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PUBLIC UTILITY COMMISSION
COURTESY

Public Utility Commission of Texas

TO: Stephen Journey
Commission Counsel

All Parties of Record

FROM: Hunter Burkhalter *LSB*
Administrative Law Judge

RE: Docket No. 49554 – *Complaint of SWWC Utilities, Inc. dba Water Services, Inc. Against the City of Bulverde and Sue Wahl*

DATE: October 24, 2019

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this memo, the parties to this proceeding are being served with the PFD.

Please place this docket on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadline for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

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DOCKET NO. 49554

COMPLAINT OF SWWC UTILITIES, INC., DBA WATER SERVICES, INC. AGAINST THE CITY OF BULVERDE AND SUE WAHL § **PUBLIC UTILITY COMMISSION**
§
§ **OF TEXAS**
§

PROPOSAL FOR DECISION

In this proceeding, SWWC Utilities, Inc. dba Water Services, Inc. complains that it was ordered by the City of Bulverde to credit the account of one of Water Services' customers. Sue Wahl, in the amount of \$604.79. In this Proposal for Decision (PFD) the administrative law judge (ALJ) recommends that the Commission dismiss the complaint under 16 Texas Administrative Code (TAC) § 22.181(d)(1) due to a lack of jurisdiction. No hearing was held in this matter, and none is necessary, because the facts relevant to the jurisdictional issue are undisputed.

I. Background

Sue Wahl is a retail customer of Water Services who lives within the corporate limits of the City of Bulverde, Texas. Sometime in September or October of 2018, Ms. Wahl filed a complaint with the city alleging that she was wrongly billed on five different occasions by Water Services. Water Services disputed the complaint, contending that it had correctly charged Ms. Wahl.

On February 12, 2019, the city council of the City of Bulverde considered Ms. Wahl's complaint and issued an order (the city's order) finding in her favor and directing Water Services to reimburse her in the amount of \$604.79. In compliance with the city's order, Water Services credited Ms. Wahl's account for \$604.79 on February 20, 2019.

On March 5, 2019, Water Services initiated Docket No. 49290¹ in which it challenged the city's order as an appeal of a rate-making decision by a municipality under Texas Water Code (TWC) § 13.043 and 16 TAC § 24.101(a). On March 19, 2019, Commission Staff recommended that Water Services' appeal was not properly brought under TWC § 13.043 and 16 TAC § 24.101(a) because the city's order cannot properly be considered to have been issued in a rate

¹ *Petition of SWWC Utilities, Inc. dba Water Services, Inc. Appealing the Order of the City of Bulverde in Complaint No. 2018-01, Docket No. 49554 (Mar. 19, 2019).*

proceeding. Commission Staff recommended that Water Services' petition should more properly be classified as a complaint brought under 16 TAC § 22.242.

On May 1, 2019, in response to Commission Staff's recommendation, Water Services withdrew its petition in Docket No. 49290 and announced that it would be refiled as a formal complaint. In Order No. 2 issued on May 3, 2019, the ALJ closed Docket No. 49290, without prejudice. On September 5, 2019, Water Services filed a motion to have its appeal in Docket No. 49290 reinstated. As of the date of this PFD, that motion remained pending.

On May 20, 2019, Water Services filed its complaint in this docket (Docket No. 49554). The complaint is filed under 16 TAC § 22.242 and alleges that the city's order requires: (a) an inaccurate calculation of bills, in violation of 16 TAC § 24.165(a); and (b) billing that is not based on actual meter readings, in violation of 16 TAC § 24.169(a)(1).

In Order No. 4 issued on August 15, 2019, the ALJ requested briefing from the parties on the question of whether the Commission has the jurisdiction to overturn the city's order. Ms. Wahl provided a brief on or about August 26, 2019.² Water Services submitted its brief on September 5, 2019. Commission Staff submitted its brief on September 26, 2019.

Commission Staff's brief includes a motion to dismiss for lack of jurisdiction. Water Services filed a timely response to the motion to dismiss on October 23, 2019.

II. Discussion and Analysis

Under 16 TAC § 22.242(a):

[A]ny affected person may complain to the commission . . . setting forth any act or thing done . . . by any person under the jurisdiction of the commission *in violation or claimed violation of any law which the commission has jurisdiction to administer or of any order, ordinance, rule, or regulation of the commission.*³

² Ms. Wahl mailed her brief directly to the ALJ without serving it on the other parties. When the ALJ became aware of this fact, he forwarded copies of the brief to the other parties and posted a copy of the brief on the Commission's AIS system on September 30, 2019.

³ Emphasis added.

Thus, in order to be able to pursue its complaint in this docket, Water Services must be able to show that the action complained of—the city’s order—is in violation of a law which the Commission has the jurisdiction to enforce against the city.

Water Services alleges that the city’s order violates two regulations of the Commission: first, because it requires an inaccurate calculation of bills, in violation of 16 TAC § 24.165(a); and second, because it requires billing that is not based on actual meter readings, in violation of 16 TAC § 24.169(a)(1). Water Services further argues that the Commission’s right to hold the city accountable for violations of 16 TAC §§ 24.165(a) and 24.169(a)(1) derives from 16 TAC § 24.377, which reads as follows:

§ 24.377 Applicability of Commission Service Rules Within the
Corporate Limits of a Municipality

The commission’s rules relating to service and response to requests for service will apply to utilities operating within the corporate limits of a municipality unless the municipality adopts its own rules. These rules include Subchapters F and G of this chapter (relating to Customer Service and Protection and Quality of Service).

According to Water Services, the city has not adopted its own rules relating to service and response to request for service. Thus, argues Water Services, because 16 TAC §§ 24.165 and 24.169 are in subchapter F of chapter 24, the Commission’s rules apply. Although not explicitly stated in its brief, Water Services must necessarily be taking the further position that not only do 16 TAC §§ 24.165 and 24.169 apply, but that it is the *Commission* that has the power to enforce those rules against the city in this case.⁴

Water Services also argues that, under TWC § 13.041(a), the Commission has the “implied authority” to review the city’s order to determine whether it affects “the Commission’s expressly authorized duties, in this case the business of a water utility.”⁵

Commission Staff disagrees with Water Services’ analysis, arguing that the Commission lacks the jurisdiction to enforce 16 TAC §§ 24.165 and 24.169 against the city.

⁴ Water Services Brief at 5-7.

⁵ Water Services Response to Motion to Dismiss at 2.

The ALJ agrees with Commission Staff. As a general matter, each municipality in Texas (including the city) is given exclusive jurisdiction over water and sewer utility rates, operations, and services within its corporate limits. The applicable statute repeatedly states that the Commission has the power to review or overturn an action of a municipality exercising its jurisdiction over water and sewer utilities only when a provision in the Texas Water Code gives it that power. Specifically, TWC § 13.042(a), (d), and (f) provide as follows:

(a) *Subject to the limitations imposed in this chapter* and for the purpose of regulating rates and services so that those rates may be fair, just, and reasonable and the services adequate and efficient, the governing body of each municipality has exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within its corporate limits.

...

(d) The utility commission shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities *as provided in this chapter*.

...

(f) This subchapter does not give the utility commission power or jurisdiction to . . . affect or limit the power, jurisdiction, or duties of a municipality that regulates land and supervises water and sewer utilities within its corporate limits, *except as provided by this code*.⁶

Under TWC § 13.042(b), a municipality may choose to delegate to the Commission its right to exercise the exclusive jurisdiction over water and sewer utility, operations, and services within the municipality’s corporate boundaries. The parties agree, however, that the city has not made such a delegation to the Commission. Thus, under TWC § 13.042(a), the Commission has the jurisdiction to enforce the Commission’s rules against the city’s order only if there is some other provision within the TWC giving it such jurisdiction.

Water Services does not cite to a provision in TWC chapter 13 or the TWC generally that gives the Commission jurisdiction to enforce 16 TAC §§ 24.165(a) and 24.169(a)(1) against the city. Rather, Water Services claims that such authority comes from 16 TAC § 24.377. Water Services’ reliance on this rule is misplaced. An administrative agency, such as the Commission, cannot confer jurisdiction on itself by adoption of a rule. Rather, as a matter of basic jurisdictional principles and, under the express text of TWC § 13.042(a), (d), and (f), the Commission has the

⁶ Emphasis added; *see also*, TWC § 13.082, reiterating that municipalities are generally exempt from regulation by the Commission as regards local water and sewer service.

jurisdiction to enforce 16 TAC §§ 24.165(a) and 24.169(a)(1) against the city only if a statute in TWC chapter 13 gives it that jurisdiction.

The TWC does not do so. Under TWC § 13.043(a), a party may appeal to the Commission a municipality's final decision in a "rate proceeding." However, that is not what Water Services is attempting to do in the present docket. Rather, Water Services asserted that it was appealing the city's final decision in a rate proceeding in Docket No. 49290.⁷

The rule which Water Services contends gives it jurisdiction, 16 TAC § 24.377, derives from the last sentence of TWC § 13.082(b). That section reads, in relevant part, as follows:

Sec. 13.082. LOCAL UTILITY SERVICE; EXEMPT AND NONEXEMPT AREAS. (a) Notwithstanding any other provision of this section, municipalities shall continue to regulate each kind of local utility service inside their boundaries until the utility commission has assumed jurisdiction over the respective utility pursuant to this chapter.

(b) If a municipality does not surrender its jurisdiction, local utility service within the boundaries of the municipality shall be *exempt from regulation by the utility commission under this chapter to the extent that this chapter applies to local service*, and the municipality shall have, regarding service within its boundaries, the right to exercise the same regulatory powers under the same standards and rules as the utility commission or other standards and rules not inconsistent with them. The utility commission's rules relating to service and response to requests for service for utilities operating within a municipality's corporate limits apply unless the municipality adopts its own rules.⁸

Rather than conveying jurisdiction on the Commission to hear Water Services' complaint, the wording of this statute withholds such jurisdiction. Under Subsection (b), because the city has not surrendered its exclusive jurisdiction over water and sewer utility regulation within its corporate boundaries, utility service within the city's limits is "exempt from regulation by the utility commission" under the provisions of TWC chapter 13 that apply to local water and sewer service, and the city has "the right to exercise the same regulatory powers under the same standards and rules as the utility commission." In other words, under TWC § 13.082(b), the city steps into the

⁷ As noted above, Water Services has moved to have its appeal in Docket No. 49290 reinstated. Commission Staff opposes reinstatement. The ALJ in the present docket takes no position on whether reinstatement of Docket No. 49290 is warranted, or whether Water Services' argument in that docket—that its challenge to the city's order constitutes an appeal of a final decision in a rate proceeding—is meritorious.

⁸ Emphasis added.

role of the enforcer of 16 TAC §§ 24.165(a) and 24.169(a)(1), but the section does not give the Commission jurisdiction to enforce 16 TAC §§ 24.165(a) and 24.169(a)(1) against the city.

Water Services' reliance on TWC § 13.041(a) is also misplaced. That section reads as follows:

The utility commission may regulate and supervise the business of each water and sewer utility *within its jurisdiction*, including ratemaking and other economic regulation. The commission may regulate water and sewer utilities *within its jurisdiction* to ensure safe drinking water and environmental protection. The utility commission and the commission may do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction . . .⁹

In other words, the section allows the Commission to exercise all powers expressly or impliedly given by TWC chapter 13 so long as the exercise is within the Commission's jurisdiction. In this case, Water Services has failed to prove that consideration of the city's order is within the Commission's jurisdiction.

For these reasons, the ALJ concludes that Water Services' complaint should be dismissed because the Commission lacks jurisdiction to hear it.

III. Findings of Fact

The ALJ makes the following findings of fact.

1. SWWC Utilities, Inc. dba Water Services, Inc. provides retail water service within the corporate limits of the City of Bulverde, Texas.
2. Sue Wahl is a retail customer of Water Services who lives within the corporate limits of the city.
3. In the fall of 2018, Ms. Wahl filed a complaint with the city alleging that she was, on multiple occasions, wrongly billed by Water Services.
4. Water Services disputed the complaint, contending that it had correctly billed Ms. Wahl.

⁹ Emphasis added.

5. On February 12, 2019, the city council of the City of Bulverde considered Ms. Wahl's complaint and issued an order (the city's order) finding in her favor and directing Water Services to reimburse her in the amount of \$604.79.
6. On March 5, 2019, Water Services initiated Docket No. 49290¹⁰ in which it challenged the city's order as an appeal of a rate-making decision by a municipality under Texas Water Code (TWC) § 13.043 and 16 Texas Administrative Code (TAC) § 24.101(a).
7. On March 19, 2019, Commission Staff argued that Water Services' appeal was not properly brought under TWC § 13.043 and 16 TAC § 24.101(a) and recommended that Water Services' petition should more properly be classified as a complaint brought under 16 TAC § 22.242.
8. On May 1, 2019, Water Services withdrew its petition in Docket No. 49290 and announced that it would be refiling the matter as a formal complaint. In Order No. 2 issued on May 3, 2019, the ALJ closed Docket No. 49290, without prejudice.
9. On May 20, 2019, Water Services filed its complaint in the present docket (Docket No. 49554). The complaint is filed under 16 TAC § 22.242 and alleges that the city's order requires: (a) an inaccurate calculation of bills, in violation of 16 TAC § 24.165(a); and (b) billing that is not based on actual meter readings, in violation of 16 TAC § 24.169(a)(1).
10. On September 26, 2019, Commission Staff filed a motion to dismiss, contending that the Commission lacked jurisdiction to consider Water Services' complaint.
11. Water Services filed a timely response to the motion to dismiss on October 23, 2019.

IV. Conclusions of Law

The ALJ makes the following conclusions of law.

1. The Commission may dismiss a proceeding with or without prejudice for, among other reasons, a "lack of jurisdiction" under 16 TAC § 22.181(d)(1).
2. Under 16 TAC § 22.181(f)(2), dismissal of a case for reasons other than those specified in 16 TAC § 22.181(g)(1) or (2) requires preparation of a PFD.

¹⁰ *Petition of SWWC Utilities, Inc. dba Water Services, Inc. Appealing the Order of the City of Bulverde in Complaint No. 2018-01, Docket No. 49554 (Mar. 19, 2019).*

3. In order for Water Services to be able to pursue its complaint in this docket under 16 TAC § 22.242, it must be shown that the action complained of—the city’s order—is in violation of a law which the Commission has the jurisdiction to enforce against the city.
4. The Commission is not conferred jurisdiction by 16 TAC § 24.377 to hold the city accountable for violations of 16 TAC §§ 24.165(a) and 24.169(a)(1).
5. Because it has not delegated to the Commission its right to exercise jurisdiction over water and sewer utility rates, operations, and services within its corporate boundaries, the city has, under TWC § 13.042, exclusive jurisdiction over water and sewer utility rates, operations, and services within its corporate limits.
6. The Commission has the power to review or overturn an action of the city committed in the exercise of its jurisdiction over water and sewer utilities only when a provision in the TWC gives it that power. TWC § 13.042(a), (d), and (f).
7. No provision in TWC chapter 13 or the TWC gives the Commission jurisdiction to enforce 16 TAC §§ 24.165(a) and 24.169(a)(1) against the city.
8. In this docket, Water Services is not attempting to appeal to the Commission a municipality’s final decision in a “rate proceeding” under TWC § 13.043(a).
9. Because the Commission lacks jurisdiction to consider Water Services’ complaint, dismissal of this proceeding is warranted under 16 TAC § 22.181(d)(1).


V. Ordering Paragraphs

In light of the findings of fact and conclusions of law, the ALJ recommends the following and ordering paragraphs.

1. The Commission dismisses Docket No. 49554.
2. The Commission denies all other motions and any other requests for general or specific relief that have not been expressly granted.

Signed at Austin, Texas the 24th day of October 2019.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE

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