



Control Number: 52758



Item Number: 15

**PUC DOCKET NO. 52758
SOAH DOCKET NO. 473-22-1659.WS**

**PETITION OF MCALLEN PUBLIC
UTILITY APPEALING WHOLESALE
WATER RATE CHARGED BY
HIDALGO COUNTY WATER
IMPROVEMENT DISTRICT NO. 3**

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PUBLIC UTILITY COMMISSION

OF TEXAS

PRELIMINARY ORDER ON PHASE I ISSUES

McAllen Public Utility filed a petition appealing the July 2021 decision of Hidalgo County Water Improvement District No. 3 to increase its rates for wholesale water service. This preliminary order identifies the issues that must be addressed and the issues that shall not be addressed in this proceeding.

McAllen challenges the district's wholesale water rates under Texas Water Code (TWC) § 12.013.¹ McAllen requests that the Commission establish interim rates under TWC § 12.013(e) and 16 Texas Administrative Code (TAC) § 24.37 to be in effect until such time as the Commission makes a final decision regarding this appeal,² and compel the district to continue wholesaling water to McAllen under TWC § 12.013(e).³

On December 7, 2021, the Commission administrative law judge (ALJ) filed an order requesting lists of issues. McAllen was 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 December 17, 2021. McAllen, the district, and Commission Staff timely filed lists 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 the State Office of Administrative Hearings (SOAH).⁴ After reviewing the

¹ Original Petition at 9 (Oct. 27, 2021).

² *Id.* at 10–12.

³ *Id.* at 13.

⁴ Tex. Gov't Code § 2003.049(e).

pleadings submitted by the parties, the Commission determines that it is appropriate to proceed in two phases—phase one to allow the Commission to determine whether the rates appealed harm the public interest under TWC 12.013(g); and phase two, if necessary, to allow the Commission to set just and reasonable rates. The Commission requests that one or more ALJs at SOAH prepare a proposal for decision for consideration by the Commission regarding the phase-one issues. If necessary, thereafter this matter will be returned to SOAH to issue a proposal for decision regarding the phase-two issues.

A. Phase One

1. Do the facts demonstrate that the Commission has authority under TWC § 12.013 to decide this appeal? If so, was the petition filed in accordance with TWC § 12.013 and 16 TAC § 24.107?
2. Should interim rates that will remain in effect until a final decision is made in this appeal be established under TWC § 12.013(e) and 16 TAC § 24.37(d) and (e)? If so, what are the appropriate interim rates?
3. Should the district be compelled to continue providing water to McAllen during the pendency of this appeal?
4. Do the rates appealed harm the public interest under TWC § 12.013(g) and 16 TAC § 24.311? In answering this issue, please address the following sub-issues.
 - a. Are the rates appealed just and reasonable?
 - b. Are the rates appealed unreasonably preferential, prejudicial, or discriminatory compared to the wholesale rates the district charges other wholesale customers?
 - c. Are the rates appealed sufficient, equitable, and consistent in application to each class of customers?
 - d. Do the rates appealed impair the district's ability to continue to provide service, based on the district's financial integrity and operational capability?
 - e. Do the rates appealed impair McAllen's ability to continue to provide service to its retail customers, based on McAllen's financial integrity and operational capability?

- f. Do the rates appealed evidence the district's abuse of monopoly power in its provision of water to McAllen? In answering this sub-issue, please address the following factors.
 - i. The disparate bargaining power of the parties, including McAllen's alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water service.
 - ii. The district's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates.
 - iii. Whether the district changed the computation of the revenue requirement or rate from one methodology to another.
 - iv. Other valuable consideration received by a party incident to the contract.
 - v. Incentives necessary to encourage regional projects or water conservation measures.
 - vi. The district's obligation to meet federal and state wastewater discharge and drinking water standards.
 - vii. The rates charged in Texas by other sellers of water service for resale.
 - viii. The district's rates for water service charged to its retail customers, if any, compared to the retail rates McAllen charges its retail customers as a result of the wholesale rate the district demands from McAllen.
5. If the rates appealed are found not to harm the public interest, what are the bases for determining that the rates appealed do not harm the public interest, as required by 16 TAC § 24.313(a)?
6. If the rates appealed are found to harm the public interest, what are the bases for determining that the rates appealed harm the public interest, as required by 16 TAC § 24.313(a)?
7. If the Commission determines the rates appealed do not harm the public interest under TWC § 12.013(g), must this appeal be dismissed?

For issues 8 through 24, the applicable time period is the period during which the rates appealed by McAllen have been charged under its contract with the district. Additionally, for issues 8 through 24, if the answer varies depending on the class of customer, i.e., retail customers, wholesale customers, or other types of customers, please explain.

8. Does the district have any debt that is secured by bonds? If so, please address the following issues.
 - a. What series or issues of bonds of the district are outstanding?
 - b. For each series or issuance 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 water service been pledged?
 - e. For each series or issues of outstanding bonds, have any contracts been pledged as security? If the answer to this issue is that there are one or more contracts pledged as security for outstanding bonds, please address the following issue.
 - f. For each contract, who are the parties to the contract, and what rate, formula, or methodology is specified in each contract related to the amount paid for water service and the amount pledged to the bond?
9. What are the district's costs to procure the water it supplies to McAllen?
10. What are the district's costs to operate and maintain its water facilities and systems on an annual basis?
11. What facilities and systems of the district, if any, are dedicated exclusively to the provision of water to McAllen?
12. What are the district's annual gross revenues?
13. What are the district's annual net revenues?
14. Are there any outstanding bonds of the district from, or secured by, ad valorem taxes in whole or in part?
15. What is the total capacity of the district to deliver water?
16. What is the capacity of the district to deliver water to McAllen?
17. What is the total demand for water for the following:
 - a. On an average basis?

- b. For the time period for which the rates appealed were or have been set?
 - c. If applicable, if each customer were to take its minimum take requirement?
18. Is there any penalty or rate-adjustment if the district cannot provide all the water requested by McAllen?
19. Does McAllen have a first right to the district's water?
20. Does McAllen have an annual revenue obligation (proportionate share of the district's annual revenue requirement) to the district? If so, what is McAllen's annual revenue obligation?
21. Does McAllen have a minimum take requirement? If so, what is McAllen's minimum take requirement and when was it established?
22. What entities, if any, other than McAllen purchase wholesale water service from the district? If there are entities other than McAllen, please address the following sub-issues.
- a. Under what terms, including the rate, do any such entities take water from the district?
 - b. What is the gross amount of revenues, if any, received from such entities by the district on an annual basis?
 - i. Is any of such revenue pledged to support any bonds issued by the district? If so, how much is pledged and for which series or issue of bonds?
 - ii. How is this revenue accounted for in determining the district's rates for water service?
 - iii. If McAllen has an annual revenue obligation to the district, is revenue from any other wholesale customers used to offset McAllen's annual revenue obligation?
 - c. Do any such entities have minimum take requirements? If so, please identify the entities, their minimum requirements, and when the requirements were established.
 - d. What is the annual revenue obligation (proportionate share of the district's annual revenue requirement), if any, of each of the district's wholesale water customers?
 - e. How is the cost responsibility to run, operate, and maintain the district's water system allocated, if at all, among McAllen and any other entities that pay for wholesale water service from the district?

23. How is the cost responsibility to run, operate, and maintain the district's water system allocated, if at all, among the district's wholesale and retail customers?
24. Do the rates appealed include payments to affiliated interests for costs of any services, for any property right or thing, or for interest expense? If so, were the payments reasonable and necessary, and was the price paid no higher than the prices charged by the supplying affiliate to its other affiliates or other unaffiliated persons or corporations for the same item or items?

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 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).

B. Phase Two

The Commission will not identify issues for phase two of this proceeding at this time but will wait until after it receives a proposal for decision on the phase-one issues. If phase two is necessary, the Commission will request lists of issues from the parties and prepare a supplemental preliminary order to scope phase two.

II. Issues Not to be Addressed

The Commission identifies the following issues that need not be addressed in this proceeding for the reasons stated.

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

Included in the above issues not to be addressed are any related, subordinate issues. The Commission's authority in this matter is found in TWC § 12.013(c). Section 12.013 authorizes the Commission to review and fix reasonable rates for the furnishing of water. This section does not authorize this Commission to rule on the issues identified above.

Further, whether the district's public securities and contracts that are pledged for the payment of those public securities are valid and enforceable is not contestable before the Commission after being approved by the attorney general and registered with the comptroller.⁵ The remaining issues related to the issuance of bonds are solely within the jurisdiction of the court.⁶

2. *Whether the rates appealed are no higher or lower than is necessary to match the cost of service.*

Commission rules explicitly preclude the Commission from determining whether the appealed rates adversely affect the public interest based on an analysis of the district's cost of service.⁷ That is, the public interest determination cannot depend solely on whether the challenged rates match the cost of service. Commission rule 16 TAC § 24.311(b) does not, however, preclude the admission of evidence on, and consideration of, the district's various costs, including its bond servicing costs and its various sources of revenue. What is precluded in the public interest determination is an analysis of the cost of service for the purpose of setting rates, which constitutes a rate-setting exercise reserved for phase two.⁸

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

⁵ Tex. Gov't Code § 1202.006.

⁶ *Id.* § 1205.021; *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 3–21 (Jun. 29, 2017).

⁷ 16 TAC § 24.311(b).

⁸ Docket No. 46662, Preliminary Order at 26–27.

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 17th day of February 2022.

PUBLIC UTILITY COMMISSION OF TEXAS



PETER M. LAKE, CHAIRMAN



WILL MCADAMS, COMMISSIONER



LORI COBOS, COMMISSIONER



JIMMY GLOTFELTY, COMMISSIONER