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Item Number: 212

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FORE THE STATE OFF
FILING CLERK
OF

PETITION OF NORTH AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1, NORTHTOWN MUNICIPAL UTILITY DISTRICT, AND WELLS BRANCH MUNICIPAL UTILITY DISTRICT FROM THE RATEMAKING ACTIONS OF THE CITY OF AUSTIN AND REQUEST FOR INTERIM RATES IN WILLIAMSON AND TRAVIS COUNTIES	§ § § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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STAFF'S MOTION FOR EXTENSION OF THE PROCEDURAL SCHEDULE

I. BACKGROUND

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("Petitioners") and an appeal of the City's wholesale wastewater rates by North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, and Wells Branch Municipal Utility District pursuant to TEX. WATER CODE ANN. § 13.044(b). On January 9, 2015, the City filed its Motion for Certification of Issues and Motion to Abate Hearing. P.U.C. PROC. R. 22.78(a) states: "Unless otherwise specified by statute, by this chapter, or by order of the presiding officer, a responsive pleading, if made, shall be filed by a party within five working days after receipt of the pleading to which the response is made." Therefore this response is timely filed.

II. RESPONSE TO CITY'S PROPOSED CERTIFICATION OF ISSUES

The City's motion to certify five issues to the Commission fails to meet the standards for certification of issues. The standards are clearly stated in P.U.C. PROC. R. 22.127 which allows the presiding officer the discretion to certify the following types of issues:

- (1) the commission's interpretation of its rules and applicable statutes;
- (2) which rules or statutes are applicable to a proceeding; or
- (3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.¹

A careful reading of the Texas Water Code (TWC) and the PUC Procedural and Substantive Rules provides all the answers to the City's questions that refer to law and other issues are more appropriately interpreted as an appeal. The motion should be denied.

A. Proposed Certified Question No. 1.

The City's first proposed certified issue asks: *"Under what Chapter(s) of the Texas Water Code is SOAH's jurisdiction to hold a contested case on behalf of the PUC appropriate, where the Petitioners are municipal utility districts that have appealed water and wastewater rates set pursuant to long term contracts between Austin and Petitioners and where the PUC has not previously prescribed such rates?"*

The Texas Water Code is clear and unambiguous as to what chapters apply to appeals where the petitioners are municipal utility districts. TWC § 13.044 gives a district the right to "appeal the rates imposed by the municipality by filing a petition with the utility commission.

¹ P.U.C. PROC. R. 22.127(b).

The utility commission shall hear the appeal de novo and the municipality shall have the burden of proof to establish that the rates are just and reasonable.”² In order for the Commission to have jurisdiction under Section 13.044, the Petitioners must prove two elements. First, the Petitioners must show that their districts are located within the corporate limits or the extraterritorial jurisdiction of the municipality (here being the City); second, the contract consenting to the creation of the district must require the district to purchase water or sewer service from the municipality.³ If the presiding officer finds that both of these elements are satisfied, Section 13.044 authorizes a district to appeal the rates imposed by the municipality.

The Petitioners are the masters of their own complaint. They chose to appeal the City’s water and sewer rates pursuant to TWC § 13.044. By order on August 1, 2013, the State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) directed the parties to provide the court briefing concerning jurisdictional matters, which all the parties provided on August 9, 2013. On September 13, 2013, SOAH Order No. 3 found that Petitioners satisfied the jurisdictional requirements of TWC § 13.044(a).

In fact, in its reply brief on jurisdiction, the City states: “Austin does not dispute the Commission’s jurisdiction under TWC § 13.044, to consider Petitioners’ appeal de novo through an evidentiary hearing, wherein Austin has the burden of proving that its rates are just and reasonable, and pursuant to which the Commission may issue an order fixing the rates.”⁴ Yet the City is now asking for a certified question on a matter it explicitly agreed to over a year ago. The Texas Water Code is clear and unambiguous on jurisdiction in this matter and the City, by its own admission, did not dispute this matter being heard by the court pursuant to TWC § 13.044; therefore, Staff urges the ALJs to deny the City’s first proposed certified question.

B. Proposed Certified Question No. 2.

The City’s second proposed certified issue asks: “*It is [sic] necessary for the PUC to make a determination whether Austin’s challenged wholesale water and wastewater rates adversely affect the public interest in an evidentiary proceeding prior to the holding of a cost of service evidentiary hearing?*”

² TWC § 13.044(b).

³ TWC § 13.044(a).

⁴ City of Austin Reply Brief to the Parties’ Briefs on Jurisdictional Issues, (dated Aug. 23, 2013).

The Texas Water Code and PUC Substantive Rules provide clear guidance as to whether the PUC is required to make a public interest determination prior to a cost of service hearing in this matter. As discussed above, the ALJ found, and the City agreed, that the Commission has jurisdiction to hear the Petitioners' appeal pursuant to TWC § 13.044. Appeals pursuant to Section 13.044 do not require a public interest determination prior to holding a cost of service evidentiary hearing.

Subchapter I of P.U.C. Substantive Rules Chapter 24 sets the guidelines and procedural requirements concerning only:

- (1) a petition to review rates charged for the sale of water for resale filed pursuant to TWC, Chapter 12; or
- (2) an appeal pursuant to TWC, §13.043(f) (appeal by retail public utility concerning a decision by a provider of water or sewer service).⁵

P.U.C. SUBST. R. 24.131(b) states: "For a petition or appeal to review a rate that is charged pursuant to a written contract, the commission will forward the petition or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on public interest." This provision is in Subchapter I of P.U.C. Substantive Rules, Chapter 24. Therefore, this rule is only applicable to a petition to review rates charged for the sale of water for resale filed pursuant to TWC Chapter 12 or an appeal pursuant to TWC §13.043(f). As Petitioners' appeal is pursuant to TWC §13.044, it is clear that in the present matter a hearing on public interest is not required. SOAH Order No. 3, signed September 13, 2013, found that because the Petitioners' appeal is pursuant to TWC §13.044, there shall not be a hearing on public interest. One year and four months later, the City proposes a certified issue in an attempt to ostensibly appeal the ALJ's decision. The ALJs made the decision concerning a hearing on the public interest based on sound, unambiguous legal authority. Therefore, the City's second proposed certified question is moot, unnecessary, and should be denied.

C. Proposed Certified Question No. 3.

The City's third proposed certified question asks: "*Is interim rate relief appropriate for Petitioners in these appeals, and if so, under what rules of the PUC and following what conditions precedent to an award of such interim rates?*" SOAH Order No. 9, signed on May

⁵ P.U.C. SUBST. R. 24.128.

29, 2014, established interim water rates in this matter pursuant to TCEQ Rule 291.29(d).⁶ Over seven months later, the City now proposes certification of issue No. 3, which appears to be an attempt to have the Commission overrule the ALJ's decision that is supported by sound legal authority. P.U.C. SUBST. R. 24.29(d) states:

Interim rates may be established by the commission in those cases under the commission's original or appellate jurisdiction where the proposed increase in rates could result in an unreasonable economic hardship on the utility's customers, unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility.

As this matter is under the Commission's appellate jurisdiction, it is clear that the ALJ has authority to establish interim rates in this matter. This requested certified issue fails to qualify as a certified issue, and, although framed as a certification, can be more properly interpreted as an appeal. Therefore, the City's third proposed certified question should be denied.

D. Proposed Certified Question No. 4.

The City's fourth proposed certified issue asks: *"If the City of Austin has been directed to pay Petitioners interim rates during the handling of these dockets, thus far without a sound legal basis for doing so, is Austin entitled to an immediate refund from Petitioners of said unauthorized interim rates?"* It appears the City is questioning whether the ALJ's prior decision to establish interim rates was "without sound legal basis for doing so." There has been no determination by any authority that interim rates set by the ALJ were imposed without sound legal basis. This proposed certified question is ineligible for certification and does it fit within any of the categories for certified questions under the PUC's procedural rules.⁷ As stated above, SOAH Order No. 9, signed on May 29, 2014, established interim water rates in this matter. If the City disagreed with the order, the appropriate remedy is to have appealed Order No. 9, not wait until January 2015 and couch the City's disagreement in terms of a certified issue. It seeks a decision by the Commission rather than an interpretation of its rules and statutes, is speculative, and appears to be an appeal of an existing order. Proposed Certified Issue No. 4 should be denied.

⁶ Currently P.U.C. SUBST. R. 24.29(d).

⁷ See P.U.C. PROC. R. 22.127(b).

E. Proposed Certified Question No. 5.

The City's fifth proposed certified question asks: "*What is the appropriate role of the PUC Staff in these appeals under TWC § 13.011(b), EMPLOYEES (of the Public Utility Commission); and, what cost of service documentation are municipalities required to present for evaluation by PUC Staff and development of a PUC Staff position?*"

This question appears to have two inquiries: the first what is Staff's role in this proceeding; and second asking what kind of documentation the City is required to submit for Staff's evaluation and development of Staff's position. The role of Commission Staff in this proceeding is clear: Staff represents the public interest.⁸ As such, it is improper to propose a certified question asking the Commission to instruct Commission Staff to enlighten a party on what kind of cost of service documentation it should submit to meet its burden. This is not Staff's burden. The City is well-represented and it is wholly within its province to determine what is necessary to prove its case. A request by the City to certify an issue on how a party must evaluate evidence and produce its own testimony is completely inappropriate.

In its motion for certification of issues, City opines that: "the Commission should decide, as a matter of agency policy the role of its staff in assisting the seller in preparing a showing which satisfies the requirements of the Commission, and allowed [sic] the PUC Staff to fulfill its role of making recommendations to the ALJs."

While it is certainly unique that the City is choosing to direct the Commission what it should consider as agency policy and the role of its Staff, it is misapplied as a certified issue.⁹ Staff is never aligned with any party¹⁰ and it is entirely improper to ask Staff to guide and instruct the City, or any party, on how to produce its cost of service analysis or how to meet its statutory burden of proof. Staff exercises independent judgment in this and all cases, and its efforts to do so do not form the basis for a certified question. The City's question fails to meet any standard for certification and should be denied.

⁸ P.U.C. PROC. 22.102(a)(4).

⁹ Commission Staff is accustomed to criticism when its position departs from that of a party in a contested case.

¹⁰ P.U.C. PROC. 22.105 ("Parties, **except for the Office of Public Utility Counsel and the commission staff representing the public interest**, may be aligned for the purposes of participating in a hearing or portions of a hearing if the parties have the same positions on issues of fact or law.")

III. STAFF'S RESPONSE TO CITY'S REQUEST FOR A PREHEARING CONFERENCE

The City has requested a prehearing conference in which to address, among other things, its motion for certified issues. These conferences are time-consuming for all parties. Staff believes the motion for certified issues and the responses can speak for themselves and further oral argument, at least on these issues as presented, is not necessary.

IV. STAFF'S RESPONSE TO CITY'S MOTION TO ABATE AND STAFF MOTION FOR EXTENSION OF THE PROCEDURAL SCHEDULE

This case was filed on April 12, 2013 and is one year and nine months old. It has been actively litigated, testimony has been filed, rebuttal is scheduled and the hearing on the merits is less than four weeks away. An abatement is not warranted; however, because of the transition from TCEQ to the PUC, the introduction and assignment of new staff to cover this matter; and, in order to allow additional time for the parties to develop their case and explore the possibility of settlement, Staff recommends an extension of the procedural schedule and postponement of the hearing on the merits to a mutually agreeable time in the near future.

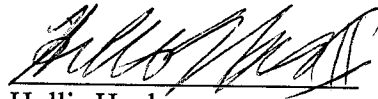
V. CONCLUSION

Based on the foregoing, Staff respectfully requests that the City's Motion for Certification of Issues and Motion for Prehearing Conference be denied. Staff also respectfully requests an extension of the procedural schedule and postponement of the hearing on the merits.

Date: January 16, 2015

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 16th day of January, 2015 in accordance with P.U.C. Procedural Rule 22.74.



Hollis Henley, Attorney