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FILE# ML-49172-22
I.D.# 49172

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Thomas J. Gleeson
Executive Director

Public Utility Commission of Texas

September 6, 2022

The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion

Dear General Paxton:

The Public Utility Commission of Texas respectfully requests your opinion under section 402.042 of the Texas Government Code on the following issue:

Whether the Public Utility Commission of Texas has authority under Texas Water Code (TWC) § 12.013 to hear an appeal by a municipal utility of the rates set by a water control and improvement district, or whether the Texas Commission on Environmental Quality (TCEQ) has exclusive authority over such an appeal under TWC § 51.305(d).

In 2013, the economic regulation of water and sewer service was transferred to the utility commission¹ from the TCEQ under two near-identical acts of the Legislature.² In these acts, TWC § 12.013(a) was amended to authorize the utility commission to “fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12” of the Water Code.³

On October 27, 2021, the City of McAllen filed a petition under TWC § 12.013 appealing water delivery rates set by Hidalgo County Water Improvement District No. 3, a water control and

¹ Within the Texas Water Code, the Public Utility Commission is defined as the utility commission and will be reference as such here. Tex. Water Code § 11.002(21).

² Act of May 13, 2013, 83rd Leg., R.S., ch. 170 (HB 1600), §§ 2.01–2.98, 2013 Tex. Gen. Laws 725; Act of May 13, 2013, 83rd Leg., R.S., ch. 171 (SB 567), §§ 1–97, 2013 Tex. Gen. Laws 772.

³ Tex. Water Code § 12.013(a).



improvement district.⁴ The utility commission referred this petition to the State Office of Administrative Hearings for a contested-case hearing; subsequently an appeal of an interim SOAH order was brought to the utility commission.

Before the utility commission was scheduled to act on this appeal, it received a letter from Texas Senator Juan Hinojosa and Texas Representative Terry Canales.⁵ For your convenience, this letter is attached. In their letter, the legislators argued that in adopting TWC § 51.305(d), the intent was to confer to TCEQ “the exclusive authority to determine whether the delivery charge or price for water levied by Hidalgo County Water Improvement District No. 3 against McAllen is ‘reasonable and just or is discriminatory.’”⁶ They further stated that by prescribing in TWC § 51.305(d) “that a petition under Section 11.041 is the ‘sole remedy’ available to McAllen, we also intended for Section 51.305(d) to render all of Water Code Section 12.013, inapplicable in this matter.”⁷

TWC § 51.305(d) was added in 2013;⁸ subsection (d) states:

- (d) A landowner of irrigable land in [a water control and improvement district] or a user of water delivered by [a water control and improvement district] for any purpose other than irrigation who disputes all or part of a board order that determines the amount of an assessment, charge, fee, rental, or deposit may file a petition under Section 11.041. That petition filed with the commission is the sole remedy available to a landowner or user of water described by this subsection.⁹

While the TCEQ has concurrent jurisdiction to hear an appeal challenging the rates charged by a water control and improvement district,¹⁰ the utility commission seeks an opinion on whether TWC § 51.305(d) vests exclusive authority in the TCEQ and divests the authority of the utility commission under TWC § 12.013 to hear such an appeal.

The amendments to TWC § 12.013 granting authority to the utility commission over the rates for raw and treated water and the amendment adding subsection (d) to TWC 51.305 mandating that a petition to the TCEQ under TWC § 11.041 is the sole remedy to dispute a rate of a water control and improvement district appear to be in irreconcilable conflict. However, the acts amending TWC § 12.013 were adopted on May 13, 2013 while the act adding TWC § 51.305(d) was adopted on May 8, 2013. Thus, under some canons of construction, the later amendment would prevail, and the utility commission would have authority to hear this appeal.

⁴ *Petition of McAllen Public Utility Appealing Wholesale Water Rates Charged by Hidalgo County Water Improvement District No. 3*, PUC Docket No. 52758, Petition (Oct. 7, 2021).

⁵ Letter from Senator Hinojosa and Representative Terry Canales to the Public Utility Commission (August 23, 2022) (filed in PUC Docket No. 52758, item 53).

⁶ *Id.* at 2.

⁷ *Id.*

⁸ Act of May 8, 2013, 83rd Leg., R.S., ch. 90 (SB 611), § 6, 2013 Tex. Gen. Laws 164, 165.

⁹ Tex. Water Code § 51.305(d). A district, as that term is used in this subsection, means a water control and improvement district. Tex. Water Code § 51.001(1).

¹⁰ *See*, Tex. Water Code §§ 11.041, 51.305.

If the three acts are considered to be *in pari materia*, then if the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.¹¹ If this doctrine applies, the earlier amendment would prevail unless the manifest legislative intent is that the latter amendments prevail.

Because TWC § 12.013 provides the utility commission with authority to fix reasonable rates for any purpose mentioned in chapter 11 or 12 of the Texas Water Code, the utility commission has acted as if it has authority over rate appeals challenging the rates set by a water control and improvement district,¹² and expects that additional appeals of rates set by water control and improvement districts will be filed with the utility commission in the future. Thus, it is necessary to obtain the requested opinion on whether the utility commission has authority to address these types of appeals or must dismiss them.

The language of TWC § 51.305(d) raises the question of whether the utility commission has jurisdiction to review McAllen's appeal and others of its kind. Consequently, utility commission has not acted on Hidalgo County Water Improvement District No. 3's appeal. Further, because the resolution of this issue concerns the jurisdiction of the TCEQ, the utility commission does not believe that it has the authority, or that it is appropriate for it, to determine, the extent of the TCEQ's authority over the appeals of the rates of water control and improvement districts. Consequently, the utility commission respectfully requests your opinion on the submitted issue.

In its open meeting of August 25, 2022, the Commission voted to seek this opinion and delegated authority to the executive director to submit this request for an opinion.

PUBLIC UTILITY COMMISSION OF TEXAS



Thomas Gleeson, Executive Director

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¹¹ *Tex. Stated Bd. Of Chiropractic Examiners v. Abbott*, 391 S.W.3d 343, 348 (Tex. App.—Austin no pet.).

¹² *See, e.g., Ratepayers' Appeal of the Decision by South Central Calhoun County Water Control and Improvement District No. 1 to Change Rates*, PUC Docket No. 47912, Order (Jan. 14, 2021).



August 23, 2022

Public Utility Commission of Texas
Attn: Commission Advising & Docket Management
P.O. Box 13326
Austin, TX 78711-3326

Re: Commission Docket No. 52758 – Petition of McAllen Public Utility Appealing Wholesale Water Rates Charged by Hidalgo County Water Improvement District No. 3

Dear Commissioners:

We are writing to encourage the Commission consider the transfer Docket No. 52758 to the Texas Commission on Environmental Quality (TCEQ) in accordance with the Texas Water Code. Further, Public Utility Commission rules should not be altered on an ad hoc basis during these ongoing proceedings. As mentioned in our letter from November 12, 2021, this proceeding is of the utmost importance to our constituents in McAllen. As such, it deserves the most expeditious process allowed by law. On June 27, 2022, the McAllen Monitor published an article reporting on this matter and stated that “the dispute has since become entangled in a morass of red tape” at both the Commission and Hidalgo County District Court. Having reviewed the record in this matter, we unfortunately must agree.

First, we wish to express concern about the Commission’s discussion during its June 30, 2022 open meeting concerning Commission Rule 24.307(d), which is the rule that the Administrative Law Judge relied on in abating this matter. Rather than provide clarity or closure for the parties, we understand all commissioners agreed to “extend time” to deliberate whether the rule is invalid or unnecessary. We are unaware of any law, either that we enacted in statute or decided by a court, which invalidates Rule 24.307(d). An action by the Commission to retroactively declare invalid a rule that not only was duly adopted by the Commission under the Administrative Procedure Act, but that has *actually been applied* in an ongoing contested case hearing, would unquestionably constitute impermissible ad-hoc rulemaking to the detriment of all parties involved.

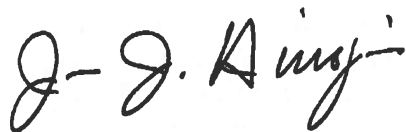
There is a simple way to resolve the Commission’s continued consideration of the petition in this matter. Chapter 51 of the Texas Water Code governs Water Control and Improvement Districts (WCIDs) like the one involved in this matter. In 2013, through Senate Bill 611, we added Section 51.305(d) to that Chapter. That statute states that “a user of water delivered by the district for any purpose other than irrigation who disputes all or part of a board order that determines the amount of an assessment, charge, fee, rental, or deposit may file a petition under Section 11.041” of the Water Code. Section 11.041 in turn confers jurisdiction on TCEQ to determine “that the price or rental demanded for the available water is not reasonable and just or is discriminatory.” Section 51.305(d) goes on to say that such a “petition filed with the [TCEQ] is *the sole remedy* available to a... user of water described by this subsection.”

We both voted in favor of SB 611, and our intent is that this statute confers upon TCEQ the exclusive authority to determine whether the delivery charge or price for water levied by Hidalgo County Water Improvement District No. 3 against McAllen is “reasonable and just or is discriminatory.” By requiring that a petition under Section 11.041 is the “sole remedy” available to McAllen, we also intended for Section 51.305(d) to render all of Water Code Section 12.013, inapplicable in this matter. In other words, the Water Code confers no jurisdiction on the Commission to determine whether the price charged by this WCID to McAllen for available water harms the public interest. And the TCEQ’s determination under Section 11.041 that a delivery charge or demanded price is not just and reasonable or is discriminatory constitutes a determination that such charge or price, whether charged pursuant to a contract or not, does in fact harm the public interest.

Lastly, Section 11.041(f) authorizes the Commission to participate in the TCEQ hearing if necessary to present evidence on the price or rental demanded for the available water. Our understanding and intent is that the two agencies may cooperate to determine what just and reasonable price or rental should be set within the confines of the TCEQ’s hearing under Section 11.041. However, we believe Section 11.041(f), when read together with Section 51.305(d), rests exclusive jurisdiction to determine a just and reasonable rate with the TCEQ with advice from your agency. We encourage both agencies to continue their excellent history of cooperation in this matter.

We encourage you to consider this jurisdictional issue at your open meeting on August 25, 2022, and transfer this proceeding to TCEQ in accordance with Section 51.305(d). Please do not hesitate to contact either of our offices if you have any questions or need any additional information.

Sincerely,



Juan “Chuy” Hinojosa
State Senator, District 20



Terry Canales
State Representative, District 40