and Motion to Dismiss and Alternatively Motion to Abate (“Response”) why jurisdiction fails under each of those statutes. These jurisdictional issues also present threshold legal issues that should be briefed for purposes of a preliminary order.

B. Sufficiency of Petition

Even if the Commission determines it has jurisdiction under Texas Water Code § 12.013, Kempner’s petition is not sufficient under 16 Tex. Admin Code (“TAC”) § 24.44 and 16 TAC § 24.130. When, as here, the petitioner is a supplier of water, the petition must include a statement that the petitioner is “willing and able to supply water at a just and reasonable price” and “that the price demanded by petitioner for the water is just and reasonable and is not discriminatory.” 16 TAC § 24.44(b)(4) and (5). Kempner’s petition does not reference the first requirement and its petition fails even to indicate what price it is demanding, much less make any showing or allegation that the price is “just and reasonable and not discriminatory.” Rule 24.130(b) requires the petitioner to set out “specific factual allegations” as well as “the relief which the petitioner seeks.” Kempner complains about the Contract but never sets out what rate it seeks to have the Commission authorize. Such a pleading does not contain the specificity required by Rule 24.130(b).

Additionally, even if the Commission had jurisdiction over Kempner’s petition under Texas Water Code § 13.043(b), a petition under that provision must be signed by the lesser of 10,000 or 10 percent of ratepayers whose rates have been changed and are eligible for appeal. Texas Water Code § 13.043(c) and 16 TAC § 24.41(b). Kempner’s petition is not signed by any parties other than Kempner.

C. Abatement

Pursuant to 16 TAC § 24.131(d), the Commission must abate a proceeding “[i]f the seller and buyer do not agree that the protested rate is charged pursuant to a written contract.” While the City agrees that the rates authorized by the district court’s rulings are the correct rates to be charged pursuant to the Contract, Kempner continues to dispute the district court’s rulings. Therefore, Kempner does “not agree that the protested rate is charged pursuant to a written contract” and abatement is required under the rule. This issue constitutes a threshold legal and/or policy issue that should be briefed for purposes of a preliminary order.

D. Public Interest

If the Commission determines that it has jurisdiction over the Contract under §§ 11.036 or 12.013, the Commission should not evaluate the protested rates unless and until Kempner accepts the district court interpretation of the Contract. If the Commission further finds that Kempner has not waived its right to invoke that jurisdiction, the Commission should limit its initial inquiry to that permitted by 16 TAC §§ 24.132 and 24.133. Under those rules, the Commission must determine whether Petitioner has met its burden of proving a violation of the public interest criteria set forth in Rule 24.133(a)(1) or (4), the two subsections Kempner claims are violated by the Contract.

E. Issues to Be Addressed

In accordance with and subject to the limitations set out in the foregoing, the following issues should be addressed:

1. Should Kempner be precluded from seeking Commission review of the Contract between it and the City because in Cause No. 19005, *City of Lampasas v. Kempner Water Supply Corp.*, in the District Court of Lampasas County, Texas, 27th Judicial District, Kempner is pursuing litigation over the same issues it raises here?
2. Does the Commission have jurisdiction of this petition under Texas Water Code ("TWC") § 12.013?
3. If the Commission has jurisdiction under TWC § 12.013, does Kempner's petition meet the requirements of 16 Tex. Admin. Code ("TAC") § 24.44(b)?
4. If the Commission has jurisdiction under TWC § 12.013, does Kempner's petition meet the requirements of 16 TAC § 24.130?
5. Does the Commission have jurisdiction of this petition under TWC § 11.036(b)?
6. Does the Commission have jurisdiction of this petition under TWC §§ 13.001 and 13.041(a)?
7. Does the Commission have jurisdiction of this petition under TWC § 13.043(b)?
8. If the Commission has jurisdiction under TWC § 13.043(b), does Kempner's petition meet the requirements of TWC §13.043(c) and 16 TAC §24.41(b)?
9. Should the Commission abate this proceeding pursuant to 16 TAC § 24.131(d) because Kempner is disputing in the Lampasas district court the City's and the district court's interpretation of the Contract, which interpretation is the basis for the rates currently being

charged, and, therefore, Kempner does "not agree that the protested rate is charged pursuant to a written contract"?

10. If the Commission finds that the rate complained of is a rate charged pursuant to a written contract, has Kempner met its burden of proof under 16 TAC § 24.136, by demonstrating that the rate adversely affects the public interest by violating the criteria in either subsection (1) or (4) of 16 TAC § 24.133(a)?

II. ISSUES THAT SHOULD NOT BE ADDRESSED

If the Commission finds that it has jurisdiction and that this proceeding should go forward, the Commission should not permit a hearing to set interim rates. The rates currently being charged by Kempner and paid by the City are those that the district court has held are allowed under the Contract. *See* Exh. A (district court order). Kempner should not be permitted to use the Commission to avoid the district court's decision. And setting interim rates would violate the prohibition in Article I, § 16 of the Texas Constitution against impairment of contracts. Unlike in the *City of Dallas v. Sabine* proceeding, rates are still in place under the Contract. *See* Tex. Pub. Util. Comm'n, *Petition of City of Dallas for Review of a Decision By the Sabine River Authority to Set Water Rates*, Docket No. 43674, SOAH Order No. 4 at p. 4 (noting Article I, § 16 not at issue because there was "no current contractual rate"). As the Commission has recognized in 16 TAC § 24.132-.133, the Commission cannot alter a contract rate without a hearing to determine whether the Contract violates the public interest criteria listed in Rule 24.133(a). An interim rate proceeding is not a public interest hearing under Rule 24.133, and the criteria in 16 TAC § 24.29 for establishing interim rates are not consistent with the public interest criteria in Rule 24.133.

Further, if the Commission concludes that it has jurisdiction but this proceeding should be abated pending resolution of the court litigation, these same factors prohibit the Commission from conducting any hearing to set interim rates before abating the case, as it did in *City of Dallas v. Sabine*. *See City of Dallas v. Sabine*, Docket No. 43674, SOAH Order No. 8.

In addition, any attempt by Kempner to seek interim rates charging the City for Kempner-treated water is precluded by Kempner's entry into a Rule 11 Agreement in the district court litigation. That Agreement provides that Kempner agrees not to demand payment for treated water from its plant "until and through the last day of any trial of this cause." *See* Exh. B.

Kempner's petition acknowledges (Petition at 4, n.4) that no final trial has occurred in the district court.

Alternatively, if the Commission does set interim rates, it should add to the issues to be addressed in any interim rate hearing whether any payments the City makes to Kempner over and above those currently authorized by the Lampasas District Court rulings should be deposited into an escrow account. *See* 16 TAC § 24.30 (authorizing escrow of proceeds received under a rate increase).

If the Commission conducts an evidentiary hearing on the public interest, pursuant to 16 TAC § 24.133(b), the Commission cannot consider Kempner's cost of service in determining whether the Contract adversely affects the public interest. Strict adherence to the public interest standards in 16 TAC § 24.144(b) is required in order to avoid violation of the prohibition in Article I, § 16 of the Texas Constitution against impairment of contracts. Kempner should not be allowed to get a new contract simply because it no longer likes the one it has had for 10 years.

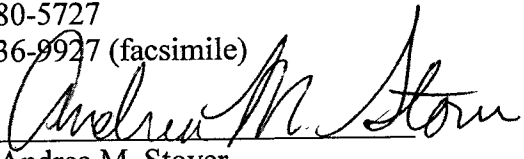
III. CONCLUSION

For the reasons stated, the City of Lampasas respectfully requests that the Commission issue an Order that identifies the issues to be briefed for purposes of a Preliminary Order and identifies the issues to be addressed and not to be addressed in a manner consistent with this filing, and for such other relief to which the City shows itself to be entitled.

Respectfully submitted,

GRAVES DOUGHERTY HEARON & MOODY, P.C.
401 Congress Avenue, Ste. 2200, Austin, Texas 78701
(512) 480-5727
(512) 536-9927 (facsimile)


By:


Andrea M. Stover
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Mary A. Keeney
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Helen Currie Foster
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hfooster@gdhm.com

ATTORNEYS FOR PLAINTIFF CITY OF LAMPASAS

CERTIFICATE OF SERVICE

I certify that on the 24th day of March, 2016, a true and correct copy of the foregoing instrument was served on all parties of record by email, hand delivery, Federal Express, regular first class mail, certified mail, or facsimile transmission.


Andrea M. Stover

CAUSE NO. 19005

CITY OF LAMPASAS, TEXAS	§	IN THE DISTRICT COURT OF
	§	
VS.	§	LAMPASAS COUNTY, TEXAS
	§	
KEMPNER WATER SUPPLY CORP.	§	27TH JUDICIAL DISTRICT

ORDER GRANTING THE CITY'S AMENDED MOTION FOR SUMMARY JUDGMENT

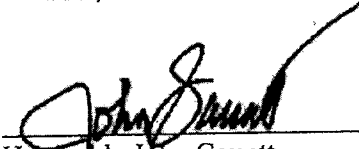
On this day came to be heard Plaintiff and Counter-Defendant City of Lampasas's Amended Motion for Summary Judgment and Defendant and Counter-Claimant Kempner Water Supply Corp.'s Motion for Partial Summary Judgment. After considering the Motions, the evidence, the pleadings on file with the Court, and the arguments of counsel, the Court finds that the City's Motion has merit and should be GRANTED. The Court also finds that Kempner's Motion lacks merit and should be DENIED. Accordingly, it shall be, and is hereby

ORDERED, ADJUDGED AND DECREED that the City's Amended Motion for Summary Judgment is GRANTED ~~in all respects~~ **AS SHOWN ON THE ATTACHED PAGE** and Kempner's Motion for Partial Summary Judgment is DENIED in all respects.

In addition, the City's objections to Kempner's Summary Judgment Evidence shall be, and are hereby, GRANTED. Kempner's objections to and motion to strike the City's summary judgment evidence shall be, and are hereby, DENIED.

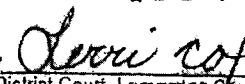
SIGNED this _____ day of ~~December, 2014.~~

JAN 12 2015


Honorable John Gauntt
District Judge

FILED
a.m. 3:00 p.m. o'clock

JAN 12 2015

By  Clerk
District Court, Lampasas County, Tx

protest in response to Kempner's June 2013 Notice of Default.

VII. CONCLUSION AND PRAYER.

WHEREFORE, premises considered, the City of Lampasas respectfully requests that the Court enter an order granting this motion and awarding the City:

1. A declaration that Kempner may not charge the City for water treated by Kempner;
2. A declaration that the City may only be charged a floor penalty where its demand for water is less than the applicable floor;
3. A finding that Kempner breached the Contract by charging a Kempner Treated Water Cost;
4. A finding that Kempner breached the Contract by imposing a floor charge where the City's demand exceeded the Central Texas floor;
5. In the alternative, a finding that Kempner waived any rights it might have during the 2011, 2012 and 2013 "true ups";
6. Damages in the amount of \$117,432.27; and
7. Such other and further relief, at law or in equity, to which the City of Lampasas may show itself to be justly entitled.



GRAVES DOUGHERTY HEARON & MOODY
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October 31, 2014

Lee A. Ream
Cody Faulk
Davidson Troilo Ream & Garza, P.C.
7550 West IH-10, Suite 800
San Antonio, TX 78229-5815

via email to lream@dtgclaw.com and cfaulk@dtgclaw.com

Re: *City of Lampasas, Texas v. Kempner Water Supply Corp.*; Cause No. 19005; In
the 27th Judicial District Court, Lampasas County, Texas

Dear Counsel:

This letter is intended to memorialize the parties' agreement with respect to Kempner's billing for treated water cost for water from Kempner's own water treatment plant, pending trial of the above referenced cause. This Rule 11 agreement supplements but does not replace the parties' September 26, 2014 Rule 11 agreement, except with respect to Kempner's billing for treated water cost for water from Kempner's own water treatment plant.

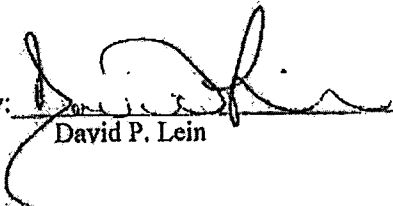
It is understood that the parties have a dispute about whether Kempner may bill for treated water from its plant. This is the subject of the above referenced litigation. The parties agree that until and through the last day of any trial of this cause, Lampasas will not have to pay for Kempner treated water previously billed by Kempner, nor will Kempner demand payment or issue further such bills, or notices of default for the City's failure or refusal to remit such payments.

This agreement shall in no way be considered or declared a waiver of Kempner's or Lampasas's contractual rights or right to pursue judicial, administrative, equitable or any other relief. It shall also not be considered or declared an admission that any such relief is available or appropriate. Kempner and Lampasas further agree that this agreement will not be offered as evidence in any court or administrative proceeding except to enforce the terms of this agreement.

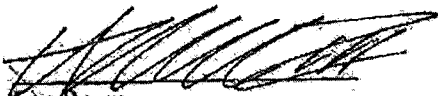
October 31, 2014
Page 2

Sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY, PC

By: 
David P. Lein

AGREED:


Leo Keam
Cody Paulk
Attorneys for Kempner Water Supply Corporation



DAVIDSON
TROILO
REAM &
GARZA PC
ATTORNEYS AT LAW

Lea A. Ream
210.442.2313 Direct
lream@dtgclaw.com

September 26, 2014

David Lein
Helen Currie Foster
Graves Dougherty Heaton & Moody
401 Congress Ave.
Austin, TX 78701

Re: Cause No. 19005
City of Lampasas, Texas v. Kempner Water Supply Corporation

Helen & David:

This letter is to confirm the parties' agreement to continue settlement negotiations and to participate in a second mediation in the above referenced matter that is presently set for trial on December 15, 2014. The agreement to continue settlement discussions and to participate in mediation is conditioned upon the following terms to which the Parties agree:

It is understood that the parties have a dispute about whether Kempner may bill for treated water from its plant. This is the subject of the above referenced litigation. While the parties are discussing settlement, the parties agree that during the term of this agreement as defined below: (i) Lampasas will not have to pay for Kempner treated water previously billed by Kempner, nor will Kempner demand payment or issue further such bills, or notices of default for the City's failure or refusal to remit such payments; and (ii) the cure period for notices of default issued since July 1, 2014 is tolled until the expiration of this agreement.

Secondly, Kempner will provide documents responsive to Lampasas' Third Request for Production and any other outstanding formal or informal requests for documents by Friday, September 26th, 2014 at the office of Lampasas' attorneys.

Thirdly, the parties agree to convene a mediation with Eric Galton to further discuss settlement of this cause, with each party bringing to the mediation less than a quorum of its governing representatives. In addition to its City Manager, no fewer than three members of the Lampasas City Council will attend the mediation. In addition to its General Manager, no fewer than three members of Kempner's Board of Directors will attend the mediation.

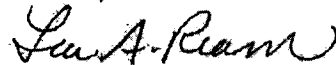
This term of this agreement extends from execution until 14 days after the agreed mediation takes place to allow for follow up negotiations to take place. This agreement may be extended by mutual agreement.

This agreement shall in no way be considered or declared a waiver of Kempner's or Lampasas's contractual rights or right to pursue judicial, administrative, equitable or any other relief. It shall also not be considered or declared an admission that any such relief is available or appropriate. Kempner and Lampasas further agree that this agreement will not be offered as evidence in any court or administrative proceeding except to enforce the terms of this agreement.

If this letter accurately reflects our agreement please sign where indicated below and return it to me by facsimile. If this letter does not accurately reflect our agreement, please contact me immediately. This agreement will only be filed with the Court upon the need of either party to enforce such agreement.

Your professional courtesies in this matter are appreciated.

Sincerely,



Lea A. Ream
For the Firm

AGREED:



David Lein
Helen Currie Foster
Counsel for Plaintiff
City of Lampasas