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DOCKET NO. 49154

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

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**PUBLIC UTILITY COMMISSION
FILING CLERK
OF TEXAS**

**ORDER NO. 5
DENYING MOTIONS TO DISMISS**

This Order denies the motions to dismiss filed by Commission Staff and Laguna Madre Water District.

I. Background

On January 29, 2019, a group of homeowners in the South Island Golf Course (Petitioners) filed this appeal of the rates charged by the Laguna Madre Water District for raw (untreated) irrigation water. In their first petition, Petitioners alleged that the rates charged by Laguna Madre violated Texas Water Code (TWC) §§ 13.043 and 13.186. Petitioners also alleged a violation of a provision of the Texas Open Meetings Act (specifically, Texas Government Code § 551.143).

On February 28, 2019, Laguna Madre moved to have the petition dismissed, arguing that the Commission lacked jurisdiction to consider Petitioners' allegations. On March 6, 2019, Commission Staff filed its own motion to dismiss, also arguing that jurisdiction was lacking.

On March 8, 2019, Petitioners filed a first amended petition. The first amended petition (1) abandons the claims under TWC §§ 13.043 and 13.186; (2) continues to assert a violation of Texas Government Code § 551.143 (the Open Meeting Act violation); and (3) asserts that the Commission should, under the authority vested by TWC § 12.013, set the rate for the raw water Petitioners buy from Laguna Madre for irrigation use.¹ Petitioners have subsequently made it clear that they are not seeking, in this docket, enforcement of the alleged Open Meeting Act violation.²

¹ Although not terribly clear from the wording of the First Amended Petition, Petitioners also arguably assert violations of TWC §§ 11.036 and 11.041. *See* First Amended Petition at 3. However, the entity with responsibility for enforcing those provisions is the TCEQ, not the Commission. Thus, in the event Petitioners in this docket are asserting claims under TWC §§ 11.036 and 11.041, those claims are hereby dismissed.

² Ratepayers' Reply to Pleadings Filed by Commission Staff and Laguna Madre Water District (Response to Motion to Dismiss) at 5.

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On April 8, 2019, Laguna Madre and Commission Staff each filed a motion to dismiss, arguing that the Commission lacked jurisdiction to consider the allegations in Petitioners' first amended petition. Petitioner filed a response to the motions to dismiss on April 16, 2019.

II. Arguments and Analysis

Under TWC § 12.013(a), the Commission “shall fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12 of this code.” This appears to be a broad delegation of authority. Commission Staff and Laguna Madre contend, however, that the authority to fix rates granted by subpart (a) is limited by subpart (d), which states that the “commission's jurisdiction under this section relating to incorporated cities, towns, or villages shall be limited to water furnished by such city, town, or village to another political subdivision on a wholesale basis.” According to Commission Staff and Laguna Madre, the verbiage of subpart (d) indicates that TWC § 12.013 as a whole empowers the Commission to fix rates for water only if the entity selling the water is a city, town, or village, the entity buying the water is another political subdivision of the state, and the water is being sold on a wholesale basis. Thus, argue Commission Staff and Laguna Madre, because Petitioners are not a political subdivision, the Commission lacks jurisdiction to set the rate in this case.³

Petitioners concede that they are not a political subdivision, but argue that this fact does not limit the applicability of TWC § 12.013.⁴ The ALJ agrees with Petitioners. The wording of TWC § 12.013 does not support the interpretation posited by Commission Staff and Laguna Madre. Subpart (d) does not limit subpart (a) generally; rather, subpart (d) creates a limited exception to the otherwise broad applicability of subpart (a). Stated differently, subpart (a) sets out the general rule—that the Commission can fix the rate for the furnishing of water subject to only one limitation, that the water must be intended for a purpose mentioned in chapters 11 or 12 of the Texas Water Code.⁵ Subpart (d) sets out an exception to the general rule that only comes

³ Laguna Madre's Response to South Padre Island Golf Course Via SPI Golf Homeowners JV, Inc. First Amended Petition Appealing Raw Water Rate (Motion to Dismiss) at 1-2; Commission Staff's Second Recommendation and Motion to Dismiss (Motion to Dismiss) at 2.

⁴ Response to Motion to Dismiss at 3.

⁵ This limitation is easily satisfied in the present case. Petitioner seek to use the water in question for irrigation. “Agricultural use” is defined to include “irrigation” and is identified in Chapter 11 as a beneficial use to which water may be put. TWC §§ 11.002(13), 11.024. “Irrigation” is also repeatedly mentioned as a legitimate

into play for a subset of disputes—those involving “incorporated cities, towns, or villages.” That is, if an incorporated city, town, or village is supplying the water in question, then the rate it charges for such water may be fixed by the Commission only if the city, town, or village is supplying that water to a political subdivision on a wholesale basis. Because Laguna Madre is not an incorporated city, town, or village, the limited exception of subpart (d) does not apply in the present case.

There is ample precedent making it apparent that TWC § 12.013 gives the Commission the authority to set water rates in this case even though Petitioners are not a political subdivision. Effective September 1, 2013, the Texas legislature transferred the economic regulation of water and sewer utilities from the TCEQ to the Commission. As part of this transition, authority under TWC §12.013 was transferred to the Commission. Before September 2013, the TCEQ (and its predecessor agencies), relying on the authority of TWC § 12.013 (and its precursors), have fixed water rates where the sellers of the water were not cities, towns, or villages, and the buyers were not political subdivisions. For example, in 1993, the Austin Court of Appeals, in *Texas Water Commission v. Boyt Realty Co.*, described TWC § 12.013 as giving the Texas Water Commission broad rate-setting authority.⁶ The relevant verbiage of TWC § 12.013 was the same at the time of the *Boyt Realty* decision as it is now. In that case, the court held that TWC § 12.013 authorized the Texas Water Commission to set the rate for water sold by the owners of a canal system to rice farmers.⁷

Since September 1, 2013, the Commission itself has held TWC §12.013(d) does not act as a limitation on the general rate-setting authority in TWC §12.013(a). In a docket that is currently pending before the Commission, Docket No. 46662, the Commission rejected an argument that subpart (d) imposes an overall limitation on the jurisdiction of subpart (a) or mandates that the Commission may engage in rate-setting only when a city, town, or village is the seller of the water

purpose for water throughout chapter 11. See, e.g., TWC §§ 11.032-.033, 11.036-.038, 11.43, 11.051, 11.086, 11.122, 11.124, 11.126-.1272, 11.132, 11.135, 11.143, 11.207, 11.305, and 11.323.

⁶ *Texas Water Commission v. Boyt Realty Co.*, 10 S.W.3d 334, 338 (Tex. Civ. App.—Austin 1993, no pet.)(*Boyt Realty*).

⁷ *Boyt Realty*, 10 S.W.3d at 338; see also, *Trinity River Authority of Texas v. Texas Water Rights Commission*, 481 S.W.2d 192, 195 (Tex. Civ. App.—Austin 1972, writ ref’d n.r.e.)(holding that the Texas Water Rights Commission could, under a statute authorizing it to “fix reasonable rates for the furnishing of water for any purpose mentioned in Chapter 5 or 6 of this case,” set the rate for water sold by the Trinity River Authority to rice farmers).

in question.⁸ In that case, the seller of the water is not a city, town, or village, yet the Commission is asserting jurisdiction to set the water rate under TWC §12.013(a).

Thus, for the foregoing reasons, the motions to dismiss filed by Commission Staff and Laguna Madre are denied.

III. Requesting Procedural Schedule

By May 8, 2019, the parties must file comments regarding how to proceed with the petition and propose a procedural schedule.

Signed at Austin, Texas the 23rd day of April 2019.

PUBLIC UTILITY COMMISSION OF TEXAS


HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE

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⁸ *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, Preliminary Order at 7-8 (June 29, 2017)(pending).