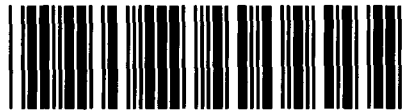




Control Number: 47863



Item Number: 24

Addendum StartPage: 0

PETITION OF THE CITIES OF	§	BEFORE THE
GARLAND, MESQUITE, PLANO AND	§	
RICHARDSON APPEALING THE	§	
DECISION BY NORTH TEXAS	§	PUBLIC UTILITY COMMISSION
MUNICIPAL WATER DISTRICT	§	
AFFECTING 2018 WHOLESALE	§	
WATER RATES	§	OF TEXAS

**NORTH TEXAS MUNICIPAL WATER DISTRICT'S LIST OF ISSUES**

The North Texas Municipal Water District ("District") timely files this List of Issues pursuant to the Order of Referral issued on January 22, 2018 and the Order Granting the Motion to Extend the Deadline for Filing Lists of Issues issued on February 1, 2018.

**I. THRESHOLD LEGAL ISSUES**

This proceeding raises the same issues regarding the District's wholesale water rate for 2018 as those in pending Docket No. 46662 also filed by the Cities of Garland, Mesquite, Plano and Richardson ("Petitioners") appealing the District's wholesale water rates set for the previous year 2017. As in Docket No. 46662, the District urges the Public Utility Commission of Texas ("Commission") to dismiss this proceeding because the underlying contract of which Petitioners complain is statutorily incontestable. Contemporaneously with this List of Issues, the District is filing a separate Motion to Dismiss laying out in detail the threshold legal issues that are appropriate for Commission consideration in this proceeding. These issues are summarized as follows:

- A. Should the Commission dismiss the petition for lack of jurisdiction because the District's enabling act precludes litigation of, or judicial inquiry into the terms of the underlying contract, including its cost allocation provisions?

- B. Should the Commission dismiss the petition as moot because the underlying contract, including its cost allocation provisions, has already been determined under statute to not adversely affect the public interest?

## **II. ISSUES TO BE ADDRESSED**

In the alternative, if the Commission does not dismiss the petition, the issues to be addressed at hearing before the State Office of Administrative Hearings are those consistent with Commission Rules 24.128 – 24.138, which are as follows:

1. Do the facts demonstrate that the Commission has authority under TWC § 12.013 to hear this appeal?
2. Do the facts demonstrate that the Commission has authority under TWC § 13.043(f) to hear this appeal?
3. Does the Petitioners' appeal meet the requirements of TWC 13.043(f) and 16 Tex. Admin. Code (TAC) 24.130?
4. If so, is the Protested Rate set by the District charged pursuant to a written contract (whether by agreement of the parties or as resolved by court determination in accordance with 16 TAC § 24.131)?
5. If the rates are charged pursuant to a written contract, have Petitioners met their burden of proof, under 16 TAC § 24.136, by demonstrating that the rates set by the District adversely affect the public interest by violating at least one of the public interest criteria listed in 16 TAC § 24.133(a)?
6. If the rates adversely affect the public interest, what are the bases for determining that rates adversely affect the public interest, as required by 16 TAC § 24.134(e)?
7. If the rates do not adversely affect the public interest, what are the bases for determining that the rates do not adversely affect the public interest, as required by 16 TAC § 24.134(a)?

### III. ISSUES NOT TO BE ADDRESSED

Commission Rule 24.133(b) requires that the “Commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller’s cost of service.”<sup>1</sup> In pending Docket No. 46662, rather than track the language of Rule 24.133(b), the Commission stated in the Preliminary Order that “the public interest determination cannot depend *solely* on whether the challenged rates match the cost of service.”<sup>2</sup> Not only is that statement inconsistent with the plain language of Rule 24.133(b), it is also inconsistent with prior administrative policy, rule interpretation, and agency decisions. Accordingly, consistent with the plain language of Rule 24.133(b) and prior agency decisions interpreting that rule, the District requests that the Commission’s list of issues not to be addressed during this phase of the proceeding include the following:

1. The determination of whether the protested rate adversely affects the public interest shall not be based on an analysis of the District’s cost of service.
2. Evidence relating to the District’s cost of service is irrelevant during the public-interest phase of the proceeding.

Prohibiting consideration of cost of service issues is consistent with Commission Rule 24.133(b), previous agency interpretation of the rule, and long-standing guidance regarding the scope of the public interest rule. The language of the rule is unambiguous—cost of service shall

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<sup>1</sup> 16 Tex. Admin. Code § 24.133(b) (TAC).

<sup>2</sup> *Petition of the Cities of Garland, Mesquite, Plano, and Richardson, Appealing the Decision by North Texas Municipal Water District Affecting Wholesale Water Rates*, Docket No. 46662 (pending), Preliminary Order at 27 (Jun. 29, 2017) (emphasis added); see also *Petition of High Point Water Supply Corp., Talty Special Utility District, and Markout Water Supply Corp. Appealing a Decision by the City of Forney Affecting Wholesale Water Rates and Request for Interim Rates*, Docket No. 47814 (pending), Preliminary Order at 5-7 (Jan. 25, 2018) and *Petition of Fort Belknap Water Supply Corp., Graham East Water Supply Corp., and the City of Bryson Appealing the Decision by the City of Graham to Change Wholesale Water Rates*, Docket No. 47742 (pending), Preliminary Order at 5-7 (Jan. 11, 2018) (similarly referring cost-of-service issues for hearing in the public-interest phase without reference to or discussion of inconsistent prior agency decisions and policy statements).

not be a basis for a determination of effects on public interest. The clarity of that requirement is confirmed by consistent interpretation and application of that provision. The District's request is also consistent with Commission Staff's proposed list of issues not to be addressed in the pending Docket No. 46662.<sup>3</sup>

When the public interest rule was originally adopted by the Texas Natural Resource Conservation Commission ("TNRCC") in 1994, the TNRCC provided guidance on the cost-of-service issue in the preamble to the rule. In the preamble, the TNRCC recognized that "the public interest does not demand that a wholesale rate shall equal the seller's cost of providing service to the purchaser."<sup>4</sup> Consequently, the TNRCC concluded that "under the adopted bifurcated hearing procedure the commission *should not consider* cost of service in the determination of public interest."<sup>5</sup>

The rule has been interpreted consistent with that guidance in a prior public interest proceeding. Parties attempted to introduce cost-of-service related evidence into the record in a rate appeal concerning wholesale rates set by the City of Corsicana. The administrative law judge in that case concluded that, in a wholesale water rate appeal, "the Commission has placed cost-of-service evidence completely off the table."<sup>6</sup> Further, "all cost-of-service evidence is irrelevant in the public-interest hearing."<sup>7</sup> The TCEQ ultimately adopted the judge's proposal.<sup>8</sup>

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<sup>3</sup> Docket No. 46662, Commission Staff's List of Issues (Apr. 28, 2017).

<sup>4</sup> 19 Tex. Reg. 6228.

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *Appeal of Navarro County Wholesale Ratepayers to Review the Wholesale Rate Increase Imposed by the City of Corsicana, Certificate of Convenience and Necessity No. 10776, in Navarro County*, TCEQ Docket No. 2009-1925-UCR, Proposal for Decision at 22 (Aug. 17, 2011).

<sup>7</sup> *Id.*

<sup>8</sup> TCEQ Docket No. 2009-1925-UCR, Order (Nov. 9, 2011).

If the Commission declines to prohibit consideration of cost-of-service issues during the public-interest phase of these proceedings, the District requests that the Commission provide guidance for how cost-of-service issues should be considered in this proceeding in light of prior interpretations of the cost-of-service provision in Rule 24.133(b).<sup>9</sup>

#### IV. CONCLUSION

The District requests that the Commission adopt a briefing order setting out threshold legal issues consistent with those issues listed above, along with a briefing schedule, or in the alternative, adopt a List of Issues consistent with those issues identified above, and that the Commission grant the District such other relief to which it is entitled.

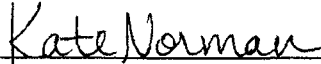
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<sup>9</sup> See *Flores v. Employees Ret. Sys. Of Tex.*, 74 S.W.3d 532, 544-545 (Tex. App.—Austin Apr. 18, 2002) (pet. denied) (An agency must explain its reasoning when it appears that it has departed from earlier administrative policy or there exists an apparent inconsistency in agency determinations, and failing to adequately explain reasoning for change in position results in “serious flaws” in agency decision making. “Any...alteration or reversal must be accompanied by some reasoning—some indication that the shift is rational, and therefore not arbitrary and capricious.”) (quoting *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm’n*, 59 F.3d 284 (1st Cir. 1995)) (internal quotations omitted); see also *Texas Health and Human Servs. Comm’n v. Antoine Dental Ctr.*, 487 S.W.3d 776, 799 (Tex. App.—Texarkana 2016, no pet.) (holding that agency acted arbitrarily and capriciously because agency “offered no reason for changing its position” from prior decision).

Respectfully submitted,

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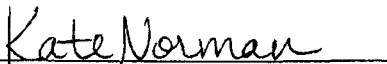
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**ATTORNEYS FOR NORTH TEXAS  
MUNICIPAL WATER DISTRICT**

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copy of the foregoing document has been served on all parties of record on February 16, 2017 in accordance with 30 Tex. Admin. Code § 22.74.

  
Kate Norman