



Control Number: 47863



Item Number: 31

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OPEN MEETING COVER SHEET

Revised Draft Preliminary Order

MEETING DATE: March 8, 2018

DATE DELIVERED: March 7, 2018

AGENDA ITEM NO.: 20

CAPTION: Docket No. 47863; SOAH Docket No. 473-18-1905.WS - Petition of the Cities of Garland, Mesquite, Plano, and Richardson Appealing the Decision by North Texas Municipal Water District Affecting 2018 Wholesale Water Rates

ACTION REQUESTED: Discussion and possible action with respect to Preliminary Order

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Public Utility Commission of Texas

TO: Chairman DeAnn T. Walker
Commissioner Brandy Marty Marquez
Commissioner Arthur C. D'Andrea

All Parties of Record

FROM: Mark Hovenkamp
Commission Advising

A handwritten signature in black ink, appearing to be "MH", written over the printed name "Mark Hovenkamp".

RE: *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. 47863, SOAH Docket No. 473-18-1905.WS, Revised Draft Preliminary Order, March 8, 2018 Open Meeting, Item No. 20.*

DATE: March 7, 2018

Please find enclosed the revised draft preliminary order filed by Commission Advising in the above-referenced docket. The Commission will consider this revised draft preliminary order at the March 8, 2018 open meeting. Parties shall not file responses or comments addressing this revised draft preliminary order.

Any modifications to the revised draft preliminary order that are proposed by one or more Commissioners will be filed simultaneously prior to the consideration of the matter at the March 8, 2018 open meeting.

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PUC DOCKET NO. 47863
SOAH DOCKET NO. 473-18-1905.WS

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

REVISED DRAFT PRELIMINARY ORDER

The cities of Garland, Mesquite, Plano, and Richardson (the petitioners) appeal the wholesale water rates imposed by the North Texas Municipal Water District¹ under Texas Water Code (TWC) §§ 12.013 and 13.043(f) and the Commission’s implementing rules.² The petitioners appeal the rate the district charges for water service for the 2018 fiscal year (October 1, 2017 through September 30, 2018). This preliminary order identifies the issues that must be addressed and the issues that shall not be addressed.

On December 15, 2017, the petitioners filed their original petition. Petitioners previously filed a nearly identical appeal of the wholesale water rates charged by the district for fiscal year 2017 (October 1, 2016 through September 30, 2017) in Docket No. 46662, which is currently pending before the State Office of Administrative Hearings (SOAH).³

The cities of Princeton, Rockwall, Wylie, McKinney, Royse City, Forney, Frisco, Allen, and Farmersville were granted intervention in this docket. Subsequently, parties were requested to file a list of issues to be addressed, any issues not to be addressed, and any threshold legal or policy issues that should be addressed.⁴ The petitioners, the district, the cities of Frisco, Forney, Allen, Farmersville, Princeton, and Wylie, and Commission Staff each timely filed lists of proposed issues.

¹ Original Petition Appealing Wholesale Water Rates at 1 (Dec. 15, 2017) (Petition).

² 16 Texas Administrative Code (TAC) §§ 24.128–.138.

³ *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).

⁴ Order Requesting Issues (Jan. 2, 2018).

I. Issues to be Addressed

The Commission must provide to the administrative law judge (ALJ) a list of issues or areas to be addressed in any proceeding referred to SOAH.⁵ After reviewing the pleadings submitted by the parties, the Commission determines that it is appropriate to proceed in two phases—phase one for the public interest determination and phase two, if necessary, for a cost-of-service determination to set rates if the Commission determines that rates being charged the petitioners are not reasonable. The Commission requests that one or more ALJs at SOAH prepare a proposal for decision for consideration by the Commission regarding the phase-one issue. If necessary, thereafter this matter will be returned to SOAH to issue a proposal for decision on the phase-two issue.

A. Phase One Issue

The Commission identifies the following issues that must be addressed in phase one:

1. Do the facts demonstrate that the Commission has authority under TWC § 12.103 to hear this appeal?
2. Do the facts demonstrate that the Commission has authority under TWC § 13.043(f) to hear this appeal?
3. Was the petition filed in accordance with TWC § 13.043(f) and 16 TAC §§ 24.44 and 24.130?
4. Do the rates the district charges petitioners for water service adversely affect the public interest under the Water Code? TWC § 13.043(j), *Texas Water Commission v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied).
 - a. Are the rates the district charges petitioners for water service just and reasonable? TWC § 13.043(j)
 - b. Are the rates unreasonably preferential, prejudicial, or discriminatory? TWC § 13.043(j)
 - c. Are the rates sufficient, equitable, and consistent in application to each class of customers? TWC § 13.043(j)

⁵ Tex. Gov't Code Ann. § 2003.049(e) (West 2016).

5. Do the rates the district charges petitioners for water service adversely affect the public interest under Commission rules? 16 TAC § 24.133
- a. Do the protested rates impair the district's ability to continue to provide service, based on the district's financial integrity and operational capability;
 - b. Do the protested rates impair the petitioner's ability to continue to provide service to their retail customers, based on each petitioner's financial integrity and operational capability;
 - c. Do the protested rates evidence the district's abuse of monopoly power in its provision of water to the petitioners? In answering this issue, please address the following factors:
 - i. The disparate bargaining power of the parties, including the petitioner's alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water service;
 - ii. The district's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates;
 - iii. Whether the district changed the computation of the revenue requirement or rate from one methodology to another;
 - iv. Other valuable consideration received by a party incident to the contract;
 - v. Incentives necessary to encourage regional projects or water conservation measures;
 - vi. The district's obligation to meet federal and state wastewater discharge and drinking water standards;
 - vii. The rates charged in Texas by other sellers of water service for resale;
 - viii. The district's rates for water service charged to its retail customers, if any, compared to the retail rates the petitioners charge their retail customers as a result of the wholesale rate the district demands from the petitioners.
 - d. Are the protested rates unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates the seller charges other wholesale customers.

For issues 6 through 22, the applicable time period for the issue is that period that determined the rates being challenged by petitioners. Additionally, for issues 6 through 22, if the

answer varies depending on the class of customer, i.e., member cities, non-member cities, or retail customers, please explain.

6. What is the district's cost of debt?
 - a. What series or issues of bonds of the district are outstanding?
 - b. For each series or issues of outstanding bonds, what are the annual servicing costs?
 - c. What debt service coverage, if any, is required for each series or issues of outstanding bonds?
 - d. For each series or issues of outstanding bonds, has revenue from water service been pledged?
 - e. For each series or issues of outstanding bonds, what contract or contracts have been pledged as security?
 - f. For each such contract, who are the parties to the contract, and what rate, formula, or methodology is specified in each such contract related to the amount paid for water service and the amount pledge to the bond?
7. What are the district's costs to operate and maintain its facilities and systems?
8. What is the total cost to run the district's systems (annual requirement)?
9. What are the district's annual gross revenues?
10. What are the district's net revenues, as that term is defined in section 10(d) of the district's organic statute?⁶
11. Are any of the outstanding bonds of the district payable from or secured by ad valorem taxes in whole or in part?
12. What is the total capacity of the district to deliver water?
13. What is the capacity of the district to deliver water to its member cities?

⁶ Act of April 4, 1951, 52nd Leg., R.S., ch. 62 (SB 141), §§ 1-26, 1951 Tex. Gen. Laws 96, as amend by Act of April 24, 1969, 61st Leg., R.S., ch. 122 (HB 654), §§ 1-4, 1969 Tex. Gen. Laws 334; Act of April 23, 1975, 64th Leg., R.S., ch. 90 (SB 640), § 1, 1975 Tex. Gen. Laws 238; Act of April 28, 2009, 81st Leg., R.S., ch. 20 (SB 715), §§ 1-6, 2009 Tex. Gen. Laws 37.

14. What is the total demand for water for the following:
 - a. On an average basis?
 - b. For the time period for which the challenged rates were set?
 - c. If each customer were to take its minimum requirement of water?
15. What is the minimum requirement to take water of each of the district's member cities?
 - a. How and when is the minimum established?
 - b. Do customers other than petitioners have minimum take requirements? If so, who are those customers?
 - c. Are there restrictions on the petitioners' use of the unused portion, if any, of the minimum take requirements? If so,
 - i. are there restrictions on re-sale to certain customers or classes of customers?
 - ii. are there geographic restrictions on re-sale?
 - iii. are there restrictions on re-use of effluent?
 - d. Does the district sell or re-sell the petitioners' unused portion, if any, of the minimum take requirements?
 - e. If the district sells or re-sells the petitioners' unused portion of the minimum take requirements, are petitioners credited for these sales?
16. Do member cities have a first right to the district's water? If not, which customers have a higher priority for water?
17. Do customers, other than the member cities, have minimum take requirements? If so, who are those customers?
18. Is there any penalty or rate adjustment if the district cannot deliver all the water requested by its member cities?
19. What is the annual revenue obligation (proportionate share of the annual requirement) of each of the district's member cities?

20. What entities, if any, other than member cities (parties that are not contracting or additional contracting parties) purchase water from the district?
 - a. Under what terms, including the rate, do any such entities take water from the district?
 - b. What is the gross amount of revenues, if any, received from such entities by the district on an annual basis?
 - c. Is any of such revenue pledged to support any bonds issued by the district? If so, how much is pledged and for which series or issues of bonds?
 - d. How is this revenue accounted for in determining the district's rates for water service?
 - e. Is any such revenue used to offset the member cities' annual payment?
21. How is the costs responsibility to run, operate, and maintain the district allocated, if at all, between the member cities and any other entities that purchase water from the district?
22. What district facilities and systems, if any, are dedicated exclusively to the provision of water service to petitioners?

This list of issues to be addressed is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ, or by the Commission in future orders issued in this docket. Furthermore, if appropriate, after Commission consideration of a proposal for decision on this issue, the Commission may identify and provide to the ALJ in the future additional issues or areas that must be addressed in one or more phases of this proceeding, as permitted under Tex. Gov't Code Ann. § 2003.049(e).

B. Phase Two Issue

This Commission will not identify issues for phase two of this proceeding at this time, but will wait until after it receives a proposal for interim decision on the phase one issues. If phase two is necessary, the Commission will request lists of issues from the parties and prepare a supplemental preliminary order to scope phase two.

II. Issues Not to be Addressed

The Commission takes the position that the following issues need not be addressed in this proceeding for the reasons stated.

1. *Whether public securities issued by the district are valid and enforceable.*
2. *Whether contracts, the proceeds of which are pledged to secure public securities issued by the district, are valid and enforceable.*
3. *The authority of the district to issue public securities.*
4. *The election at which the district authorized issuance of public securities.*
5. *The validity of the district.*
6. *The boundaries of the district.*
7. *The validity of an assessment, a tax, or a tax lien imposed by the district.*
8. *The district's authority to enter into and execute contracts.*
9. *The pledge or encumbrance of a tax, revenue, receipts, or property to secure the bonds issued by the district to finance its water system infrastructure needed to serve the petitioners.*
10. *The legality and validity of each expenditure or proposed expenditure of money relating to the bonds issued by the district to finance its water system infrastructure needed to serve the petitioners.*
11. *The legality and validity of the bonds issued by the district to finance its water system infrastructure needed to serve the petitioners.*

Included in the listed issues not to be addressed are any subordinate issues, such as whether the district was properly formed, whether a proper election on the public securities was held, whether any required notice of bond issuance was given, whether the district properly undertook and completed any other action that is required before the district may issue public securities, whether the district may enter into a contract, whether the district may pledge the proceeds of a contract to secure public securities, or whether the district properly undertook and completed any

other action that is required before the district may enter into a contract or pledge the proceeds of a contract to secure public securities.

As discussed above, the Commission's authority in this matter is found in TWC §§ 12.013(c) and 13.043(j). Section 12.013 authorizes the Commission to review and fix reasonable rates for the furnishing of water. Section 13.043 obligates the Commission to ensure that rates for water service are just and reasonable, are not unreasonably preferential, prejudicial, or discriminatory, but are sufficient, equitable, and consistent in application to each class of customer. These sections do not authorize this Commission to rule on issues one through 12 not to be addressed identified above.

Further, whether the district's public securities and contracts that are pledged for the payment of those public securities are valid and enforceable is not contestable before the Commission after being approved by the attorney general and registered with the comptroller.⁷ The remaining issues related to issuance of bonds are solely within the jurisdiction of the court under Texas Government Code § 1205.021.⁸

12. *Whether the challenged rates are no higher or lower than is necessary to match the cost of service.*

Commission rules explicitly preclude whether the challenged rates adversely affect the public interest based on an analysis of the district's cost of service.⁹ That is, the public interest determination cannot depend solely on whether the challenged rates match the cost of service. Commission Rule 16 TAC § 24.133(b) does not, however, preclude the admission of evidence on and consideration of the various costs of the district, including its bond servicing costs, and its various sources of revenues. What is precluded in the public interest determination is an analysis of the cost of service for the purpose of setting rates, which constitutes a rate-setting exercise reserved for phase two.¹⁰

⁷ Tex. Gov't Code § 1202.006.

⁸ Docket No. 46662, Preliminary Order at 3-21 (Jun. 29, 2017).

⁹ 16 TAC § 24.133(b).

¹⁰ Docket No. 46662, Preliminary Order at 26-27 (Jun. 29, 2017).

III. Effect of Preliminary Order

The Commission's discussion and conclusions in this order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the SOAH ALJ determines that such clarification is necessary. As to all other issues, this order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this order before the SOAH ALJ at hearing. The SOAH ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this order when circumstances dictate that it is reasonable to do so. Any ruling by the SOAH ALJ that deviates from this order may be appealed to the Commission. The Commission will not address whether this order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

Signed at Austin, Texas the _____ day of March 2018.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

BRANDY MARTY MARQUEZ, COMMISSIONER

ARTHUR C. D'ANDREA, COMMISSIONER