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**RATEPAYERS' APPEAL OF THE
DECISION BY LAGUNA MADRE
WATER DISTRICT TO CHANGE
RATES**

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RECEIVED
PUBLIC UTILITY COMMISSION
OF TEXAS
FILING CLERK

COMMISSION STAFF'S SECOND RECOMMENDATION AND MOTION TO DISMISS

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (PUC), representing the public interest, and files this recommendation and motion to dismiss. Staff recommends that the application be found administratively incomplete and moves that this proceeding be dismissed for lack of jurisdiction. In support thereof, Staff would show the following:

I. BACKGROUND

On January 29, 2019, a petition to appeal rates was filed by South Padre Island Golf Course via the SPI Golf Homeowners JV, Inc. (appellant). Appellant challenged a decision by Laguna Madre Water District's board of directors which increased appellant's rates for untreated irrigation water. As a basis for jurisdiction, appellant cited Texas Water Code (TWC) §§ 13.043 and 13.186.

On February 28, 2019, Laguna Madre filed a response and motion to dismiss appellant's petition. Appellant argued that the PUC lacked jurisdiction because appellant was appealing a rate decision concerning untreated water, not potable water. On March 6, 2019, Staff filed a recommendation and motion to dismiss. In it, Staff echoed Laguna Madre's belief that the PUC lacked jurisdiction.

On March 8, appellant filed its first amended petition, in which it invoked four new sources of jurisdiction: TWC §§ 11.036, 11.041, 12.013, and the Texas Open Meetings Act.

Order No. 3, issued on March 11, 2019, required Staff to comment on jurisdiction and the administrative completeness of the petition by April 8, 2019. Therefore, this pleading is timely filed.

II. ARGUMENT CONCERNING JURISDICTION

Staff continues to believe that the Commission does not have jurisdiction to consider this appeal. Appellant has cited three new sections of the TWC as support for its appeal. Two of these sections from chapter 11—TWC §§ 11.036 and 11.041—plainly relate to the authority of the Texas Commission on Environmental Quality (TCEQ), not the PUC. These sections discuss the authority

of the “commission” to set rates and conduct proceedings concerning stored water.¹ However, in chapter 11, “commission” is defined as TCEQ.² The PUC is defined as the “utility commission.”³ Chapter 11’s only other mention of the PUC occurs in § 11.041(d), which provides that the “utility commission may participate in the hearing” that is being conducted by TCEQ “if necessary to present evidence on the price or rental demanded” for stored water.⁴ This section does not provide the PUC with jurisdiction to conduct a hearing, let alone render an order. Thus, if appellant wishes to pursue action under TWC §§ 11.036 and 11.041, its recourse is with TCEQ, not the PUC.

The third section cited by appellant—TWC § 12.013—provides the PUC with a limited grant of jurisdiction concerning irrigation water furnished “to another political subdivision on a wholesale basis.”⁵ Appellant cannot argue that it qualifies as a political subdivision of the state, and it therefore cannot avail itself of the jurisdiction provided by § 12.013.⁶

Finally, appellant alleges that Laguna Madre has committed an open meetings violation. Agencies may exercise only those powers the law confers upon them in clear statutory language and those reasonably necessary to fulfill a function that the Legislature has expressly placed with the agency.⁷ Staff is not aware of any authority allowing the PUC to render a binding decision on an open meetings claim. Just the opposite, where it has been suggested that a state agency should have jurisdiction to consider an open meetings claim, the Legislature has responded in a way which implies that it is improper for the agency to exercise jurisdiction. In 2007, the San Antonio Court of Appeals held that the Texas Education Agency had exclusive jurisdiction over an open meetings claim filed against school officials.⁸ The Legislature amended the relevant statute specifically to overrule this decision and to make clear that the open meetings claim was not subject to the

¹ See TWC § 11.036(d) (“If any person uses the stored or conserved water without first entering into a contract with the party that conserved or stored it, the user shall pay for the use at a rate determined by the *commission* to be just and reasonable, subject to court review as in other cases.”) (emphasis added); *id.* § 11.041(a) (“Any person entitled to receive or use water from any canal, ditch, flume, lateral, dam, reservoir, or lake or from any conserved or stored supply may present to the *commission* a written petition”) (emphasis added).

² See *id.* § 11.002(1) (“In this chapter and in Chapter 12 of this code: (1) ‘Commission’ means the Texas Commission on Environmental Quality.”).

³ See *id.* § 11.002(21).

⁴ *Id.* § 11.041(d).

⁵ *Id.* § 12.013(d).

⁶ See, e.g., Tex. Gov’t Code Ann. § 305.026(b) (West, Westlaw current through 2017 1st C.S.) (“In this section, ‘political subdivision’ includes: a municipality; a county; and a special district created under the constitution or laws of this state”).

⁷ *In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004) (orig. proceeding).

⁸ *Harrison v. Neeley*, 229 S.W.3d 745, 746 (Tex. App.—San Antonio 2007, pet. denied).

agency's exclusive jurisdiction.⁹ Because the Legislature has disfavored a state agency's consideration of open meetings claims, and because no statute authorizes the PUC to consider such a claim, the PUC should be reluctant to exercise jurisdiction.

The authorities cited by appellant do not provide the Commission with jurisdiction, and Staff has not identified any other provision which would offer a valid basis for jurisdiction. Staff therefore believes that the application is administratively incomplete. Further, dismissal of a proceeding is appropriate where the Commission lacks jurisdiction.¹⁰ Staff moves that the presiding officer dismiss this proceeding.¹¹

III. CONCLUSION

Because the Commission lacks jurisdiction over appellant's appeal, Staff prays that the honorable judge enter an order dismissing this proceeding.

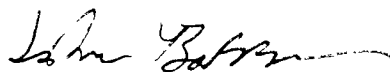
Dated: April 8, 2019

Respectfully Submitted,

PUBLIC UTILITY COMMISSION OF TEXAS LEGAL DIVISION

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⁹ See *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 553 (Tex. 2016) (summarizing legislative history).

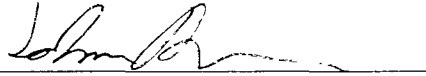
¹⁰ 16 Tex. Admin. Code § 22.181(d)(1).

¹¹ *Id.* § 22.181(a).

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on April 8, 2019, in accordance with 16 TAC § 22.74.

A handwritten signature in black ink, appearing to read 'Joshua Barron', is written over a horizontal line.

Joshua Barron