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PETITION OF THE CITIES OF §  
GARLAND, MESQUITE, PLANO AND § BEFORE THE STATE OFFICE  
RICHARDSON APPEALING THE §  
DECISION BY NORTH TEXAS § OF  
MUNICIPAL WATER DISTRICT §  
AFFECTING 2019 WHOLESALE § ADMINISTRATIVE HEARINGS  
WATER RATES §

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

Two days after the Public Utility Commission of Texas ("Commission") issued an order referring this proceeding to the State Office of Administrative Hearings ("SOAH") and directed parties to file Lists of Issues, the Administrative Law Judges issued SOAH Order No. 1 ruling "this case is **ABATED** until otherwise ordered."<sup>1</sup> Nevertheless, the Commission's Order of Referral issued on February 19, 2019, requires parties to file Lists of Issues by February 28, 2019. In accordance with the Order of Referral, the North Texas Municipal Water District (the "District") timely files this List of Issues.

**I. THRESHOLD POLICY ISSUE**

In conjunction with the abatement order from SOAH, the District requests that the Commission postpone issuing a Preliminary Order in this proceeding. This case regarding the District's 2019 wholesale water rates raises the same issues that are pending in Docket Nos. 46662 and 47863, in which the Cities of Garland, Mesquite, Plano, and Richardson ("Petitioners") challenge the District's wholesale water rates for 2017 and 2018, respectively. In Docket No. 46662, SOAH conducted a hearing in October 2018, and the record closed on January 18, 2019.<sup>2</sup> Parties are currently awaiting issuance of the Proposal for Decision by the ALJs and a Final Order

<sup>1</sup> SOAH Order No. 1 at 2 (Feb. 21, 2019) (emphasis in original).

<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, SOAH Order No. 23 (Jan. 10, 2019).

by the Commission in Docket No. 46662. During the pendency of Docket No. 46662, the ALJs abated the Petitioning Cities' challenge to the District's 2018 wholesale water rates in Docket No. 47863.<sup>3</sup> All three cases are governed by Commission rules in Subchapter J, Wholesale Water or Sewer Service. Rule 24.309 requires that a public interest hearing be held in Docket No. 46662.<sup>4</sup> Whether a public interest hearing is required in subsequent proceedings is dependent, in part, upon the outcome of Docket No. 46662.<sup>5</sup>

The Commission's Order of Referral in this docket requested that the parties develop a list of issues to be addressed, as well as any necessary statement of Commission policy, precedent, or position on any threshold legal or policy issues relevant to this proceeding. Because the challenges to the District's 2017 and 2019 wholesale water rates address the same issues, the same wholesale water facilities contract, and the same parties, the District anticipates that the Commission's decision in Docket No. 46662 will establish relevant Commission policy, precedent, and positions for this case. Referral at this time of specific issues to be addressed in this case runs the risk of being premature and creating potentially unnecessary briefing.

To conserve judicial and party resources, and to allow for consistent consideration by the Commission, the District respectfully requests that the Commission postpone issuance of a Preliminary Order in this case until after a decision is rendered in Docket No. 46662. Furthermore, the District requests that the parties be allowed to file updated Lists of Issues twenty days after a ruling by the Commission in Docket No. 46662. Postponement would ensure that the policy directives and precedent enshrined in the Commission's decision in Docket No. 46662 are considered in this proceeding.

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<sup>3</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. 47863, SOAH Order No. 4 (Apr. 3, 2018).

<sup>4</sup> 16 Tex. Admin. Code § 24.309 ("TAC").

<sup>5</sup> *Id.* § 24.319.

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

In the alternative, if the Commission determines that a Preliminary Order should be issued at this time, the issues to be addressed at a hearing before SOAH are those consistent with Commission Rules 24.301 – 24.321, 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 TAC § 24.305?
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 § 24.307)?
5. If the rates are charged pursuant to a written contract, have Petitioners met their burden of proof, under 16 TAC § 24.317, 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 § 24.311(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 § 24.313(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 § 24.313(a)?

## **III. ISSUES NOT TO BE ADDRESSED**

Commission Rule 24.311(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>6</sup> In pending Docket Nos. 46662 and 47863, rather than track the language of Rule 24.311(b), the Commission stated in the Preliminary Orders that “the public interest determination

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<sup>6</sup> *Id.* § 24.311(b).

cannot depend *solely* on whether the challenged rates match the cost of service.”<sup>7</sup> Not only is that statement inconsistent with the plain language of Rule 24.311(b), it is also inconsistent with prior administrative policy, rule interpretation, and agency decisions. Accordingly, to ensure consistent application of Rule 24.311(b), the District requests that the Commission’s list of issues not to be addressed during this phase of the proceeding include recitation of the rule language and reiteration of prior administrative interpretations:

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.<sup>8</sup>
2. Evidence relating to the District’s cost of service is irrelevant during the public-interest phase of the proceeding.<sup>9</sup>

Prohibiting consideration of cost-of-service issues is required by Rule 24.311(b) and consistent with previous agency interpretation of the public interest rule, as well as long-standing guidance regarding the scope of the rule.<sup>10</sup> When the public interest rule was originally adopted by the Texas Natural Resource Conservation Commission (“TNRCC”) in 1994, the TNRCC provided guidance in the preamble to the rule on the role of cost-of-service issues in the public interest phase. 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>11</sup>

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<sup>7</sup> Docket No. 47863, Preliminary Order at 8 (Mar. 9, 2018) (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); Docket No. 46662, Preliminary Order at 27 (Jun. 29, 2017) (similarly referring cost-of-service issues).

<sup>8</sup> *See* 16 TAC § 24.311(b).

<sup>9</sup> *See 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>10</sup> 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. Docket No. 46662, Commission Staff’s List of Issues (Apr. 28, 2017).

<sup>11</sup> 19 Tex. Reg. 6228 (Aug. 9, 1994).

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>12</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>13</sup> Further, “all cost-of-service evidence is irrelevant in the public-interest hearing.”<sup>14</sup> The TCEQ ultimately adopted the judge’s proposal.<sup>15</sup>

Case law supports relying on the plain, unambiguous language of Rule 24.311(b) rather than the interpretation that is included in the Preliminary Orders in Docket Nos. 46662 and 47863.<sup>16</sup> A reviewing court will only defer to the Commission’s interpretation of its own administrative rule when (1) the rule is ambiguous, and (2) the Commission’s interpretation is reasonable.<sup>17</sup> On the other hand, when an agency interprets an unambiguous rule in a way that conflicts with the plain language of the rule and prior agency policy, the agency’s ultimate decision has been reversed because it was arbitrary and capricious.<sup>18</sup> Similarly, the Austin Court of Appeals rejected the Commission’s interpretation of a statute that required the Court to “read words into

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<sup>12</sup> *Id.* (emphasis added).

<sup>13</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>14</sup> *Id.*

<sup>15</sup> TCEQ Docket No. 2009-1925-UCR, Order (Nov. 9, 2011).

<sup>16</sup> Docket No. 46662, Preliminary Order at 27 (Jun. 29, 2017); *See also* Docket No. 47863, Preliminary Order at 8 (Mar. 9, 2018) (stating, “the public interest determination cannot depend *solely* on an analysis of the district’s cost of service” or that “[w]hat is precluded is an analysis of the cost of service *for the purpose of setting rates.*”).

<sup>17</sup> *Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm’n of Tex.*, 406 S.W.3d 253, 270 (Tex. App.—Austin 2013, no pet.). In *Oncor Electric Delivery Company, LLC*, the Commission interpreted Rule 25.231(b) to require that, in an electric rate proceeding, rate-case expenses incurred outside of the test year are not recoverable. *Id.* at 270. The Court held that the rule was unambiguous and that the Commission’s interpretation of it conflicted with both the plain language of the rule and the Commission’s prior policy. *Id.*

<sup>18</sup> *Id.* at 272.

PURA that simply are not there[.]”<sup>19</sup> The Court noted that “[e]very word excluded from a statute must be presumed to have been excluded for a purpose.”<sup>20</sup> Commission rules are interpreted the same as statutes.<sup>21</sup> The language of the public interest rule is unambiguous—cost of service shall not be a basis for a determination of effects on public interest. To interpret the rule otherwise requires words to be read into Rule 24.311(b) that are not there.

If the Commission declines to prohibit consideration of cost-of-service issues during the public-interest phase of this proceeding, the District requests that the Commission provide guidance for how cost-of-service issues should be considered in light of prior interpretations of the cost-of-service provision in Rule 24.311(b).<sup>22</sup>

#### **IV. CONCLUSION**

The District requests that the Commission postpone consideration of lists of issues and the issuance of a Preliminary Order until a decision is issued on the public interest issues in Docket No. 46662, and that the parties be permitted to supplement their lists of issues filed in this case twenty days after a decision is rendered in Docket No. 46662. In addition, the District respectfully requests that the Commission grant the District such other relief to which it is entitled.

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<sup>19</sup> *Sw Bell Tel. Co. v. Pub. Util. Comm’n of Tex.*, 79 S.W.3d 226, 229 (Tex. App.—Austin 2002, no pet.).

<sup>20</sup> *Id.*


<sup>21</sup> *AEP Tex. Com. & Indus. Retail, Ltd. P’ship v. Pub. Util. Comm’n. of Tex.*, 436 S.W.3d 890, 905-06 (Tex. App.—Austin 2014, no pet.).

<sup>22</sup> *See Oncor*, 408 S.W.3d at 267 (holding that “[a]lthough agencies are not bound to follow their decisions in contested cases in the same way that courts must follow controlling precedent, an agency must explain its reasoning when it departs from prior norms” and “Commission acted arbitrarily and capriciously by failing to adequately explain the reasoning for its change in position”) (internal parenthetical omitted); *see also 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); *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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**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 28, 2019 in accordance with 16 Tex. Admin. Code § 22.74.

  
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Kate Norman