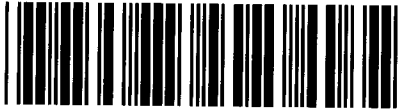




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SOAH DOCKET NO. 473-15-2671.WS
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FILING CLERK

PETITION OF BLUEBERRY HILLS	§	BEFORE THE STATE OFFICE
WATER WORKS, LLC, APPEALING	§	
FROM THE DECISION OF THE CITY	§	OF
OF BEEVILLE TO CHANGE	§	
WHOLESALE WATER RATES	§	ADMINISTRATIVE HEARINGS

**COMMISSION STAFF'S RESPONSE TO THE CITY OF BEEVILLE'S APPEAL OF
SOAH ORDER NO. 4 SETTING INTERIM RATES**

COMES NOW the Staff of the Public Utility Commission of Texas, representing the public interest and files this Response to the City of Beeville's Appeal of SOAH Order No. 4 Setting Interim Rates.

I. Background

On February 18, 2015, Blueberry Hills Water Works, LLC (Blueberry) filed a petition pursuant to Texas Water Code § 13.043 (TWC) appealing the City of Beeville's wholesale water rate and requesting interim water rates (Petition). The Petition challenges the City of 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 23, 2014, the Administrative Law Judge (ALJ) issued SOAH Order No. 2, which set a prehearing conference for April 16, 2015. On March 31, 2015, the City of Beeville (Beeville) filed a Plea in Abatement based 16 Tex. Admin.Code § 24.131(d) (TAC). That section provides that if the parties in a wholesale appeal case do not agree that the rate appealed from was a rate set pursuant to a contract, the case must be abated "until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction." Blueberry requested interim rates in its initial filing.¹ On April 10, 2015, Blueberry

¹ Blueberry's Petition Appealing a Decision by Beeville to Change Wholesale Water Rates at 10.

re-urged that request² when it filed a motion for interim rates pursuant to section 24.29 of the Texas Administrative Code. In Order No. 3 the ALJ rescheduled the prehearing conference to April 30, 2015, to consider the implementation of interim rates and also granted the plea in abatement. On April 30, 2015, the ALJ convened a telephonic prehearing conference on Blueberry's interim rate motion to consider the arguments of the parties and documents the parties provided to support their arguments.

On May 21, 2015, the ALJ issued Order No. 4 setting interim rates. The rates were set at "\$4.00 per 1,000 gallons, a \$600 [base rate] for a 6 inch meter, and the \$574 per month reimbursement from the agreement as originally written." In addition, Order No. 4 also required Beeville "to place the difference between the [interim] rates 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."

On May 29, 2015, Beeville filed City of Beeville's Appeal of SOAH Order No. 4 Setting Interim Rates Pursuant to 16 TAC § 22.123. 16 TAC § 24.123(a)(4) requires a response to a motion for interim rates to be filed "within five working days of the filing of the appeal." Therefore this filing is timely.

II. The Appeal should be denied because Interim Rate Orders are not appealable.

16 TAC § 24.29 sets out the procedures for setting interim rates in cases under either the original or appellate jurisdiction of the Commission. Subsection (e) of that rule provides that "the presiding officer shall issue a **non-appealable** interlocutory ruling setting interim rates to remain in effect until a final rate decision is made."³ The interim rate rule allows the parties to true up with interest the amount paid under an interim rate to match the final rate after the decision is made.⁴ Therefore, no permanent deprivation of property occurs as the result of an interim rate. Consequently, further prolonging a case by allowing interim rate orders to be appealed is unnecessary to protect the rights of the parties, but instead only unnecessarily

² *Blueberry's Motion for Interim Water Rate Order* at 1.

³ 16 TAC § 24.29(f)(emphasis added)

⁴ 16 TAC §§ 24.29(h)-(i).

prolongs the case.⁵ On this basis alone, the Appeal should be denied. However, Staff will respond further to Beeville's arguments.

III. The Commission can require escrow of all or part of a requested rate increase

Beeville argues that "there is no legal authority for the escrow deposit requirement" in SOAH Order No. 4, but Beeville's argument fails at the outset because PUC rules plainly and directly do allow escrow in cases under the Commission's appellate jurisdiction.⁶ 16 TAC § 24.29(d) provides that "interim rates may be established by the commission in those cases under the commission's original or appellate jurisdiction." 16 TAC § 24.29(e) provides that in "making a determination under subsection (d) of this section the commission...may:...(3) require all or part of the requested rate increase be deposited in an escrow account in accordance with § 24.20 of this title." The fact that an interim rate order may require escrow appears clear in the law. In fact, in a recent case that came before the Commission the SOAH administrative law judge required escrow as part of an interim rate order in a wholesale appeal.⁷

Beeville raises several arguments in an attempt to show that an escrow of funds is not authorized in this case, but its arguments are not persuasive. Beeville first argues that subsection (h) of section 24.29 is the only part of the rule that allows SOAH to make an interim rate decision, and that only the Commission can take the actions outlined in subsection (e) because subsection (e) identifies only the commission as the empowered entity.⁸ The argument fails on several grounds. To begin with, subsection (b) provides that the ALJ can set interim rates.⁹ A

⁵ There has been a recent appeal in a case that included a discussion of interim rates, but it was not an appeal of an interim rate. See *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, Order on Appeal of Order No. 5, in which the Commission addressed the authority of the Commission and SOAH to issue interim rate orders even if the case had been abated for a court of competent jurisdiction to resolve whether the rate was charged pursuant to a contract. Therefore, while that appeal was in a case involving the possible imposition of an interim rate, it was not an appeal of any ordered rate, but instead was an appeal to determine whether the Commission and SOAH had jurisdiction to hear and decide an interim rate motion after abatement.

⁶ 16 TAC § 24.29(e).

⁷ *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 Order No. 8 at 4 (April 3, 2015).

⁸ *Beeville's Appeal of SOAH Order No. 4* at 2.

⁹ 16 TAC § 24.29(b) provides in pertinent part as follows: "After a hearing is convened, any party may petition the judge or commission to set interim rates."

second reason why this argument fails is that 16 TAC 24.3(14) defines “Commission” as the PUC or a presiding officer, as applicable. Therefore, as the presiding officer the SOAH ALJ clearly has the authority pursuant to TWC and PUC rules to hear the case, set interim rates or deny them based on oral argument, and require escrow of any amount of the requested rate increase.

Beeville also repeats an argument it made in opposition to the interim rate motion as grounds for not requiring escrow. Beeville argues that it will be overburdened because the TCEQ required it to make expensive improvements and that this would be impacted if it has to escrow everything it collects with the interim rate above the original contractual rate. The affidavit quoted in Beeville’s appeal shows that the water rates collected from Blueberry are unrelated to paying for these improvements. The affidavit from Jack Hamlett recites that the debt service for the improvements “is backed by city property tax and not paid by water customers located outside of the city limits, such as Blueberry Hill.”¹⁰ Likewise, the TCEQ requirement for upgrading emergency communication systems was funded by money “received from district bond proceeds paid for by property tax...”¹¹ Furthermore, if Beeville is correct in its overall position, and can justify the latest increase in rates, then all the money will be returned to the city with interest when the final rate is established.

Beeville also argues that the interim rate could be in place for a long time exacerbating the harm it claims flows from non-access to the escrowed funds, but the argument is unpersuasive. Beeville argues that the case Blueberry filed in District Court (to determine whether the rate is set pursuant to a contract or not) includes diverse and apparently improperly joined causes of action, and therefore could mean a long delay because Beeville has “no control over the complexity of Blueberry’s lawsuit or the time that may be required to obtain a final judgement.”¹² This argument fails because Beeville can file a motion for partial summary judgment¹³ and then file a motion to sever that final decision¹⁴ in order to return to SOAH for either a hearing on the rate (not pursuant to contract) or a hearing on whether the contract

¹⁰ *City of Beeville’s Appeal of SOAH Order No. 4 Setting Interim Rates* at 3-4

¹¹ *Id.* at 4

¹² *Id.* at 5

¹³ Tex. R. Civ. P. 166a(a)

¹⁴ Tex. R. Civ. P. 41

violates the public interest (pursuant to a contract). Furthermore, Blueberry also has an incentive to expedite the District Court case because it has to pay the full rate that the city imposed in its latest ordinance and Blueberry also would have no access to the escrowed funds. Delay is not in Blueberry's interest.

Beeville also makes a vague argument that because the city already passed its ordinance that escrow cannot be required because 16 TAC § 24.29(e) uses the word "requested rates" and the city is not requesting rates, but has already adopted the rates.¹⁵ The argument misses the fact that appeals of city imposed rates are done through trial de novo.¹⁶ When the appeal is perfected, the city's prior decision is nullified.¹⁷ The city will have to show that the rate in its ordinance is "just and reasonable"¹⁸ before the Commission can authorize collection of that rate. Hence, the city's most recent rate ordinance is now a proposed rate, and not a rate that has been established.

IV. Beeville's Request to Decrease the Amount to be Escrowed Should be Denied

Beeville also argues that if any interim rate is to be set, it should be at 3.17 per 1,000 gallons because that was the amount it was charging and collecting before it passed the ordinance raising the rate to \$4.00 per 1,000 gallons.¹⁹ Therefore, Beeville submits, the escrowed amount should be the difference between \$3.17 and \$4.00 (\$0.83) per thousand gallons. Beeville misstates the law when making this argument. It wrote the "The Commission, and thus the administrative law judge,²⁰ is prohibited under P.U.C. Subst. R. 24.29(e) from setting interim rates lower than the rates that the petitioner paid to Beeville prior to the effective dates of rates adopted by ordinance No. 2246."²¹ The rule does not provide that the rate paid prior to the new rate is the floor for the range of setting interim rates. It provides that the floor is the "authorized

¹⁵ *Beeville's Appeal of Order No. 4* at 2.

¹⁶ Texas Water Code § 13.043(a).

¹⁷ *Texas Department of Public Safety v. Banks Transportation Co.*, 427 S.W.2d 593, 594 (Tex. 1968).

¹⁸ Tex. Water Code § 13.043(j).

¹⁹ *Beeville's Appeal of SOAH Order No. 4* at 5.

²⁰ Interestingly, Beeville takes a position that contradicts its earlier position that the powers and limitations listed under 24.29(e) only pertain to the Commission and do not apply to SOAH.

²¹ *Beeville's Appeal of SOAH Order No. 4* at 6.

rates prior to the proposed increase.”²² Furthermore, the interim rate was not set lower than \$3.17 per 1,000 gallons; it was set at \$4.00 per 1,000 gallons. It appears that Beeville is arguing that the escrowed amount should be the difference between what it believes the prior authorized rate was and what the order found the prior authorized rate to be.

The parties presented different positions on what the bottom of the range of interim rate possibilities should be, and the ALJ found that the prior authorized rate was \$2.76 per 1,000 gallons.²³ The range is provided for by rule, which specifically states that interim rates can be set “not lower than the authorized rates prior to the proposed increase, nor higher than the requested rates.”²⁴ The original contract between Blueberry and Beeville provided that the gallonage charge would be \$2.76 per 1,000 gallons “as set by the Beeville Ordinance and as amended from time to time.”²⁵ Both Commission Staff and Blueberry contended that this was the lower limit of the interim rate possibilities because the evidence showing any other rate as “authorized” was insufficient. Beeville argued that it had increased its rate to 3.17 per 1,000 gallons in Ordinance No. 2198, which was passed on September 27, 2011.²⁶ However, Blueberry did not provide a copy of the ordinance increasing the rate, but instead provided a copy of the minutes of the city’s meeting which contained a general reference to passing a 15% increase in rates.²⁷ The order found that “the statement that prior rates were increased by 15% is not sufficient to establish that \$3.17 per 1000 gallons was the resulting rate.”

V. Conclusion

Interim rate orders are non-appealable orders. Therefore, the appeal should be denied forthwith. However, even if the Commission were to consider the arguments raised by Beeville,

²² 16 TAC § 24.29(e)(1) (emphasis added).

²³ *Petition of Blueberry Hills Water Works, LLC, appeal of a decision by the City of Beeville to change Wholesale Water Rates*, Docket No. 44463, SOAH Order No. 4 (May 22, 2015) at 3.

²⁴ 16 TAC § 24.29(e)(1)

²⁵ *Petitioner’s Original Petition Appealing the City of Beeville, Texas ‘Wholesale Water Rate and Petitioner’s Request for Interim Rates*, Exhibit E at 3

²⁶ *Beeville’s Appeal of SOAH Order No. 4* at 5

²⁷ *City of Beeville’s Response to Blueberry Hills’ Motion for Interim Rates* at 49.

its arguments are not persuasive. Therefore, Staff respectfully requests that Beeville's' appeal of SOAH Order No. 4 be denied.

Dated: June 4, 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 June 4, 2015, in accordance with P.U.C. Procedural Rule 22.74.


Brian MacLeod