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OPEN MEETING COVER SHEET

DRAFT PRELIMINARY ORDER

MEETING DATE: AUGUST 8, 2019

DATE DELIVERED: JULY 31, 2019

AGENDA ITEM NO.: 5

CAPTION: Docket No. 49154; SOAH No. 473-19-5677.WS
Ratepayers' Appeal of the Decision by
Laguna Madre Water District to Change
Rates

DESCRIPTION: Draft Preliminary Order

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Chairman

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Commissioner

Shelly Botkin
Commissioner

John Paul Urban
Executive Director




Greg Abbott
Governor

Public Utility Commission of Texas

TO: Chairman DeAnn T. Walker
Commissioner Arthur C. D'Andrea
Commissioner Shelly Botkin

All Parties of Record

FROM: Carsi Mitzner 
Commission Advising

RE: *Ratepayers' Appeal of the Decision by Laguna Madre Water District to Change Rates*, Docket No. 49154, SOAH Docket No. 473-19-5677.WS, Draft Preliminary Order, August 8, 2019 Open Meeting, Item No. 5

DATE: July 31, 2019

Please find enclosed the draft preliminary order filed by Commission Advising in the above-referenced docket. The Commission will consider this draft preliminary order at the August 8, 2019 open meeting. Parties shall not file responses or comments addressing this draft preliminary order.

Any modifications to the draft preliminary order that are proposed by one or more Commissioners will be filed simultaneously prior to the consideration of the matter at the August 8, 2019 open meeting.

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PUC DOCKET NO. 49154
SOAH DOCKET NO. 473-19-5677.WS

RATEPAYERS' APPEAL OF THE	§	PUBLIC UTILITY COMMISSION
DECISION BY LAGUNA MADRE	§	
WATER DISTRICT TO CHANGE	§	OF TEXAS
RATES	§	

DRAFT PRELIMINARY ORDER

South Padre Island Golf Course via the SPI Golf Homeowners JV, Inc. (SPI) filed an appeal of Laguna Madre Water District's decision to increase its rates for raw, or untreated, water. This preliminary order identifies the issues that must be addressed and the issues that shall not be addressed.

On January 29, 2019, SPI filed its initial petition to appeal the rates charged by Laguna Madre for raw water. SPI stated that the rate for raw water was initially set at \$0.55 per 1000 gallons in November 2017 and that both the rate increase to \$0.80 per 1000 gallons effective April 1, 2018 and the subsequent increase in November of 2018 to \$1.04 per 1000 gallons are unreasonable.¹ The petition also raised Laguna Madre's potential violations of the Texas Open Meetings Act² and potential damages to the properties of SPI, but SPI did not specifically request relief from the Commission regarding those issues. In the initial petition, SPI sought Commission review of the changes in rates under Texas Water Code (TWC) §§ 13.043 and 13.186.³

Commission Staff and Laguna Madre both argued that TWC §§ 13.043 and 13.186 are inapplicable to a raw water appeal and moved to dismiss the proceeding.⁴ On March 8, 2019, SPI filed a first amended petition, seeking review of the changes in rates under TWC § 12.013 and

¹ Petition to Appeal 89% Increase in Rate for Irrigation Raw Water (Untreated Water) Established by Board of Directors of Laguna Madre Water District (105 Port Road, Port Isabel, TX 78578) at 1-2 (Jan. 29, 2019). (Petition).

² Tex. Gov't Code § 551.001-.146.

³ Petition at 1-2 (Jan. 29, 2019).

⁴ Commission Staff's Recommendation and Motion to Dismiss at 1-2 (Mar. 6, 2019); Laguna Madre Water District's Response to Ratepayers' Petition to Appeal at 1-2 (Feb. 28, 2019).

removing references to a review under TWC §§ 13.043 and 13.186.⁵ In its first amended petition, SPI also sought interim rates, a refund in the difference of the rate as of the date of the first amended petition and the rates set by the Commission plus interest, and to compel continuing service during the pendency of this rate proceeding.⁶ Commission Staff and Laguna Madre continued to argue that the Commission lacks jurisdiction, arguing that TWC § 12.013 applies only to incorporated cities, towns, or villages that furnish water to other political subdivisions on a wholesale basis.⁷ In Order No. 5 issued on April 23, 2019, the Commission administrative law judge (ALJ) denied the motions to dismiss and found that the Commission does have jurisdiction over raw water rate appeals under TWC § 12.013.⁸ No party appealed Order No. 5. On July 3, 2019, SPI filed a second amended petition that did not substantively alter the review it is seeking or the statute under which it brings its petition.

The Commission ALJ referred this proceeding to the State Office of Administrative Hearings (SOAH) on June 21, 2019. SPI and Laguna Madre were directed and Commission Staff and other interested persons were allowed to file a list of issues to be addressed in the docket and also identify any issues not to be addressed and any threshold legal or policy issues that should be addressed by July 3, 2019. SPI, Laguna Madre, and Commission Staff timely filed a list of issues.

I. Issues to be Addressed

The Commission must provide to the ALJ a list of issues or areas to be addressed in any proceeding referred to SOAH.⁹ After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in this proceeding:

⁵ First Amended Petition to Appeal 89% Increase in Rate for Irrigation Raw Water (Untreated Water) Established by Board of Directors of Laguna Madre Water District (105 Port Road, Port Isabel, TX 78578) at 1–2 (Mar. 8, 2019).

⁶ *Id.* at 2, 5–6.

⁷ Commission Staff's Second Recommendation and Motion to Dismiss at 2 (Apr. 8, 2019); Laguna Madre Water District's Response to South Padre Island Golf Course Via SPI Golf Homeowners JV, Inc. First Amended Petition Appealing Raw Water Rate at 2 (Apr. 8, 2019).

⁸ Order No. 5 at 2–4 (Apr. 23, 2019).

⁹ Tex. Gov't Code § 2003.049(e).

1. Do the facts demonstrate that the Commission has authority under TWC § 12.013 to hear this appeal? If so, was the petition filed in accordance with TWC § 12.013 and 16 TAC § 24.107?
2. Are the raw water rates charged by Laguna Madre just and reasonable? If not, what is the just and reasonable rate Laguna Madre should charge SPI? TWC § 12.013; 16 TAC § 24.107(a)(6).
3. If the Commission determines that it should fix Laguna Madre's raw water rates, what basis should the Commission use for fixing reasonable rates? TWC § 12.013(c).
4. Are the raw water rates charged by Laguna Madre discriminatory? 16 TAC § 24.107(a)(6).
5. Has Laguna Madre failed or refused to supply raw water to SPI? 16 TAC § 24.107(a)(6).
6. Should the Commission compel continuing service and establish interim rates under TWC § 12.013(e) to remain in effect until a final decision is made in this appeal? If so, what are the appropriate interim rates?
7. If the Commission fixes different rates than what Laguna Madre actually charged since the filing of the second amended petition, should the Commission order a refund or assess additional charges of the difference between the rate actually charged and the rate fixed by the Commission, plus interest? TWC § 12.013(f).
8. Does Laguna Madre charge rates to SPI pursuant to a written agreement?
 - a. What is the effective date of the agreement?
 - b. If applicable, what is the effective date of any amendments to the agreement?
 - c. Has the written agreement been produced in this proceeding?

For issues 9 through 25, the applicable time period for the issue is the period in which the rates being challenged by SPI were determined. Additionally, the issues are limited to the facts that apply to Laguna Madre's raw water service system.

9. What is Laguna Madre's cost of debt? TWC § 12.013(c).
 - a. What series or issues of bonds of Laguna Madre 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 raw 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 raw water service and the amount pledged to the bond?
 - g. Are any of the outstanding bonds of Laguna Madre payable from or secured by ad valorem taxes in whole or in part?
10. What are Laguna Madre's costs to procure the raw water it supplies to SPI?
11. What are Laguna Madre's costs to operate and maintain its facilities and systems?
12. What is the total cost to run Laguna Madre's systems?
13. What are Laguna Madre's annual gross revenues?
14. What are Laguna Madre's net revenues?
15. What is the maximum amount of raw water Laguna Madre is capable of delivering?
16. What is the maximum amount of raw water Laguna Madre is capable of delivering to SPI?
17. Is SPI the ultimate consumer of all raw water purchased from Laguna Madre?
18. What entities, if any, other than SPI, purchase raw water from Laguna Madre?
- a. Under what terms, including the rate, do any such entities take raw water from Laguna Madre?
 - b. What is the gross amount of revenues, if any, received from such entities by Laguna Madre on an annual basis?
 - i. Is any of such revenue pledged to support any bonds issued by Laguna Madre? If so, how much is pledged and for which series or issues of bonds?
 - ii. How is this revenue accounted for in determining Laguna Madre's rates for raw water service?

- iii. Is any such revenue used to offset SPI's annual payment?
19. Does SPI have a minimum-take requirement for raw water supplied by Laguna Madre? If so,
- a. What is SPI's minimum-take requirement?
 - b. What is each of Laguna Madre's other customers', if any, minimum requirement to take raw water?
 - c. How and when is the minimum established?
 - d. Are there restrictions on SPI's use of the unused portion, if any, of the minimum take requirements?
 - e. If so, are there restrictions on re-use of effluent, if applicable?
 - f. Does Laguna Madre sell or re-sell SPI's unused portion, if any, of the minimum-take requirements?
 - g. If Laguna Madre sells or re-sells SPI's unused portion of the minimum-take requirements, is SPI credited for these sales?
20. What is the total demand for raw 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, if such a minimum requirement exists?
21. Does SPI have a first right to Laguna Madre's raw water? If not, do any other customers have a higher priority for raw water?
22. Is there any penalty or rate adjustment if Laguna Madre cannot deliver all the raw water requested by SPI?
23. What is the annual revenue obligation of each of Laguna Madre's raw water customers?
24. How is the cost responsibility to run, operate, and maintain Laguna Madre's raw water system allocated, if at all, between SPI and any other entities that purchase raw water from Laguna Madre?

25. What facilities and systems, if any, are dedicated exclusively to the provision of raw water service to SPI?

This list of issues 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 Section II of this Order, by the ALJ, or by the Commission in future orders issued in this docket. The Commission may identify and provide to the ALJ in the future any additional issues or areas that must be addressed, as permitted under Tex. Gov't Code § 2003.049(e).

II. Issues Not to be Addressed

As a state agency, the Commission is a creature of the legislature and has only those powers that the legislature expressly delegates to the agency or those implied powers that are reasonably necessary to carry out the powers expressly delegated.¹⁰ In its second amended petition, SPI discussed allegations that Laguna Madre violated the Texas Open Meetings Act and that SPI suffered damages it estimates to be in the tens of millions of dollars relating to the property values of SPI.¹¹ While SPI did not specifically request action by the Commission on these issues, the inclusion of the discussion of those topics in its petition obliges the Commission to reiterate that those issues are not properly before it and are better suited for discussion in a court of proper jurisdiction. No statute allows the Commission to address violations of the Open Meetings Act or to issue rewards for damages, and therefore the Commission identifies the following issues that need not be addressed in this proceeding for the reasons stated.

- 1. Has Laguna Madre or any of the members of its board of directors violated the Texas Open Meetings Act?**
- 2. Have the actions of Laguna Madre negatively affected the property values of SPI, and if so, to what extent?**

¹⁰ *Pub. Util. Comm'n v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001).

¹¹ Second Amended Petition to Appeal 89% Increase in Rate for Irrigation Raw Water (Untreated Water) Established by Board of Directors of Laguna Madre Water District (105 Port Road, Port Isabel, TX 78578) at 3–4 (Jul. 3, 2019).

Whether any of Laguna Madre's contracts, if pledged for the payment of any public securities, are valid and enforceable is not contestable before the Commission after being approved by the attorney general and registered with the comptroller. Issues related to issuance of bonds are solely within the jurisdiction of the courts under Texas Government Code § 1205.021. Therefore, the Commission identifies the following issue that need not be addressed in this proceeding. Included in the below issue not to be addressed are any related, subordinate issues.

The Commission's authority in this matter is found in TWC § 12.013. Section 12.013 obligates the Commission to ensure that rates for water service are reasonable. This section does not authorize this Commission to rule on the below issue not to be addressed.

3. **The validity or boundaries of Laguna Madre; Laguna Madre's authority to enter into and execute contracts or to issue bonds or other public securities; the validity or enforceability of an assessment, tax, or tax lien imposed by Laguna Madre, bonds or other public securities issued by Laguna Madre, or contracts the proceeds of which are pledged to secure public securities issued by Laguna Madre; the pledge or encumbrance of a tax, revenue, receipts, or property to secure the bonds to finance its water system infrastructure needed to serve SPI; or the legality and validity of the bonds or each expenditure or proposed expenditure of money relating to the bonds issued by Laguna Madre to finance its water system infrastructure needed to serve SPI.**

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 August 2019.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER