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SOAH DOCKET NO. 473-15-2671.WS
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PETITION OF BLUEBERRY HILLS §
WATER WORKS, LLC, APPEALING A §
DECISION BY THE CITY OF §
BEEVILLE TO CHANGE WHOLESALE §
WATER RATES §

BEFORE THE STATE OFFICE
PUBLIC UTILITY COMMISSION
FILING CLERK
OF

ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 4
SETTING INTERIM RATES

On February 18, 2015, Blueberry Hills Water Works, LLC (Blueberry) filed a petition (Petition) appealing the wholesale water rate of the City of Beeville, Texas (Beeville) and requesting interim water rates 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 Public Utility Commission of Texas (Commission) has jurisdiction pursuant to Texas Water Code § 13.043.

On March 31, 2015, Beeville filed a Plea in Abatement, contending that the parties disagree as to whether the challenged rate is set pursuant to a wholesale contract. Beeville contends that the rate is set pursuant to a wholesale contract.¹ On April 10, 2015, Blueberry filed its response to Beeville's Plea in Abatement, in which Blueberry stated "the intentions of Beeville and Blueberry Hills as expressed in the Wholesale Water Supply Contract clearly shows that the protested water rate increase is not charged pursuant to the Agreement."²

The parties disagreed as to whether the challenged rate is set pursuant to a wholesale contract. As a result, the Administrative Law Judge (ALJ) abated this proceeding so the question of whether the challenged rate is set pursuant to a wholesale contract can be decided by a court of proper jurisdiction.³ Blueberry filed suit against Beeville in Bee County on April 22, 2015, for a decision by the trial court on the question of whether the challenged rate is set pursuant to a wholesale contract and related matters.⁴

¹ Beeville Plea in Abatement at 2.

² Blueberry Response to Beeville Plea in Abatement at 1.

³ P.U.C. Subst. R. 24.131(d).

⁴ *Blueberry Hills Water Works, LLC, v. City of Beeville*, Cause No. B-15-1203-CV-A, 36th Judicial District Court, Bee County, Texas

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Blueberry requested interim rates in its initial filing⁵ and re-urged that request on April 10, 2015.⁶ The Commission has authority to set interim rates⁷ and that authority has been delegated to the ALJ by virtue of the delegation of this matter to the State Office of Administrative Hearings (SOAH).⁸ The Commission has held that interim rates can be established even after a motion to abate has been filed and it is clear that abatement is required by P.U.C. Subst. R. 24.131(d).⁹ Accordingly, before abating this proceeding pursuant to P.U.C. Subst. R. 24.131(d), the ALJ must address the issue of interim rates.

Using the process set out in P.U.C. Subst. R. 24.29(d) and (e), the ALJ heard oral arguments from the parties on April 30, 2015, regarding whether an interim rate should be established. Under P.U.C. Subst. R. 24.29(d):

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.

The parties entered into a water supply contract (Agreement) that addresses the amount Blueberry will pay Beeville.¹⁰ Under the Agreement, the price of the potable water purchased from Beeville by Blueberry is set at \$2.76 per 1,000 gallons as set by the Beeville ordinance and as amended from time to time. Blueberry is also obligated to pay Beeville a monthly pro rata reimbursement of \$574 per month beginning on the first billing cycle after water is first delivered under the Agreement and each month for a total of 240 payments or until the \$87,293 pro rata reimbursement is paid in full (whichever comes first) with no penalty for early payoff.¹¹ Blueberry argues that interim rates should be set at the level specified in the Agreement, \$2.76 per 1,000 gallons plus the \$574 per month reimbursement.

⁵ Blueberry's Petition Appealing a Decision by Beeville to Change Wholesale Water Rates at 10.

⁶ Blueberry's Motion for Interim Water Rate Order.

⁷ Tex. Water Code § 13.043(h).

⁸ P.U.C. Proc. R. 22.2(3), 22.125(c).

⁹ *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority to Set Water Rates (Lake Fork Reservoir)*, Docket No. 43674, SOAH Docket No. 473-15-1149.WS, Order on Appeal of Order No. 5 (Mar. 26, 2015).

¹⁰ Blueberry Ex. 2 (Unger Aff.) at 00020.

¹¹ Blueberry Ex. 2 (Unger Aff.) at 00022.

Beeville contends that its governing body passed Ordinance No. 2198, on September 27, 2011, which increased the volumetric charge under the Agreement to \$3.17 per 1,000 gallons,¹² and that Blueberry has waived any challenge it may have had against this rate. Accordingly, this is the minimum rate at which the interim rates should be set. Beeville, however, has been unable to locate the ordinance and was able to provide only an affidavit of the minutes of the governing body meeting reflecting that the rate was increased by 15%.¹³ As Staff noted at the conclusion of the hearing,¹⁴ the statement that prior rates were increased 15% is not sufficient to establish that \$3.17 per 1,000 gallons was the resulting rate.

Beeville contends that effective January 1, 2015, in Ordinance No. 2246, it increased the rate under the Agreement to \$4.00 per 1,000 gallons, \$600 for a 6-inch meter, and the \$574 per month reimbursement from the Agreement as originally written.¹⁵ It is at this level that Beeville contends the interim rates should be set.

The Texas Constitution prohibits any law impairing the obligation of contracts.¹⁶ Blueberry filed suit against Beeville in Bee County on April 22, 2015, for a decision by the trial court on the question of whether the challenged rate is set pursuant to a wholesale contract and related matters. If the court finds Beeville is charging a rate not set by contract, the Commission may set the rate.¹⁷ If the court finds that Beeville is charging a rate set by contract, the Commission may change that rate after finding that the rate adversely affects the public interest. A Texas agency does not violate the constitutional limitation on contract impairment when it reviews rates under authority granted by the legislature if the agency first finds that the rates adversely affect the public interest by being unreasonably preferential, prejudicial, or discriminatory.¹⁸ Given the above legal complexities, the parties agree that resolution of their dispute could take several years.

¹² Beeville Response to Blueberry Motion for Interim Rates at 6.

¹³ Beeville Ex. 6.

¹⁴ Tr. at 81.

¹⁵ Beeville Ex. 1.

¹⁶ Tex. Const. art. I, § 16.

¹⁷ Tex. Water Code §§ 12.013, 13.043(f).

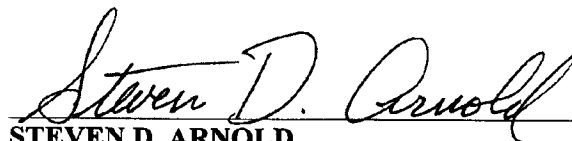
¹⁸ See *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.--Austin 1994, writ denied).

With so many legal hurdles and unknowns ahead, the ALJ cannot reasonably, legally conclude at this preliminary stage that the rate Beeville currently charges Blueberry is unjust or unreasonable. Nor can he find that the rate imposes an unreasonably economic hardship on Blueberry or its customers.

However, the ALJ finds that the current rate could result in Blueberry paying an unjust and unreasonable rate because the Commission may ultimately set a lower rate. Importantly, setting an interim rate, even if it is the rate Beeville currently is charging, allows the ALJ to order Beeville to place rate collections into escrow during the interim, which will ensure that Blueberry can be repaid if it is ultimately determined that Beeville was overcharged.¹⁹ These factors lead the ALJ to conclude that he should set the rate Beeville currently charges as the interim rate and require escrow.

Accordingly, the ALJ orders that the rate Beeville currently charges Blueberry will be the interim rate to be in effect until this case is finally decided, namely \$4.00 per 1,000 gallons, a \$600 for a 6-inch meter, and the \$574 per month reimbursement from the Agreement as originally written. The interim rate is retroactively effective from January 1, 2015, when the rate Beeville is charging took effect.²⁰ In addition, Beeville is ordered to place the difference between the above rate and the rate specified in the original Agreement (\$2.76 per 1,000 gallons plus \$574 per month reimbursement from the Agreement as originally written) since January 1, 2015, into an escrow account, in accordance with P.U.C. Subst. R. 24.30.

SIGNED May 21, 2015.


STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹⁹ P.U.C Subst. R. 24.29(e)(3).

²⁰ Tex. Water Code §§ 12.013(e) & (f), 13.043(h).