

SUBCHAPTER I: WHOLESALE WATER OR SEWER SERVICE

§§291.128 - 291.138
Effective October 19, 2000

§291.128. Petition or Appeal Concerning Wholesale Rate.

This subchapter sets forth substantive guidelines and procedural requirements concerning:

(1) a petition to review rates charged for the sale of water for resale filed pursuant to Texas Water Code, Chapter 11 or 12; or

(2) an appeal pursuant to Texas Water Code, §13.043(f) (appeal by retail public utility concerning a decision by a provider of water or sewer service).

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§291.129. Definitions.

For purposes of this subchapter, the following definitions apply:

(1) **Petitioner** - The entity that files the petition or appeal.

(2) **Protested rate** - The rate demanded by the seller.

(3) **Cash Basis calculation of cost of service** - A calculation of the revenue requirement to which a seller is entitled to cover all cash needs, including debt obligations as they come due. Basic revenue requirement components considered under the cash basis generally include operation and maintenance expense, debt service requirements, and capital expenditures which are not debt financed. Other cash revenue requirements should be considered where applicable. Basic revenue requirement components under the cash basis do not include depreciation.

(4) **Utility Basis calculation of cost of service** - A calculation of the revenue requirement to which a seller is entitled which includes a return on investment over and above operating costs. Basic revenue requirement components considered under the utility basis generally include operation and maintenance expense, depreciation, and return on investment.

§291.130. Petition or Appeal.

(a) The petitioner must file a written petition with the commission accompanied by the filing fee required by the Texas Water Code. The petitioner must serve a copy of the petition on the party against whom the petitioner seeks relief and other appropriate parties.

(b) The petition must clearly state the statutory authority which the petitioner invokes, specific factual allegations, and the relief which the petitioner seeks. The petitioner must attach any applicable contract to the petition.

(c) The petitioner must file an appeal pursuant to Texas Water Code, §13.043(f) in accordance with the time frame provided therein.

§291.131. Executive Director's Review of Petition or Appeal.

(a) When a petition or appeal is filed, including a petition subject to the Texas Water Code, §11.041, the executive director shall determine within ten days of the filing of the petition or appeal whether the petition contains all of the information required by this subchapter. For purposes of this section only, the executive director's review of probable grounds shall be limited to a determination whether the petitioner has met the requirements of §291.130 of this title (relating to Petition or Appeal). If the executive director determines that the petition or appeal does not meet the requirements of §291.130 of this title, the executive director shall inform the petitioner of the deficiencies within the petition or appeal and allow the petitioner the opportunity to correct these deficiencies. If the executive director determines that the petition or appeal does meet the requirements of §291.130 of this title, the executive director shall forward the petition or appeal to the State Office of Administrative Hearings for an evidentiary hearing.

(b) For a petition or appeal to review a rate that is charged pursuant to a written contract, the executive director will forward the petition or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on public interest.

(c) For a petition or appeal to review a rate that is not charged pursuant to a written contract, the executive director will forward the petition or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on the rate.

(d) If the seller and buyer do not agree that the protested rate is charged pursuant to a written contract, the administrative law judge shall abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.

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§291.132. Evidentiary Hearing on Public Interest.

(a) If the executive director forwards a petition to the State Office of Administrative Hearings pursuant to §291.131(a) and (b) of this title (relating to Executive Director's Review of Petition or Appeal), the State Office of Administrative Hearings shall conduct an evidentiary hearing on public interest to determine whether the protested rate adversely affects the public interest.

(b) Prior to the evidentiary hearing on public interest, discovery shall be limited to matters relevant to the evidentiary hearing on public interest.

(c) The administrative law judge shall prepare a proposal for decision and order with proposed findings of fact and conclusions of law concerning whether the protested rate adversely affects the public interest, and shall submit this recommendation to the commission.

(d) The seller and buyer may agree to consolidate the evidentiary hearing on public interest and the evidentiary hearing on cost of service. If the seller and buyer so agree the administrative law judge shall hold a consolidated evidentiary hearing.

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§291.133. Determination of Public Interest.

(a) The commission shall determine the protested rate adversely affects the public interest if after the evidentiary hearing on public interest the commission concludes at least one of the following public interest criteria have been violated:

(1) the protested rate impairs the seller's ability to continue to provide service, based on the seller's financial integrity and operational capability;

(2) the protested rate impairs the purchaser's ability to continue to provide service to its retail customers, based on the purchaser's financial integrity and operational capability;

(3) the protested rate evidences the seller's abuse of monopoly power in its provision of water or sewer service to the purchaser. In making this inquiry, the commission shall weigh all relevant factors. The factors may include:

(A) the disparate bargaining power of the parties, including the purchaser's alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water or sewer service.

(B) the seller's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates.

(C) the seller changed the computation of the revenue requirement or rate from one methodology to another.

(D) where the seller demands the protested rate pursuant to a contract, other valuable consideration received by a party incident to the contract.

(E) incentives necessary to encourage regional projects or water conservation measures.

(F) the seller's obligation to meet federal and state wastewater discharge and drinking water standards.

(G) the rates charged in Texas by other sellers of water or sewer service for resale.

(H) the seller's rates for water or sewer service charged to its retail customers, compared to the retail rates the purchaser charges its retail customers as a result of the wholesale rate the seller demands from the purchaser.

(4) the protested rate is unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates the seller charges other wholesale customers.

(b) The commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service.

§291.134. Commission Action to Protect Public Interest, Set Rate.

(a) If as a result of the evidentiary hearing on public interest the commission determines the protested rate does not adversely affect the public interest, the commission will deny the petition or appeal by final order. The commission must state in the final order that dismisses a petition or appeal the bases upon which the commission finds the protested rate does not adversely affect the public interest.

(b) If the commission determines the protested rate adversely affects the public interest, the commission will remand the matter to the State Office of Administrative Hearings for further evidentiary proceedings on the rate. The remand order is not a final order subject to judicial review.

(c) No later than 90 days after the petition or appeal is forwarded to the State Office of Administrative Hearings for an evidentiary hearing on the rate pursuant to subsection (b) of this section or §291.131(a) and (c) of this title (relating to Executive Director's Review of Petition or Appeal), the seller shall file with the Office of Chief Clerk five copies of a cost of service study and other information which supports the protested rate.

(d) Prior to the evidentiary hearing on the rate, discovery shall be limited to matters relevant to the evidentiary hearing on the rate.

(e) The administrative law judge shall prepare a proposal for decision and order with proposed findings of fact and conclusions of law recommending a rate and shall submit this recommendation to the commission. The commission shall set a rate consistent with the ratemaking mandates of Texas Water Code, Chapters 11, 12, and 13. If the protested rate was charged pursuant to a written contract, the commission must state in a final order the bases upon which the commission finds the protested rate adversely affects the public interest.

§291.135. Determination of Cost of Service.

(a) The commission shall follow the mandates of the Texas Water Code, Chapters 11, 12, and 13 to calculate the annual cost of service. The commission shall rely on any reasonable methodologies set by contract which identify costs of providing service and/or allocate such costs in calculating the cost of service.

(b) When the protested rate was calculated using the cash basis or the utility basis, and the rate which the protested rate supersedes was not based on the same methodology, the commission may calculate cost of service using the superseded methodology unless the seller establishes a reasonable basis for the change in methodologies. Where the protested rate is based in part upon a change in methodologies the seller must show during the evidentiary hearing the calculation of revenue requirements using both the methodology upon which the protested rate is based, and the superseded methodology. When computing revenue requirements using a new methodology, the commission may allow adjustments for past payments.

§291.136. Burden of Proof.

The petitioner shall have the burden of proof in the evidentiary proceedings to determine if the protested rate is adverse to the public interest. The seller of water or sewer service (whether the petitioner or not) shall have the burden of proof in evidentiary proceedings on determination of cost of service.

§291.137. Commission Order to Discourage Succession of Rate Disputes.

(a) If the commission finds the protested rate adversely affects the public interest and sets rates on a cost of service basis, then the commission shall add the following provisions to its order:

(1) If the purchaser files a new petition or appeal, and the executive director forwards the petition or appeal to the State Office of Administrative Hearings pursuant to §291.131 of this title (relating to Executive Director's Determination of Probable Grounds), then the administrative law judge shall set an interim rate immediately. The interim rate shall equal the rate set by the commission in this proceeding where the commission granted the petition or appeal and set a cost of service rate.

(2) The commission shall determine in the proceedings pursuant to the new petition or appeal that the protested rate adversely affects the public interest. The administrative law judge shall not hold an evidentiary hearing on public interest but rather shall proceed with the evidentiary hearing to determine a rate consistent with the ratemaking mandates of the Texas Water Code, Chapters 11, 12, and 13.

(b) The effective period for the provisions issued pursuant to subsection (a) of this section shall expire upon the earlier of three years after the end of the test year period, or upon the seller and purchaser entering into a new written agreement for the sale of water or sewer service which supersedes the agreement which was the subject of the proceeding where the commission granted the petition or appeal and set a cost of service rate. The provisions shall be effective in proceedings pursuant to a new petition or appeal if the petition or appeal is filed before the date of expiration.

(c) For purposes of subsection (b) of this section, the "test year period" is the test year used by the commission in the proceeding where the commission granted the petition or appeal and set rates on a cost of service basis.

Adopted August 21, 1996

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§291.138. Filing of Rate Data.

(a) For purposes of comparing the rates charged in Texas by providers of water or sewer service for resale, the commission may require each provider of water or sewer service for resale to report the retail and wholesale rates it charges to purchasers.

(b) Within 30 days after receiving a written request from the executive director, a provider of water or sewer service for resale shall file a report with the commission. The report must provide the information prescribed in a form prepared by the commission.

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