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SOAH DOCKET NO. 473-15-2671.WS
PUC DOCKET NO. 44463

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PUBLIC UTILITY COMMISSION
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PETITION OF BLUEBERRY HILLS
WATER WORKS, LLC, APPEALING
FROM THE DECISION OF THE CITY
OF BEEVILLE TO CHANGE
WHOLESALE WATER RATES

§ BEFORE THE STATE OFFICE
§ OF
§ ADMINISTRATIVE HEARINGS
§

COMMISSION STAFF'S RESPONSE TO THE PLEA IN ABATEMENT AND THE
MOTION FOR INTERIM RATES

COMES NOW the Staff of the Public Utility Commission of Texas, representing the public interest and files this Response to the Plea in Abatement and the Motion for Interim Rates.

I. Background

On February 18, 2015, Blueberry Hills Water Works, LLC (Blueberry) filed a petition appealing the City of Beeville's (Beeville) wholesale water rate and requesting interim water rates (Petition) pursuant to Texas Water Code § 13.043. The Petition challenges Beeville's decision affecting the amount to be paid for water service that was to be effective on January 1, 2015. The Commission has jurisdiction pursuant to Texas Water Code § 13.043.

On March 3, 2015, the Public Utility Commission of Texas referred this docket to the State Office of Administrative Hearings.

On March 31, 2015, the Beeville filed a Plea in Abatement. On April 10, 2015, Blueberry filed a response to the Plea in Abatement and a more detailed Motion for Interim Rates.

II. Response to Plea in Abatement

Beeville's Plea in abatement rests on the contention that the parties disagree on whether the wholesale rate is pursuant to contract. Under 16 T.A.C. § 24.131(d), "If the buyer and seller do not agree that the protested rate is 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." Beeville contends that the rate was set pursuant to a written contract because the contract contains an open price term where it

provides that the price “shall be \$2.76 per 1,000 gallons as set by City of Beeville Ordinance and as amended from time to time.” Blueberry cites a Texas Court of Appeals case in support of its claim that what Beeville claims is an open price term is not.

Commission Staff (Staff) submits that the parties dispute whether the rate is set by contract. Therefore, the case should be abated pursuant to 16 T.A.C. § 24.131(d).

II. Response to Motion for Interim Rates

If the Plea in Abatement is granted, SOAH still has the power to set interim rates.¹ 16 T.A.C. § 24.29(d) provides that interim rates can be established 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 unreasonable economic hardship on the utility.”

Staff does not have access to information that would confirm the allegations of economic hardship, and therefore cannot speak to that portion of the test. Staff does, however, have input on the floor for the range of interim rates SOAH could order. 16 T.A.C. § 24.29(e)(1) provides that interim rates can be set “not lower than the authorized rates prior to the proposed increase, nor higher than the requested rates.” The only evidence of a prior authorized rate is the contract that shows the prior rate to be \$2.76 per 1000 gallons. Beeville has prefiled business records revealing that it may have been charging \$3.17 per 1000 gallons before the appealed rate was put in place. However, proof that the rate was being charged does not prove that it was an “authorized” rate. The contract authorizes rates “as set by City of Beeville Ordinance and as amended from time to time.” There is no evidence that the rate of \$3.17 per 1000 was authorized by an amended Beeville ordinance.

¹ Attached hereto is a Commission Order issued on March 26, 2015, which concludes that abatement does not preclude the setting of an interim rate.

III. Conclusion

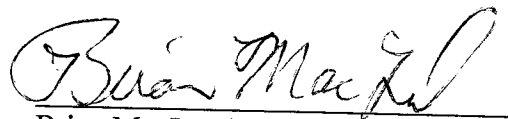
Because the parties disagree on whether the protested rate is set pursuant to contract, the case should be abated until a court of proper jurisdiction can decide the contractual dispute. However, that does not preclude the ordering of an interim rate. Considering the information on file in this case at this time, if an interim rate is set, Staff's position is that it should be set no lower than \$2.76 per 1000 gallons.

Dated: April 14, 2015

Respectfully Submitted,

Margaret Uhlig Pemberton
Division Director
Legal Division

Shelah J. Cisneros
Managing Attorney
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A handwritten signature in cursive script, appearing to read "Brian MacLeod", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on April 14, 2015, in accordance with P.U.C. Procedural Rule 22.74.


Brian MacLeod

PUC DOCKET NO. 43674
SOAH DOCKET NO. 473-15-1149.WS

2015 MAR 26 AM 11:19
PUBLIC UTILITY COMMISSION
FILED SECTION

PETITION OF THE CITY OF DALLAS
FOR REVIEW OF A DECISION BY
THE SABINE RIVER AUTHORITY TO
SET WATER RATES (LAKE FORK
RESERVOIR)

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§

PUBLIC UTILITY COMMISSION
OF TEXAS

ORDER ON APPEAL OF ORDER NO. 5

This order addresses the city of Dallas's appeal of the State Office of Administrative Hearings' administrative law judge's decision to grant the Sabine River Authority's motion to abate this docket.¹ The target of Dallas's appeal, however, is that the judge did not establish interim rates before abating this docket. It was unclear from the judge's order whether he believed that the Commission's rule required an immediate abatement upon receiving the motion and thus precluded him from considering whether to set interim rates in this matter. In this order, the Commission determines that the Commission and, therefore the judge, has authority to set interim rates before abating a docket as required by 16 Tex. Admin. Code (TAC) § 24.131(d). As the judge's rationale for not addressing interim rates is not clear, the Commission remands this matter to SOAH to allow the judge an opportunity to consider whether interim rates should be set in this docket.

I. Background

Dallas purchases from the Sabine River Authority water out of the Lake Fork Reservoir pursuant to a written agreement entered into in 1981.² When the initial term of the agreement ended on November 1, 2014, the agreement was automatically renewed for an additional 40-year

¹ SOAH Order No. 5 (Jan. 22, 2015).

² Original Petition for Review and Request for Interim Rates at 1 (Oct. 30, 2014) (Petition); Sabine River Authority's Response to City of Dallas's Original Petition and Request for Interim Rates at 5 (Dec. 2, 2014) (Petition Response).

term.³ The agreement provides that compensation for the renewal term, in part, is to be determined by mutual agreement between the river authority and Dallas, taking into account “such price as is prevailing in the general area at the time for like contract sales of water of similar quality, quantity and contract period.”⁴ The parties were unable to agree on the amount of compensation the Sabine River Authority would receive under the agreement’s renewal term, and on October 9, 2014, the Board of Directors of the Sabine River Authority set a rate that became effective November 2, 2014.⁵

Dallas filed a petition on October 30, 2014 in which it asked the Commission to review the rates set by the Sabine River Authority for wholesale water delivered from the Lake Fork Reservoir. Dallas also requested that interim rates be set. Dallas asserted that the Commission had jurisdiction over this matter under Tex. Water Code § 12.013.⁶ Dallas further asserted that the rate set by the river authority “does not constitute ‘a rate set pursuant to a contract’ within the meaning of [16 TAC] §24.31(c).”⁷ Dallas then stated that if Sabine does not agree that the rate is not set pursuant to contract, that the ALJ, “after interim rates are set, should abate the case” until the contract issues are resolved.⁸ On November 10, 2014, the Commission issued an order referring this docket to SOAH.

In its response filed on December 2, 2014, Sabine asserted that this matter is a contract dispute and that it “does not agree that the rate was not set pursuant to contract.”⁹ Sabine therefore asserts that, “as posited by the [c]ity, the provisions of [16 TAC] § 24.131(d) require the ALJ to abate this proceeding.”¹⁰ The river authority then argued that because the matter is a claim for breach of contract the Commission should abate the proceeding.¹¹

³ Petition at 5-6; Petition Response at 6.

⁴ Petition at 2; Petition Response at 7.

⁵ Petition at 7; Petition Response at 7-8.

⁶ Petition at 4.

⁷ Petition at 8.

⁸ Petition at 8-9.

⁹ Petition Reponse at 9.

¹⁰ *Id.*

¹¹ *Id.*

The SOAH administrative law judge (ALJ) held a prehearing conference on January 6, 2015 that was recessed until January 22 and issued SOAH Order No. 4 to memorialize that prehearing conference. In SOAH Order No. 4, the SOAH ALJ made several findings relevant to this appeal. First, he found that the Commission has jurisdiction of this matter under section 12.013 of the Texas Water Code.¹² Second, he found that the Commission has authority to set an interim rate.¹³ Third, the judge ruled that the Commission had delegated authority to him to set interim rates by referring the matter to SOAH.¹⁴ Fourth, the judge stated that he “may and will set an interim rate using the process set out in [Commission rules],”¹⁵ and that he could set an interim rate because “there is currently no contractual rate” and, therefore, there is “no need” to determine whether the public interest is adversely affected.¹⁶ And, finally, the judge stated that he “will abate the case if [Sabine] or Dallas files a motion to abate in accordance with 16 Tex. Admin. Code § 24.131(d).”¹⁷

On January 20, the river authority concurrently filed a motion to abate under 16 TAC § 24.131(d) and an appeal of Order No. 4. No commissioner voted to hear Sabine’s appeal of Order No. 4 and that appeal was denied by operation of law.¹⁸ The parties were so notified on January 30.

In its motion to abate, the river authority recounted the ALJ’s language in Order No. 4 that if the parties disputed whether the rate was set by contract and a motion to abate was filed that the judge would abate the case.¹⁹ Sabine reasserted that the subject rate was set pursuant to contract and noted Dallas’s argument that the rate was not set pursuant to contract.²⁰ Thus, Sabine stated, the matter must be abated in accordance with 16 TAC § 24.131(d).²¹ In Order

¹² SOAH Order No. 4 at 2, 3 (Jan 12, 2015).

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 2; *see also id.* at 5.

¹⁸ 16 TAC 22.123(a)(7)(A).

¹⁹ Sabine River Authority’s Motion to Abate at 1 (Jan. 20, 2015).

²⁰ *Id.* at 2.

²¹ *Id.*

No. 5, the ALJ stated that he had no discretion in the matter and granted Sabine's motion to abate.²² In addition, the judge cancelled the prehearing conference that was to have reconvened on January 22²³ where it appears that he had intended to address interim rates.²⁴

II. Discussion

Dallas filed its appeal of Order No. 5 on February 2, 2015. The city asserted that the Commission's rule "does not specify or require the abatement at a time prior to the setting of interim rates."²⁵ Dallas also asserts that the ALJ interprets the rule to "require an immediate abatement."²⁶ Dallas then argues that an interim rate is necessary under the facts of this case.²⁷ The city asked the Commission to "reverse SOAH Order No. 5 and order the ALJ to consider and decide the issue of interim rates prior to abating the case."²⁸ Sabine responds that the "fact that the ALJ declined to order interim rates prior to abating the case is clearly not a violation of the Commission's rules, nor does it evidence any improper action by the ALJ."²⁹ Thus, Sabine asserts, Dallas has "failed to allege any error by the ALJ . . . ,"³⁰ and the ALJ's decision to abate without addressing interim rates does not violate the Commission's rule.³¹

A. Authority to Set Interim Rates

The issue presented by the city's appeal is whether interim rates can be established after a motion to abate has been filed and it is clear that an abatement is required by the Commission's abatement rule.³² However, neither the Water Code, the Commission's interim-rate rule,³³ nor

²² SOAH Order No. 5 at 1 (Jan. 22, 2015).

²³ *Id.*

²⁴ SOAH Order No. 4 at 6 (Jan. 12, 2015).

²⁵ Dallas's Appeal of SOAH Order No. 5 (Feb. 2, 2015).

²⁶ *Id.* at 5.

²⁷ *Id.* at 6-10.

²⁸ *Id.* at 10.

²⁹ Sabine River Authority's Response to City of Dallas's Appeal of SOAH Order No. 5 at 4 (Feb. 9, 2015).

³⁰ *Id.* at 7.

³¹ *Id.* at 10.

³² 16 TAC 24.131(d).

³³ 16 TAC 24.29(d).

the Commission's abatement rule³⁴ speak to the issue. For the reasons discussed in this order, the Commission determines that it has authority and, by referring this matter to SOAH, the ALJ has authority to establish interim rates in this proceeding. The fact that a motion to abate has been filed and that an abatement is required under the abatement rule does not impinge on the authority to establish interim rates.

When exercising its rate-fixing powers under section 12.013 of the Texas Water Code, the Commission has express authority "to set interim rates and compel continuing service during the pendency of any rate proceeding."³⁵ The Commission is also authorized to "order a refund or assess additional charges from the date a petition for rate review is received by the [Commission] of the difference between the rate actually charged and the rate fixed by the [Commission], plus interest at the statutory rate."³⁶ The statute does not impose any time constraints or require any conditions—other than a rate proceeding be pending—on the Commission's authority to establish interim rates. Thus, the Commission's authority to set interim rates is not affected by the fact that an abatement is required under the Commission's abatement rule.

In addition, the Commission has adopted a rule that allows interim rates to be established in 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.³⁷ Under that rule, the Commission may remand a request for interim rates to SOAH for an evidentiary hearing on interim rates.³⁸ This rule does not, however, mandate that interim rates be established, rather it leaves the matter to the discretion of the Commission, or the judge, after considering the standards set out in the rule.³⁹

Furthermore, the Commission's abatement rule directs an ALJ to abate a rate proceeding brought under chapter 12 of the Water Code "[i]f the buyer and seller do not agree that the

³⁴ 16 TAC 24.131(d).

³⁵ Tex. Water Code § 12.013(e) (West Supp. 2014).

³⁶ *Id.* § 12.013(f).

³⁷ 16 TAC 24.29(d).

³⁸ *Id.* § 24.29(f).

³⁹ 16 TAC 24.29(d) ("Interim rates *may* be established . . .").

protested rate is charged pursuant to a written contract . . . until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.”⁴⁰ The pleadings in this matter demonstrate that Dallas and Sabine do not agree whether the subject rate “is charged pursuant to a written contract.”⁴¹ Accordingly, this matter must be abated to allow the contract dispute to be resolved by the courts.

However, neither the Water Code, the Commission’s interim-rate rule, nor the Commission’s abatement rule speaks to the issue presented: may interim rates be established after a motion to abate has been filed and an abatement is required under the abatement rule. Under the circumstances presented here, the Commission determines that it has authority and, by referring this matter to SOAH, the ALJ has authority to establish interim rates in this proceeding. The fact that a motion to abate has been filed and it is clear from the record that an abatement is required does not impinge on the authority to establish interim rates.

B. Basis of Decision

In Order No. 5, the judge recognized that Dallas and Sabine disagree on whether the subject rate is charged pursuant to a written contract. In such a situation, the judge stated that he had no discretion and that he must abate the proceedings until the contract dispute has been resolved by the courts.⁴² However, in Order No. 4, the judge stated that he would set interim rates but also stated that he would abate the case if a motion to abate was filed.⁴³ The decision to set interim rates was not conditioned on a motion to abate being filed.

It is not clear to the Commission whether the ALJ believed he was precluded by the abatement rule from setting interim rates prior to abating the case or whether the ALJ exercised his discretion under the interim-rate rule in not setting interim rates. As discussed above, the judge’s authority to establish interim rates was not affected by Sabine’s motion to abate. The Commission therefore remands this case to the SOAH ALJ to allow the judge the opportunity to consider whether an interim rate should be established in the proceeding.

⁴⁰ 16 TAC 24.131(d).

⁴¹ Petition at 8; Petition Response at 9.


⁴² SOAH Order No. 5 at 1 (Jan. 22, 2015).


⁴³ SOAH Order No. 4 at 2 (Jan. 12, 2015).

SIGNED AT AUSTIN, TEXAS the 26th day of March 2015.

PUBLIC UTILITY COMMISSION OF TEXAS


DONNA L. NELSON, CHAIRMAN


KENNETH W. ANDERSON, JR., COMMISSIONER


BRANDY MARTY MARQUEZ, COMMISSIONER