



Control Number: 42867



Item Number: 10

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014.

SOAH DOCKET NO. 582-13-4617
TCEQ DOCKET NO. 2013-0865-UCR

**PETITION OF NORTH AUSTIN
MUNICIPAL UTILITY DISTRICT
NO. 1, NORTHTOWN MUNICIPAL
UTILITY DISTRICT, TRAVIS COUNTY
WATER CONTROL AND
IMPROVEMENT DISTRICT NO. 10
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

SOAH DOCKET NO. 582-14-3145
TCEQ DOCKET NO. 2014-0489-UCR

**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

ORDER NO. 9

**MEMORIALIZING FIRST JOINT PREHEARING CONFERENCE; CONSOLIDATING
CASES; ADOPTING PREHEARING AND HEARING SCHEDULE; SETTING INTERIM
WATER RATES; AND GRANTING CITY'S MOTION TO COMPEL**

On May 15, 2014, the undersigned Administrative Law Judge (ALJ) convened the first joint prehearing conference (PHC) in the above-captioned dockets at the hearings facility of the State Office of Administrative Hearings (SOAH) in Austin, Texas. The following parties made appearances in both cases, with the exception of Travis County Water Control and Improvement District No. 10 (Travis WCID No. 10), which is not a party to SOAH Docket No. 582-14-3145:

PARTY	REPRESENTATIVE
North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement District No. 10, and Wells Branch Municipal Utility District (Petitioners)	Randall B. Wilburn, Attorney John J. Carlton, Attorney
The City of Austin (City)	Gwendolyn Hill Webb, Attorney Stephen P. Webb, Attorney Clark Cornwell, Assistant City Attorney
The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission)	Ron Olson, Staff Attorney Hollis Henley, Staff Attorney
Office of Public Interest Counsel (OPIC)	Garrett Arthur, Assistant Public Interest Counsel

The ALJ admitted jurisdictional documents offered by the ED: ED-A (Petition) and ED-B (Notice of Public Hearing), and admitted all of the above as parties (except Travis WCID No. 10) in SOAH Docket No. 582-14-3145.

A. Jurisdictional Basis for Wastewater Case

SOAH Docket No. 582-13-4617 (Water Case) deals with Petitioners' appeal of the City's water rates. SOAH Docket No. 582-14-3145 (Wastewater Case) is an appeal by Petitioners of the City's wastewater rates.¹ During the PHC, the ALJ took jurisdiction over the Wastewater Case. Petitioners filed the Wastewater Case under Texas Water Code § 13.044(b) (Section 13.044(b)). In Order No. 3, the ALJ discussed at length the alternative bases for jurisdiction that Petitioners presented in the Water Case, and determined that (1) Petitioners met the jurisdictional requirements of Section 13.044(a) and (2) the hearing on the merits would be a cost of service hearing under Section 13.044(b). The discussion in Order No. 3 is incorporated by reference, and the ALJ makes the same findings with respect to the Wastewater Case.

¹ For convenience, this Order will use the term "Petitioners," with the understanding that when used in reference to the Wastewater Case, Travis WCID No. 10 is not a Petitioner.

B. Consolidation of Cases for Administrative Hearing

The City represented, in a motion for consolidation filed on May 8, 2014, that the City's "practices, policies, and procedures for the adoption of wholesale water and wholesale sewer rates are virtually the same" and that the same witnesses are expected to testify in both cases. A consolidated proceeding would, in the City's view, preserve the resources of all parties and reduce rate case expenses. Petitioners, the ED, and OPIC agreed to or supported the motion.

The ALJ determined that the cases appeared appropriate for consolidation, but noted the parties' disagreement as to which fiscal years are at issue in the Wastewater Case. The City argued that Petitioners filed the Wastewater Case on December 12, 2013, after what the City said is a 90-day deadline for appeals, and thus Petitioners can appeal only the rate increase(s) that will apply in FY 2014.² Petitioners countered that the Wastewater Case was brought under Section 13.044, which they assert does not set a time limit on appeals. The ED stated that the Wastewater Case appeal was accepted by the TCEQ in December 2013 as administratively complete, and agreed that Section 13.044 does not set a time limit for filing appeals.

After conferring, the parties agreed that they will use FY 2013 as the reference year in a consolidated administrative hearing. However, the City will preserve for appeal its argument that jurisdiction in the Wastewater Case lies only for the rate increase in FY 2014.³ With that understanding, the ALJ consolidated the cases, as reflected in Section F of this Order.

C. Prehearing and Hearing Schedule for Consolidated Hearing

The parties proposed, and the ALJ approved, a consolidated hearing on the merits to convene from **February 12 to 25, 2015**. The approved prehearing deadlines are reflected below in Section F of

² On September 10, 2012, the City approved an increase in wastewater rates. The first phase of the increased rates took effect on February 1, 2013. The second phase took effect on October 1, 2013 (in FY 2014).

³ On May 19, 2014, the City filed a Post-Preliminary Hearing Brief (Post-PHC Brief) in which it argued, *inter alia*, that Petitioners waived their right to contest FY 2013 wastewater rates.

this Order. Unless otherwise ordered, the hearing will convene at SOAH's hearings facility in Austin, Texas.

D. Interim Water Rates

During the PHC, the ALJ verbally ordered that interim rates in the Water Case would be set at the rates in effect prior to the first phase of the rate increase (in February 2013), and that interim rates would not be set in the Wastewater Case. The City argued that interim rates cannot be set without an evidentiary record that demonstrates economic hardship to the utility, and that a motion for interim rates first must be made by the ED. The City also noted that in Order No. 3, the ALJ determined that interim rates would not be set at that time for the Water Case.

As explained during the PHC, the ALJ applied 30 Texas Administrative Code (TAC) § 291.29(d) (Rule 291.29(d)). Rule 291.29 presents several distinct grounds for establishing interim rates. Under Rule 291.29(a), the commission or judge may set interim rates "on a motion by the executive director or by the appellant under Texas Water Code, § 13.043(a), (b), or (f)[.]"⁴ Alternatively, Rule 291.29(b) permits the commission or judge to set interim rates at "any time after the filing of a statement of intent to change rates under Texas Water Code, § 13.187" upon a petitioner by the executive director, or, once a hearing is convened, on the petition of any party.⁵

In this case, the ALJ is applying Rule 291.29(d). That provision states:

Interim rates may be established by the commission or judge 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.⁶

⁴ 30 TAC § 291.29(a).

⁵ 30 TAC § 291.29(b)

⁶ 30 TAC § 291.29(d)

In making a determination under Rule 291.29(d), the commission or judge “may limit its consideration of the matter to oral arguments of the affected parties[.]”⁷

Rule 291.29(d) does not require a petition by the ED before the Commission or ALJ sets interim rates. Further, as spelled out in Rule 291.29(e), no evidentiary record is required. Although Rule 291.29(e) permits the judge to limit consideration of interim rates to “oral arguments,” the ALJ has heard oral arguments as well as considered two rounds of written briefing by the parties.

The Commission or ALJ is not required by Rule 291.29(d) to detail an evidentiary basis for a decision to set interim rates. This is logical, given that the decision may be based on oral arguments without an evidentiary record. However, the ALJ notes that time is one element (among many) that is relevant to finding unreasonable economic hardship. Order No. 3, which initially denied Petitioners’ request for interim water rates, was issued on September 13, 2013, shortly after this case was docketed at SOAH. The hearing in this case has now been delayed to early 2015, and—allowing time for preparation of a hearing transcript, post-hearing briefs, and issuance of a Proposal for Decision—a decision likely will not be rendered by the Commission until mid-2015 at the earliest. That is one, but not the sole or necessarily most important, consideration.

As noted previously, the City approved a water rate increase in September 2012, and the first phase of the rate increase took effect in February 2013, the second phase in October 2013, and a third phase is slated for October 2014. The parties questioned during the PHC whether the ALJ’s decision to set interim water rates would have any effect on the rate increases in the second and third phases. Petitioners, in their April 11, 2014 Amended Motion to Establish Interim Rates, argued that none of the rate increases should be permitted to go into effect without the TCEQ and/or Public Utility Commission of Texas (PUC) having an opportunity to review them.⁸

⁷ 30 TAC § 291.29(e)

⁸ On September 1, 2014, jurisdiction over water and wastewater rate cases will be transferred from the TCEQ to the PUC. For dates after September 1, 2014, any reference to “Commission” in this Order is to the PUC.

The ALJ stated during the PHC that the only rate increase being addressed was the February 2013 first phase. The ALJ's ruling was based on the fact that Petitioners in the Water Case filed an appeal immediately after the first rate increase, and there has not been an appeal filed specifically with respect to the second rate increase (October 2013). The third rate increase (October 2014) has yet to take effect.

Upon reviewing the filings, however, the ALJ notes that Petitioners appealed the water rate increase as a whole, as approved by the City in September 2012. If the City had implemented the rate in one step rather than in phases, Petitioners' appeal obviously would apply to the entire rate. The fact that the rate increase goes into effect in three phases does not require three separate appeals. Petitioners challenged the basis for the entire water ratemaking decision, not just one phase.

Accordingly, during the pendency of this consolidated proceeding, and until otherwise ordered or until a final decision is issued by the Commission, interim water rates shall be set at the rate in effect prior to the first phase of the rate increase, as specified in Section F below. No refund is ordered for any amount charged or collected prior to May 29, 2014, the effective date of this Order. Any amounts over-collected prior to May 29, 2014, or under-collected after May 29, 2014—as the case may be—will be reconciled when a final decision is made by the Commission.

E. City's Motion to Compel⁹

On March 3, 2014, the City served its First Request for Production of Documents and First Set of Interrogatories on Petitioners in the Water Case. These requests seek information concerning budgets, revenue forecasts, water rate ordinances, details of operating and capital expenses, water rate studies, water conservation program activities, financial reserves, and the like.

On April 2, 2014, Petitioners objected that the City sought information that was neither relevant nor calculated to lead to the discovery of admissible evidence. Petitioners sought a protective order. The City filed its Motion to Compel, explaining that, in its effort to demonstrate that its rates are "just

⁹ The discussion in this section is summarized from the parties' written filings as well as oral argument at the PHC

and reasonable” rather than “excessive,” it is entitled to discover policies and practices that are standard in the industry among water utilities. Petitioners responded that they are retail utilities and their costs, rates, and budgeting methodology for provision of water on a retail basis is irrelevant to whether the City’s wholesale water rates are just and reasonable. Petitioners added that the TCEQ does not have jurisdiction over retail rates, and only Petitioners’ customers can object to Petitioners’ rates in any event.

The ALJ finds that the City’s requests are potentially relevant to the ultimate issue of what is a “just and reasonable” rate, particularly since that standard is not explicitly defined by the applicable statutes or rules. Even if Petitioners’ budgeting, for example, is for retail services provided to its customers, the method and process of budgeting may yield information relevant to what is a “just and reasonable” method of developing a budget by a water utility. It has not been shown to be overly burdensome to Petitioners to provide the requested types of information.

The ALJ notes that the parties dispute how many questions are actually contained within the City’s interrogatories and whether the City has propounded compound requests that ultimately exceed the permitted number of interrogatories. The ALJ trusts that the parties will strive in good faith to resolve that matter so that Petitioners can file discovery responses promptly. With that proviso, the City’s Motion to Compel answers to its First Request for Production of Documents and First Set of Interrogatories is **GRANTED**, and Petitioners’ motion for a protective order is **DENIED**.

F. Orders

It is hereby **ORDERED** that:

1. SOAH Docket Nos. 582-13-4617 and 582-14-3145 are **CONSOLIDATED** as a single administrative proceeding.
2. The following prehearing deadlines shall govern in this consolidated case:

DATE	EVENT/ACTION
November 8, 2013	Discovery begins; parties file disclosures pursuant to Tex. R. Civ. P. 194

July 15, 2014 ¹⁰	City files Rate Filing Package and Direct Case
September 6, 2014	A "Quiet Period" ¹¹ begins (no discovery to be propounded on Petitioners/OPUC ¹² no answers required)
October 6, 2014	Petitioners/OPUC file Direct Cases
November 12, 2014	A "Quiet Period" begins (no discovery to be propounded on the ED, no answers required)
December 12, 2014	ED files Direct Case
December 22, 2014	Objections to Direct Cases must be filed
December 30, 2014	Close of Discovery
January 5, 2015	Responses to Objections to Direct Cases must be filed
January 30, 2015	City files Rebuttal Case
February 6, 2015	Objections to City's Rebuttal Case must be filed
February 10, 2015	Responses to Objections to City's Rebuttal Case are due; Prehearing Conference to be held
February 12, 2015 through February 25, 2015	Hearing on the merits: beginning at 10:00 a.m. the first day and at 9:00 a.m. on subsequent days.

3. Interim water rates shall be set at the rates in effect prior to the February 2013 first phase of the City's rate increase,¹³ as follows. These rates shall be implemented beginning May 29, 2014, the effective date of this Order. No refund is ordered at this time for any amounts collected prior to May 29, 2014. No interim rates are set in the Wastewater Case.

PETITIONER	MONTHLY FIXED RATE	VOLUME RATE
Wells Branch MUD	\$744.00	\$3.46
Travis County WCID No. 10	\$690.00	\$3.97
Northtown MUD	\$1,050.00	\$3.57
North Austin MUD No. 1	\$1,320.00	\$3.71

¹⁰ By agreement of the parties, the 30-day deadline in 1 Texas Administrative Code § 155.251(c)(1) shall not apply in this case. The 20-day response time in 1 Texas Administrative Code § 155.251(c)(3) shall apply

¹¹ The ALJ has memorialized the "Quiet Period" per her understanding at the PHC. The parties should advise the ALJ if the Quiet Period is to apply to parties other than those preparing to file a direct case

¹² It is anticipated that after jurisdiction over this case is transferred from the TCEQ to the PUC, the Office of Public Utility Council (OPUC) will take the place of OPIC

¹³ These rates were obtained from the Petitioners' Amended Motion to Establish Interim Rates. If there is an error in these numbers, the parties should notify the ALJ immediately

4. As stated above, the City's Motion to Compel responses to its First Request for Production of Documents and First Set of Interrogatories served on Petitioners in the Water Case is **GRANTED**, and Petitioners' motion for a protective order is **DENIED**. The parties are directed to confer and make good faith efforts to resolve any disputes as to the number of interrogatories at issue.

A party with procedural questions may contact the ALJ's assistant, Melissa Ethridge. Ms. Ethridge may be reached at 512.463.0203 or melissa.ethridge@soah.texas.gov.

SIGNED May 29, 2014.



PRATIBHA J. SHENOY
ADMINISTRATIVE LAW JUDGE
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SOAH DOCKET NUMBER: 582-13-4617
REFERRING AGENCY CASE: 2013-0865-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
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