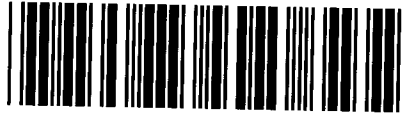




Control Number: 44463



Item Number: 37

Addendum StartPage: 0

2015 JUN -5 AM 10:43

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

**PETITIONER'S RESPONSE AND OBJECTIONS TO THE CITY OF BEEVILLE'S
APPEAL OF SOAH ORDER NO. 4 SETTING INTERIM RATES**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW Blueberry Hills Water Works, LLC ("Blueberry Hills"), Petitioner in the above referenced case, and files this Petitioner's Response and Objections to the City of Beeville's Appeal of SOAH Order No. 4 Setting Interim Rates. The Petitioner would respectfully show the Public Utility Commission of Texas (PUC) as follows:

Summary of the Issues and Applicable Law

1. On May 21, 2015, Judge Steven D. Arnold (ALJ) signed SOAH Interlocutory Order No. 4 Setting Interim Water Rates. In SOAH Interlocutory Order No. 4, the ALJ ordered that the rate the City of Beeville Texas (Beeville) currently charges Blueberry Hills will be the interim water 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 Wholesale Water Supply Agreement between the parties as originally written. Under Interlocutory Order No. 4, the interim water rate is retroactively effective from January 1, 2015, when the rate Beeville is charging took effect. 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.

2. On May 29, 2015, the City of Beeville (Beeville) filed an appeal regarding SOAH Interlocutory Order No. 4. In its appeal, Beeville made the following incorrect assertions regarding applicable law and the facts in this case: (1) Beeville is authorized to appeal SOAH Interlocutory Order No. 4 setting interim water rates pursuant to PUC Subst. R. 22.123 (a)(2), (2) there is no legal authority that authorizes the PUC to require that all or part of the requested rate increase be deposited into an escrow account, (3) PUC Subst. R. 24.29(e) and 24.30 do not apply to Beeville because it is a municipally owned utility, (4) no evidence or justification exist in the record for the escrow requirement, (5) Beeville is required to deposit into escrow revenue from rates that the Petitioner has paid since 2012 and failed to timely challenge, (6) escrow inequitably deprives Beeville of revenue required to satisfy TCEQ mandated compliance, and (7) in the alternative, the escrow should apply to the difference between the \$3.17 per thousand gallons

charge by Beeville pursuant to Ordinance 2198 despite the fact that it was not an authorized rate prior to the proposed water rate increase and is not in the evidentiary record in this case.

3. Contrary to the claims by Beeville, Beeville's appeal of the interlocutory interim water rate in SOAH Order No. 4 to the PUC should be denied for the following reasons: (1) Beeville is not authorized to appeal SOAH Interlocutory Order No. 4 setting interim water rates pursuant to PUC Subst. R. 22.123 (a)(2) because SOAH Order No. 4 is ***a non-appealable interlocutory ruling setting interim rates*** to remain in effect until a final rate determination is made by the PUC pursuant to PUC Subst. R. 24.29(f); (2) the PUC can require that all or part of the requested rate increase by Beeville be deposited in an escrow account in accordance with §24.30 of the PUC rules pursuant to PUC Subst. R. 24.29(e)(2) and (3), (3) the PUC and SOAH has already determined that they have the delegated authority to set interim water rates with an escrow requirement. 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, SOAH Docket No. 473-15-1149.W.S. Order on Appeal of Order No. 5 (Mar. 26, 2015), (4) PUC Subst. R. 24.29(e) and 24.30 applies to Beeville because Beeville is a "retail public utility" (utility) as that term is defined in §13.002 (19) of the Water Code that provides potable water service for compensation that is subject to the appellant jurisdiction of the PUC pursuant to §13.043(f) of the Water Code, (4) the evidentiary record clearly supports the escrow requirement, (5) SOAH Order No.4 does not require Beeville to deposit into escrow revenue from rates that the Petitioner has paid since 2012, (6) the escrow requirement does not inequitably deprives Beeville of revenue required to satisfy TCEQ mandated compliance, and (7) the escrow should not apply to the difference between the \$3.17 per thousand gallons charge by Beeville allegedly pursuant to Ordinance 2198 because it was not an authorized rate prior to the proposed water rate increase and it cannot be considered by the PUC because it is not in the evidentiary record in this case.

Arguments & Authorities

A. The PUC should deny Beeville's appeal because Beeville is not authorized to appeal SOAH Interlocutory Order No. 4 setting interim water rates pursuant to PUC Subst. R. 22.123 (a)(2)

4. Under the general procedural rules in PUC Subst. R. 22.123 (a)(1), appeals are available for any order of the presiding officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings. Interim orders shall not be subject to exceptions or application for rehearing prior to the issuance of a proposal for decisions. PUC Subst. R. 22.123 (a)(2) set forth the procedure for an appeal that is available under PUC Subst. R. 22.123 (a)(1). Contrary to the claim by Beeville, PUC Subst. R. 22.123 (a)(2) does not authorize this appeal by Beeville. Under the substantive rules applicable to rates and rate-making by water and sewer service providers in PUC Subst. R. 24.29(f), the PUC may remand a request for interim water rates to the State Office of Administrative Hearings (SOAH) for an evidentiary hearing on interim rates and the presiding officer is required to issue ***a non-appealable interlocutory ruling setting interim rates*** to remain in effect until a final rate determination is made by the commission. Interim rates may be established by the PUC in those cases under the PUC 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 the failure to set interim rates could result in an unreasonable economic hardship on the utility. PUC Subst. R. 24.29(d). In making a determination under PUC Subst. R. 24.29 (d), the PUC may deny the interim rate relief requested by the Petitioner and require that all or part of the requested rate increase by the Respondent be deposited in an escrow account in accordance with PUC Subst. R. 24.30. PUC Subst. R. 24.29(e)(2) and (3). In this case, the PUC remanded this case to SOAH for an evidentiary hearing on the interim rates requested by Blueberry Hills and based on the evidence presented by Blueberry Hills during the interim water rate hearing the ALJ found that the failure to set interim water rates could result in an unreasonable economic hardship on Blueberry Hills and the ALJ issued SOAH Interlocutory Order No. 4, which is a **non-appealable interlocutory ruling setting interim rates** to remain in effect until a final rate determination is made by the PUC pursuant to PUC Subst. R. 24.29(f). Contrary to the claim by Beeville, the escrow requirement in SOAH Interlocutory Order No. 4 is authorized pursuant to PUC Subst. R. 24.30. PUC Subst. R. 24.29(e)(3). Additionally, Beeville has not presented any evidence that supports its claim that an appeal of SOAH Interlocutory Order No. 4 is available under PUC Subst. R. 22.123(a)(1) because SOAH Interlocutory Order No. 4 immediately prejudices a substantial or material right of Beeville or materially affects the course of any hearing in this case. Contrary to the claim by Beeville, the final hearing on the merits regarding this case has been abated by the ALJ pending a determination by the 36th judicial district court in Beeville, Texas regarding whether the challenged rate is set pursuant to a wholesale water contract and the amount of money that Beeville has been ordered to escrow since January 1, 2015 is approximately \$4,405. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville's appeal because the decision by the ALJ in SOAH Interlocutory Order No. 4 is a non-appealable interlocutory ruling setting interim rates to remain in effect until a final rate determination is made by the PUC pursuant to PUC Subst. R. 24.29(f) that cannot be appealed by Beeville and Beeville has not presented any evidence to the PUC that supports its claim that an appeal of SOAH Interlocutory Order No. 4 is available pursuant to PUC Subst. R. 22.123(a)(1).

B. The PUC should deny Beeville's appeal because the PUC can require that all or part of the requested rate increase by Beeville be deposited in an escrow account in accordance with §24.30 of the PUC rules pursuant to PUC Subst. R. 24.29(e)(2) and (3)

5. Under the substantive rules applicable to rates and rate-making by water and sewer service providers in PUC Subst. R. 24.29(f), the PUC may remand a request for interim water rates to the State Office of Administrative Hearings (SOAH) for an evidentiary hearing on interim rates and the presiding officer is required to issue a **non-appealable interlocutory ruling setting interim rates** to remain in effect until a final rate determination is made by the commission. Interim rates may be established by the PUC in those cases under the PUC 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 the failure to set interim rates could result in an unreasonable economic hardship on the utility. PUC Subst. R. 24.29(d). In making a determination under PUC Subst. R. 24.29 (d), the PUC may deny the interim rate relief requested by the Petitioner and require that all or part of the requested rate increase by the Respondent be deposited in an escrow account in accordance with PUC Subst. R. 24.30. PUC Subst. R. 24.29(e)(2) and (3). In this case, the PUC remanded this case to SOAH for an evidentiary hearing on the interim rates requested by Blueberry Hills and based on the

evidence presented by Blueberry Hills during the interim water rate hearing the ALJ found that the failure to set interim water rates could result in an unreasonable economic hardship on Blueberry Hills and the ALJ issued SOAH Interlocutory Order No. 4, which is a **non-appealable interlocutory ruling setting interim rates** to remain in effect until a final rate determination is made by the PUC pursuant to PUC Subst. R. 24.29(f). Contrary to the claim by Beeville, the escrow requirement in SOAH Interlocutory Order No. 4 is authorized pursuant to PUC Subst. R. 24.30. PUC Subst. R. 24.29(e)(3). Contrary to the claim by Beeville, the fact that PUC Subst. R. 24.30 uses the term “utility” does not mean that this rule does not apply to Beeville and Beeville has not provided any competent legal authority for their claim. PUC Subst. R. 24.30 applies to Beeville because Beeville is a “retail public utility” (utility) as that term is defined in §13.002 (19) of the Water Code that provides potable water service for compensation that is subject to the appellant jurisdiction of the PUC pursuant to §13.043(f) of the Water Code. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville’s appeal because the PUC can require that all or part of the requested rate increase by Beeville be deposited in an escrow account in accordance with §24.30 of the PUC rules pursuant to PUC Subst. R. 24.29(e)(2) and (3).

C. The PUC should deny Beeville’s appeal because the PUC and SOAH has already determined that they have the delegated authority to set interim water rates with an escrow requirement.

6. On March 26, 2015, the PUC issued an order on appeal of SOAH Order No. 5 in the *City of Dallas* case cited below. In the *City of Dallas* case, the PUC concluded that it and the ALJ through referral had the authority to set interim water rates. The PUC remanded the case to the ALJ to give the ALJ an opportunity to consider whether interim water rates should be established. The ALJ found that the current water rate could result in the City of Dallas paying an unjust and unreasonable water rate because the PUC may ultimately set a lower water rate. Additionally, the ALJ held that setting an interim water rate, even if it is the rate that SRA was currently charging, allows the ALJ to order SRA to place rate collections into escrow during the interim which would ensure that the City of Dallas can be repaid if it is ultimately determined that Dallas was overcharged. In addition, the ALJ held that setting the water rate that SRA was charging as the interim water rate and requiring escrow may encourage the parties to resolve their dispute. Therefore, the ALJ concluded that those factors lead the ALJ to conclude that he should set the rate SRA currently charges as the interim water rate and require escrow. Thus, the ALJ ordered that the water rate that SRA was currently charging the City of Dallas was the interim water rate to be in effect until the case is finally decided, the interim water rate was retroactively effective from November 2, 2014, when the first rate SRA was charging took effect, and that the City of Dallas’ motion to require SRA to deposit all collections under the above water rate since November 2, 2014 into an escrow account was granted. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville’s appeal because the PUC and SOAH has already determined that they have the delegated authority to set interim water rates with an escrow requirement. See, Order No. 8 Establishing Interim Water Rates in Exhibit A concerning a PUC case styled the *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.W.S. Order on Appeal of Order No. 5 (Mar. 26, 2015)

D. The PUC should deny Beeville's appeal because the evidentiary record clearly supports the escrow requirement

7. On April 24, 2015, in response to the claims by Beeville regarding Blueberry Hills' Motion for an Interim Water Rate Order, Blueberry Hills filed the Petitioner's Brief and Evidence in Support of the Petitioner's Motion for an Interim Water Rate Order. Blueberry Hills attached approximately 70 pages of evidence in support of its request for interim water rates to its brief. During the hearing regarding the Petitioner's Motion for an Interim Water Rate Order, the ALJ admitted approximately 70 pages of evidence that was offered by Blueberry Hills in support of its request for an interim water rate order. Based on the evidence in the record in this case that was offered and admitted into evidence by the ALJ, the ALJ found that the failure to set interim water rates could result in an unreasonable economic hardship on Blueberry Hills and the ALJ issued SOAH Interlocutory Order No. 4 with the escrow requirement. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville's appeal because the evidentiary record clearly supports the escrow requirement in SOAH Interlocutory Order No. 4.

E. The PUC should deny Beeville's appeal because SOAH Order No.4 does not require Beeville to deposit into escrow revenue from rates that the Petitioner has paid since 2012

8. On May 21, 2015, Judge Steven D. Arnold (ALJ) signed SOAH Interlocutory Order No. 4 Setting Interim Water Rates. In SOAH Interlocutory Order No. 4, the ALJ ordered that the rate the City of Beeville Texas (Beeville) currently charges Blueberry Hills will be the interim water 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 Wholesale Water Supply Agreement between the parties as originally written. Under Interlocutory Order No. 4, the interim water rate is retroactively effective from January 1, 2015, when the rate Beeville is charging took effect. 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. Contrary to the claim by Beeville, SOAH Interlocutory Order No. 4 does not require Beeville to deposit into escrow revenue from water rates the Petitioner has paid since 2012. Based on the water bill information provided to Blueberry Hills by Beeville, SOAH Interlocutory Order No. 4 requires Beeville to deposit approximately \$4,405 into escrow from January 1, 2015 to May 5, 2015. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville's appeal because SOAH Order No.4 does not require Beeville to deposit into escrow revenue from rates that the Petitioner has paid since 2012. See, SOAH Interlocutory Order No. 4 in Exhibit B

F. The PUC should deny Beeville's appeal because the escrow requirement does not inequitably deprives Beeville of revenue required to satisfy TCEQ mandated compliance

9. Contrary to the claim by Beeville, the approximately \$4,405 deposit into escrow from January 1, 2015 to May 5, 2015 does not inequitably deprive Beeville of revenue required to satisfy TCEQ mandated compliance related to the construction of a new clarifier for its water treatment plant with a cost estimate of \$3,006,000. The financing for improvements to Beeville's water treatment plant for new development is subject to the provisions in Chapter 395 of the

Local Government Code. Under §395.011 of the Local Government Code, Beeville may not enact or impose an impact fee for the construction of a new clarifier for its water treatment plant on land within their corporate boundaries or extraterritorial jurisdiction without complying with the provisions in Chapter 395 of the Local Government Code. Since Beeville has not adopted an impact fee for the financing of the improvements to its water treatment plant, Beeville is prohibited from collecting an impact fee from Blueberry Hills. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville's appeal because the escrow requirement does not inequitably deprive Beeville of revenue required to satisfy TCEQ mandated compliance.

G. The PUC should deny Beeville's appeal because the escrow should not apply to the difference between the \$3.17 per thousand gallons charge by Beeville allegedly pursuant to Ordinance 2198

10. Under the substantive rules applicable to rates and rate-making by water and sewer service providers in PUC Subst. R. 24.29(e), the PUC may set interim rates not lower than the *authorized* rates prior to the proposed increase nor higher than the requested rates. Contrary to the claim by Beeville, the escrow should not apply to the difference between the \$3.17 per thousand gallons charge by Beeville allegedly pursuant to Ordinance 2198 because the \$3.17 rate was not an authorized water rate prior to proposed increase by Beeville and a true and correct copy of Ordinance 2198 is not in the evidentiary record in this case and not in the official records of Beeville. Therefore, Blueberry Hills objects and respectfully request that the PUC deny Beeville's appeal because the escrow should not apply to the difference between the \$3.17 per thousand gallons charge by Beeville allegedly pursuant to Ordinance 2198.

11. For these reasons, Blueberry Hills requests that the PUC deny Beeville's appeal of SOAH Interlocutory Order No. 4.

Respectfully submitted,

By: Ronnie Jones /s/

Ronnie Jones

State Bar No. 00786003

9951 Anderson Mill Road, Unit 201

Austin, Texas 78750

(512) 291-6821 (office)

(512) 291-6823 (facsimile)

Attorney for Blueberry Hills Water Works, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2015, a true and correct copy of Petitioner's Response and Objections to the City of Beeville's Appeal of SOAH Order No. 4 Setting Interim Rates was served via e-mail, first class mail, facsimile, or hand delivered to the following persons on the attached mailing list.

Ronnie Jones /s/

RONNIE JONES

Patrick W. Linder
Davidson, Troilo, Ream & Garza, P.C.
7550 West IH-10, Suite 800
San Antonio, Texas 78220-5815
Attorney for the City of Beeville, Texas

Brian MacLeod
Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326
Attorney for the Public Utility Commission of Texas

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

RECEIVED

2015 APR -3 AM 9:29

PUBLIC UTILITY COMMISSION
CLERK

PETITION OF THE CITY OF DALLAS
FOR REVIEW OF A DECISION BY
THE SABINE RIVER AUTHORITY

§
§
§
§
§

BEFORE THE STATE OF TEXAS
OF
ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 8
ESTABLISHING INTERIM RATES

On March 26, 2015, the Public Utility Commission of Texas (PUC or Commission) issued an order on appeal of State Office of Administrative Hearings (SOAH) Order No. 5. The PUC concluded that it and the Administrative Law Judge (ALJ), thorough referral, currently have authority to set interim rates in this case. Texas Water Code § 12.013(e). It also concluded that one of its rules provides for its setting interim rates in this case. 16 Tex. Admin. Code § 24.29(d). The PUC remanded this matter to the ALJ to give the ALJ an opportunity to consider whether interim rates should be established.

Using the process set out in 16 Texas Administrative Code § 24.29(d) and (e), the ALJ heard oral arguments from the parties on April 2, 2015, regarding whether an interim rate should be established. Under § 24.29(d),

{i}nterim 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 have entered into a water supply contract that addresses the amount the City of Dallas (Dallas) will pay Sabine River Authority (SRA) during the renewal term.¹ After negotiations broke down, SRA unilaterally began charging the current rate, \$0.5613 per 1,000 gallons, on a take-or-pay basis.

¹ Petition, ex. A at 21.

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

ORDER NO. 8

PAGE 2

The Texas Constitution prohibits any law impairing the obligation of contracts.² Dallas filed a declaratory judgment action in Travis County District Court on January 30, 2015, seeking a determination that the rate set by SRA was not set pursuant to the contract. If the court finds SRA is charging a rate not set by contract, the PUC may set the rate. Tax Water Code § 12.013. If the court finds that SRA is charging a rate set by contract, the PUC 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.³ Given the above legal complexities, the parties agree that resolution of their dispute could take several years.

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

However, the ALJ finds that the current rate could result in Dallas paying an unjust and unreasonable rate because the PUC may ultimately set a lower rate. Importantly, setting an interim rate, even if it is the rate SRA currently is charging, allows the ALJ to order SRA to place rate collections into escrow during the interim, which will ensure that Dallas can be repaid if it is ultimately determined that Dallas was overcharged. 16 Tex. Admin. Code § 24.29(e)(3). Further, setting the rate SRA is charging as the interim rate and requiring escrow may encourage the parties to resolve their dispute. These factors lead the ALJ to conclude that he should set the rate SRA currently charges as the interim rate and require escrow.

Accordingly, the ALJ orders that the rate SRA currently charges Dallas will be the interim rate to be in effect until this case is finally decided, namely \$0.5613/1,000 gallons, on a take-or-pay basis. The interim rate is retroactively effective from November 2, 2014, when the

² Tex. Const. art. I, § 16.

³ See *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied).

SOAH DOCKET NO. 473-13-1149.WS
PUC DOCKET NO. 43674

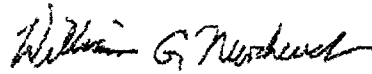
ORDER NO. 8

PAGE 3

rate SRA is charging took effect. Tex. Water Code § 12.013(e) & (f). Further, Dallas' motion to require SRA to deposit all collections under the above rate since November 2, 2014, into an escrow account, in accordance with 16 Texas Administrative Code § 24.30, is granted.

The parties have stipulated that Dallas also pays SRA an undisputed service charge under the contract that is separate and apart from the above rate. The service charge is not subject to this interim-rate order or to escrow.

SIGNED April 2, 2015.



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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

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

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

SOAH ORDER NO. 4

PAGE 2

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).

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

SOAH ORDER NO. 4

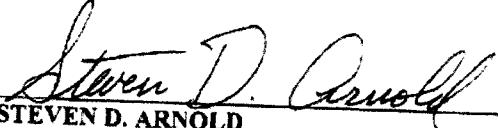
PAGE 4

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)