

Control Number: 43943



Item Number: 42

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**SOAH DOCKET NO. 582-05-1005
TCEQ DOCKET NO. 2004-1384-UCR**

**PETITION OF BEXAR METROPOLITAN §
WATER DISTRICT TO COMPEL RAW §
WATER COMMITMENT FROM §
GUADALUPE-BLANCO RIVER §
AUTHORITY §**

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

Bexar Metropolitan Water District ("BMWD") filed a petition with the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), seeking to compel Guadalupe-Blanco River Authority ("GBRA") to commit a supply of raw water to BMWD's use. BMWD subsequently sought to withdraw the petition without prejudice. Because BMWD has reimbursed expenses incurred by other parties in this hearing process, to the extent provided by 30 TEX. ADMIN. CODE ("TAC") § 80.25(e)(2), this Proposal for Decision recommends granting BMWD's request for withdrawal without prejudice.

II. PROCEDURAL HISTORY

BMWD filed its completed petition with the Commission on January 16, 2004. On October 11, 2004, the Commission referred the matter to the State Office of Administrative Hearings ("SOAH") for a contested-case hearing.

A preliminary hearing on the petition was convened on January 11, 2005, before Mike Rogan, an Administrative Law Judge ("ALJ") with SOAH. The following were named as parties: BMWD, TCEQ's Executive Director, TCEQ's Office of Public Interest Counsel ("OPIC"), and GBRA.

The parties agreed to mediation and a procedural schedule, to culminate in an evidentiary hearing in October of 2005. The parties subsequently sought to abate the initial schedule and entered a lengthy period of argument and briefing on the issue of the Commission's jurisdiction over

BMWWD's petition. On April 3, 2006, BMWWD filed a motion seeking to withdraw its petition. GBRA immediately responded that it had no objection to the withdrawal, so long as it was effected *with prejudice* to refiling. On April 14, 2006, BMWWD submitted pleadings clarifying that it sought to withdraw the petition *without* prejudice. The ALJ then issued an order directing the parties to confer and determine which of GBRA's expenses BMWWD would need to reimburse in order to qualify for dismissal of this action without prejudice, under 30 TAC § 80.25(e)(2).

GBRA identified its reimbursable expenses in this case as \$2,396.14, including \$903.89 for "computer legal research." BMWWD acknowledged that GBRA had incurred these expenses but contended that the portion for legal research could not be recovered under 30 TAC § 80.25(e)(2), because it constituted an element of attorney's fees. After according the parties an opportunity to submit further argument and authorities on this issue, the ALJ issued an order on June 27, 2006, concluding that expenses for legal research are encompassed within attorney's fees and therefore directing BMWWD to reimburse GBRA \$1,492.25, in order to qualify for dismissal of its petition without prejudice under 30 TAC § 80.25(e)(2).

On July 5, 2006, BMWWD submitted to the ALJ correspondence and a copy of a check, indicating that BMWWD had tendered payment of \$1,492.25 to GBRA.

III. DISCUSSION

Under 30 TAC § 80.25, an applicant may withdraw an application at any time before issuance of a proposal for decision in the case. However, such withdrawal may occur *without* prejudice to refiling only under circumstances described in 30 TAC § 80.25(e), as follows:

An applicant is entitled to an order dismissing an application without prejudice if:

- (1) the parties, or the applicant, executive director, and public interest counsel if no parties have been named, agree in writing;

- (2) the applicant reimburses the other parties all expenses, not including attorney's fees, that the other parties have incurred in the permitting process for the subject application; or
- (3) the commission authorizes the dismissal of the application without prejudice.

In this case, the BMWD has sought to satisfy 30 TAC § 80.25(e)(2) by reimbursing all proper case-related expenses claimed by other parties. Such reimbursable expenses do not include "computer legal research," BMWD argued, because Texas case law defines legal research as an incidental aspect of services covered by attorney's fees, which are explicitly not recoverable under 30 TAC § 80.25(e)(2). In support of that principle, the district cited *Flint & Associates v. Intercontinental Pipe & Steel, Inc.*,¹ which declared that various disputed expenses (including photocopy, travel, long-distance, postage, and messenger expenses) "made up the overhead of a law practice, are considered in hourly billing rates and reasonable fees, and may be recovered as a component of such fees." Conversely, the decision stated that such expenses could not be considered "costs" – as distinguished from attorney's fees – under § 38.001 of the Texas Civil Practice and Remedies Code (which generally defines circumstances in which such fees or costs are recoverable in judicial actions).

BMWD concluded that legal research is clearly a regular item of an attorney's business overhead, which should only be recoverable through attorney's fees. Drawing an analogy, BMWD urged that "even GBRA" would regard the cost of maintaining a law firm's research materials in paper format (*i.e.*, its law library) as an element of such overhead – and the conclusion should be no different for research materials in an electronic format.

GBRA argued that the Commission already has set precedents approving the recovery of computer costs for legal research as a prerequisite for obtaining dismissal without prejudice – most

¹ 739 S.W. 2d 622 (Tex. App. - Dallas 1987, writ denied).

notably in a decision last year relating to a water-rights application by Canyon Regional Water Authority ("CRWA").²

Although the first ALJ in the CRWA case apparently did find expenses for computer research to be reimbursable under 30 TAC § 80.25(e)(2), neither that finding nor its rationale was explicitly reflected in a written order nor subsequently disputed by the parties. The Proposal for Decision in that case thus presented the TCEQ Commissioners with no controversy relating to that specific issue. The undersigned ALJ is unable to locate any statute, rule, agency guideline, or decision that defines those types of expenses that are (or are not) reimbursable under 30 TAC § 80.25(e)(2).

In the ALJ's view, however, any type of legal research (when conducted by or on behalf of an attorney, at least) is such an integral and time-consuming part of an attorney's services that allowing its reimbursement would substantially vitiate the exclusion of attorney's fees in 30 TAC § 80.25(e)(2). The services for which an attorney charges fees, after all, consist largely of evaluating often complex bodies of law and of articulating how specific enactments or decisions within such bodies should affect the outcome of specific disputes. Doing this typically requires focused, discriminating legal research. While labeling an activity as "computer legal research" may make it sound like something of an independent commodity, any useful research is actually an interaction on the part of the attorney—that is, the researcher's judgment and expertise both direct and are informed by the research process. Such judgment and expertise are also, ultimately, the principal basis for an attorney's fees.

The *Flint & Associates* decision cited by BMWD provides solid support for the district's position in this dispute. That decision, in turn, is based in part upon the Texas Supreme Court ruling in *Hammonds v. Hammonds*³, which stated that "the ordinary expenses incurred by a party in

² *Application of Canyon Regional Water Authority to Amend Certificate of Adjudication No. 18-3834*; TCEQ Docket No. 2003-1067-WR; SOAH Dkt. No. 582-04-4678.

³ 313 S.W. 2d 603 (Tex. 1958).

prosecuting or defending suit cannot be recovered either as damages or by way of court costs in the absence of statutory provisions or usages of equity.” Moreover, the expenses that the *Hammonds* decision characterized as “ordinary” litigation expenses – *i.e.*, the purchase of a replevy bond – were much less ordinary or routine aspects of an attorney’s overhead than are legal research expenses. Other cases bearing on the issue include *Shenandoah Associates v. J&K Properties, Inc.*⁴ – which reiterated the general Texas rule that “expenses in preparation for trial” are not recoverable – and *Allen v. Crabtree*⁵ – which notes that the Practice and Remedies Code and the Texas Rules of Civil Procedure generally specify those items that are recoverable as costs.

The ALJ concludes that under the circumstances of this case (where legal research has not been shown to be anything other than normal attorney preparation for litigation), “computer legal research” represents an element of expense encompassed within attorney’s fees. It therefore is not reimbursable under 30 TAC § 80.25(e)(2).

In this case, then, BMWD has satisfied 30 TAC § 80.25(e)(2) by reimbursing all proper case-related expenses that have been claimed by other parties. Therefore, by rule, BMWD is “entitled” to an order dismissing its application without prejudice. The language of the rule thus appears to mandate such dismissal in these circumstances, leaving the ALJ and the Commission without discretion to act otherwise. Nonetheless, 30 TAC § 80.25(d) requires that a dismissal under 30 TAC § 80.25(e)(2) be referred for final action to the Commissioners, rather than to the Executive Director,⁶ and the ALJ has submitted this Proposal for Decision on that basis.

⁴ 741 S.W. 2d 470 (Tex. App. - Dallas 1987, writ den.).

⁵ 936 S.W. 2d 6 (Tex. App. - Texarkana 1996, no writ).

⁶ 30 TAC § 80.25(d) states, “If neither subsection (b) or (c) of this section apply, the judge will forward the application, the request, and a recommendation on the request to the commission.” Subsection (b) relates to dismissals *with* prejudice. Subsection (c) applies, in pertinent part, if the parties agree in writing to the withdrawal of the application without prejudice.

IV. RECOMMENDATION

Since BMWD has reimbursed the expenses incurred by other parties in this hearing process, to the extent provided by 30 TAC § 80.25(e)(2), it should be permitted to withdraw its pending petition in this docket without prejudice to refiling. The ALJ respectfully recommends, therefore, that the Commission issue in this proceeding an order substantially reflecting those terms contained in the proposed order attached to this Proposal for Decision.

SIGNED July 18, 2006.



MIKE ROGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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STYLE/CASE: BEXAR METROPLITIAN WATER DISTRICT

SOAH DOCKET NUMBER: 582-05-1005

REFERRING AGENCY CASE: 2004-1384-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ MIKE ROGAN**

REPRESENTATIVE / ADDRESS

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HAZEN & TERRILL

May 25 2005
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P. 002/002

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Via Facsimile: (512) 475-4994

The Honorable Mike Rogan
Administrative Law Judge
State Office of Administrative Hearings
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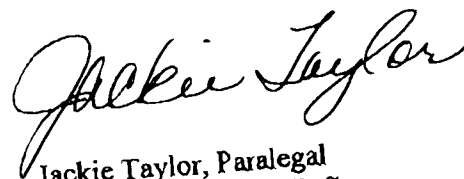
Re: TCEQ Docket No. 2004-1384-UCR; SOAH Docket No. 582-05-1005; In re Petition
of Bexar Metropolitan Water District to Compel Raw Water Commitment from
Guadalupe-Blanco River Authority

Dear Judge Rogan:

Please be advised that Paul M. Terrill, III, counsel for Bexar Metropolitan Water District,
will be on vacation from June 10, 2005 through June 25, 2005. We respectfully request that no
hearings be set during this time frame.

Thank you for your courtesies in this matter.

Sincerely,



Jackie Taylor, Paralegal
HAZEN & TERRILL, P.C.

/jat

cc: Docket Clerk *Via fax to 239-3311*
Todd Galiga *Via fax to 239-0606*
Scott Humphrey *Via fax to 239-6377*
Molly Cagle *Via fax to 236-3280*
Roger Nevola *Via fax to 499-0575*

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See attached vacation letter from Paul M. Terrill, III.			
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Via Facsimile: (512) 475-4994

The Honorable Mike Rogan
Administrative Law Judge
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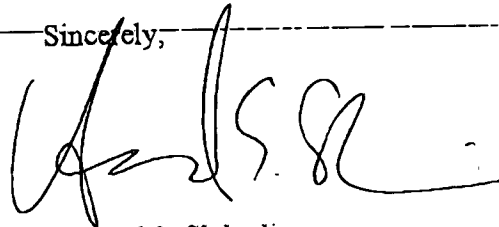
Re. TCEQ Docket No. 2004-1384-UCR; SOAH Docket No. 582-05-1005; In re Petition
of Bexar Metropolitan Water District to Compel Raw Water Commitment from
Guadalupe-Blanco River Authority

Dear Judge Rogan.

In response to Order No. 8, please be advised that Petitioner Bexar Metropolitan Water District ("BexarMet") and Respondent Guadalupe-Blanco River Authority ("GBRA") are in continuing discussions regarding the amount of reimbursable expenses claimed by GBRA under 30 TEX. ADMIN. CODE § 80.25(e)(2). I anticipate that the parties will conclude those discussions by June 2, 2006. The parties respectfully request the opportunity to continue their discussions until that time, and advise the Court on June 2, 2006 whether an agreement regarding those expenses has been reached. If no agreement has been reached by that time, BexarMet will propose to the Court a procedural mechanism that would enable the ALJ to make an efficient determination of reimbursable expenses, as required by Order No. 8.

Thank you for your consideration in this matter.

Sincerely,



Howard S. Slobodin
HAZEN & TERRILL, P.C.

From: 5124749888

May 23 2006 16:59

P.03

P C - 004

2006/MAY/23/TUE 04:53 PM HAZEN&TERRILL

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The Honorable Mike Rogan
Administrative Law Judge
May 23, 2006
Page 2

cc: Docket Clerk *Via fax to 239-3311*
Todd Galiga *Via fax to 239-0606*
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Molly Cagle *Via fax to 236-3280*
Roger Nevola *Via fax to 499-0575*

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May 23 2006 16:59

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P.04

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The Honorable Mike Rogan
Administrative Law Judge
May 23, 2006
Page 3

bcc: Gil Olivares (gilivares@bexanet.org)
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See attached May 23, 2006 correspondence from Howard Slobodin.			
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