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SOAH DOCKET NO. 473-19-6297.WS
PUC DOCKET NO. 49189

APPLICATION OF THE CITY OF
AUSTIN DBA AUSTIN WATER FOR
AUTHORITY TO CHANGE WATER
AND WASTEWATER RATES

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

2019 DEC 16 PM 3:19

SOAH ORDER NO. 13
DISMISSING CASE WITHOUT PREJUDICE BASED ON WITHDRAWAL;
STAYING DISMISSAL TO ALLOW OPPORTUNITY FOR INTERIM APPEAL;
ABATING PROCEDURAL SCHEDULE

In this order, the Administrative Law Judges (ALJs):

- Grant Austin Water's¹ request to dismiss its application without prejudice from the dockets of the Public Utility Commission of Texas (Commission) and the State Office of Administrative Hearings (SOAH) because Austin Water has withdrawn its application—a request that the Districts² oppose;
- On the ALJs' own motion, stay the dismissal to allow an opportunity to appeal this order to the Commission; and
- On the ALJs' own motion, abate the procedural schedule.

The ALJs will lift the stay if this order is not appealed, or the Commission does not hear or does not grant the appeal.

Procedural Background

On October 14, 2019, in SOAH Order No. 7, the ALJs denied the Districts' motion to compel discovery from Austin Water involving prudence issues relating to water treatment plant No. 4 (WTP4). On October 24, 2019, Commission staff (Staff) and the Districts filed a joint appeal

¹ City of Austin d/b/a Austin Water (Austin Water).

² North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control & Improvement District No. 10, and Wells Branch Municipal Utility District (collectively, Districts).

of SOAH Order No. 7. The Commission granted the appeal orally at its November 14, 2019, open meeting and in writing in an order issued November 21, 2019.

On November 19, 2019, the ALJs convened a prehearing conference to discuss the impact on the procedural schedule of the Commission's ruling on the appeal.³ The parties agreed to a procedural schedule in which (1) the hearing was continued from early December 2019 to late June 2020; (2) Austin Water, instead of responding to the discovery requests, would file supplemental testimony relating to WTP4; and (3) the other parties could then conduct discovery on the supplemental testimony and file their own supplemental testimony relating to WTP4. The ALJs adopted the agreed schedule, which is set out in SOAH Order No. 11.

On December 2, 2019, Austin Water filed a short letter withdrawing its application and asking that it be dismissed without prejudice pursuant to the Commission's dismissal rule, 16 Texas Administrative Code (TAC) § 22.181. On December 6, 2019, the Districts filed a response, arguing that the rule does not allow dismissal based on withdrawal under the facts of this case. On December 12, 2019, Austin Water filed a short letter response arguing that because it no longer seeks authority to increase the rates it charges to the Districts, the Commission lacks jurisdiction over this case. Staff has not taken a position on these filings.

Discussion

The ALJs note that the Districts' opposition to withdrawal of the application is inconsistent with their position taken at the November 19, 2019 prehearing conference. At that time, in response to the Commission's ruling on the appeal of SOAH Order No. 7, Thomas Brocato, attorney for Austin Water, expressed willingness to amend the schedule to allow preparation of additional testimony on WTP4. Randall Wilburn, attorney for the Districts, suggested that withdrawal of the application would be appropriate. The audio tape of the prehearing conference includes this exchange:

³ At that time, Austin Water, the Districts, and Staff had filed their direct testimony but Austin Water had not yet filed its rebuttal testimony.

JUDGE SIANO: I'm presuming that we'll want to continue the hearing on the merits. Is there anyone who does not want to?

MR. BROCATO: Actually, your honor, haven't really visited with the other parties—I'm not sure exactly what their thoughts are—but in light of the Commission's ruling, we're willing to abate the schedule in order to prepare additional testimony.

JUDGE SIANO: Ok, so with that, we'll need to look at dates for a hearing on the merits that fit with our schedules, and then we want to give that to you so you can use that to inform your discussion.

MR. WILLBURN: Your honor, I think where we were, was the position that since the City has not supported the water treatment plant for costs in its application, that they've known about this issue for the last seven years and they didn't do that, that their application is defective. That we should either strike all the water treatment plant for cost and move forward on the schedule we have now, *or the City could withdraw their application*. But in talking to Staff, I think they may have a better approach to this.

Regarding the parties' current positions, Austin Water's December 2, 2019 letter seeks dismissal of its application due to withdrawal pursuant to 16 TAC § 22.181(g)(1). Based on its interpretation of two phrases in subsection 22.181(g), the Districts argue Austin Water's request does not comply with that rule. According to the Districts:

- Subsection 22.181(g)(1) allows withdrawal only before an applicant has presented its direct case, which does not apply here because Austin Water has already filed its direct case; and
- Subsection 22.181(g)(4) requires Austin Water to show good cause for withdrawal because this proceeding has been placed on an open meeting agenda for consideration of an appeal of an interim order, namely, SOAH Order No. 7, for which the Commission had granted the Districts' appeal, as described above.

As discussed in the next two sections of this order, the ALJs find both interpretations by the Districts to be unpersuasive.

In its response, Austin Water argues that the Commission's jurisdiction under Texas Water Code § 13.044(b) is limited to approving an increase to the rates set in Docket No. 42857,⁴ and because the City is no longer seeking an increase, Commission approval is no longer required. The ALJs note that 16 TAC § 22.181(d) allows dismissal for reasons that include lack of jurisdiction and moot questions or obsolete petitions. Because the ALJs conclude the rule's requirements to dismiss the application on the basis of withdrawal have been met, they do not reach the issue of whether the application should be dismissed on one of those other grounds.

The Districts' two arguments opposing dismissal based on withdrawal are addressed below.

Interpretation of "Presented Its Direct Case" in 16 TAC § 22.181(g)(1)

Regarding the Districts' first argument, subsection 22.181(g)(1) provides that "[a] party that initiated a proceeding may withdraw its application without prejudice to refile of same, at any time before that party has ***presented its direct case.***"⁵ Subsection (g)(2) states: "[a]fter the ***presentation of its direct case,*** a party may request to withdraw its application with or without prejudice, and withdrawal may be granted only upon a finding of good cause by the presiding officer."⁶ The Districts argue that in subsection (g)(1), "presented" means filed. The ALJs conclude "presented" instead means presented at the hearing on the merits.

The Districts' interpretation is inconsistent with precedents.⁷ It would also produce unreasonable outcomes. The Commission requires many applications to include the applicant's

⁴ *Petition of the North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement District No. 10, and Wells Branch Municipal Utility District from the Ratemaking Actions of the City of Austin and Request for Interim Rates in Williamson and Travis Counties*, Docket No. 42857, Order on Rehearing (Jan. 14, 2016).

⁵ Emphasis added.

⁶ Emphasis added.

⁷ See, e.g., *Application of Entergy Texas, Inc., for Authority to Change Rates*, Docket 44704, SOAH Order No. 4, Dismissing Case Without Prejudice (July 20, 2015).

prefiled direct case. Examples include major rate change applications filed by electric and Class A water utilities, and applications to construct an electric transmission facility designated as critical to reliability.⁸ In all of those cases, the Districts' interpretation would require good cause to withdraw an application from the moment the application was filed. A more reasonable reading of subsection 22.181(g)(1) is that "presented its direct case" means presented its direct case *at the hearing on the merits*. This reading is consistent with subsection 22.181(g)(2), which sets the conditions for withdrawal "[a]fter the presentation of its direct case, but prior to the issuance of a proposed order or proposal for decision," thus describing the interval after the hearing on the merits but before the proposal for decision is issued.

Interpretation of 16 TAC § 22.181(g)(4)

Subsection 22.181(g)(4) provides:

A request to withdraw an application with or without prejudice *after the application has been placed on an open meeting agenda for consideration of* an appeal of an interim order, a request for certified issues, or a preliminary order with threshold legal or policy issues may be granted only upon a finding of good cause by the commission. In ruling on the request, the commission will weigh the importance of *the matter being addressed* to the jurisprudence of the commission and the public interest.⁹

The Districts contend this subsection requires good cause to withdraw an application in any proceeding in which an application has *ever* been placed on a Commission open meeting agenda for consideration of an appeal of an interim order, a request for certified issues, or a preliminary order with threshold legal or policy issues. The ALJs construe the phrase "after the application has been placed on an open meeting agenda for consideration of an appeal of an interim order, a request for certified issues, or a preliminary order with threshold legal or policy issues" to refer to those matters if posted on the agenda of an upcoming open meeting. If that phrase were as broad as the Districts suggest, the ALJs would expect it to be worded differently, such as "if the

⁸ 16 TAC § 22.225(a)(6)(A) and (9); Tex. Water Code § 13.187(c); 16 TAC § 24.27(b)(3).

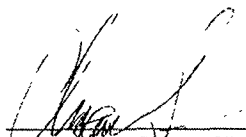
⁹ Emphasis added.

Commission has ruled or is scheduled to rule on an interim order, a request for certified issues, or a preliminary order with threshold legal or policy reasons,” instead of merely referring to whether any of those matters “has been placed on an open meeting agenda.” The second sentence also supports this interpretation —“the importance of the matter *being addressed* to the jurisprudence of the commission and the public interest.” That sentence indicates the subsection is intended to prevent a party—not from withdrawing the application after that matter is part of Commission jurisprudence because the Commission has already ruled on it—but from avoiding imminent Commission consideration of a matter important to Commission jurisprudence.

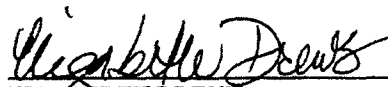
The Districts’ interpretation would also produce unreasonable outcomes. For example, to provide guidance to SOAH and the parties, the Commission typically issues a preliminary order early in the processing of a case. If a preliminary order addressed threshold legal or policy issues, the Districts’ interpretation could require good cause to withdraw an application even if discovery has barely begun and no prehearing conference has yet been held. It would require good cause to withdraw an application if an appeal of an interim order has ever been placed on an open meeting agenda, regardless of whether the appeal was granted and regardless of the nature of the matter that was the subject of the appeal.

In conclusion, the rule requirements to dismiss Austin Water’s application based on withdrawal have been met, but the ALJs stay the dismissal and abate the procedural schedule to allow an opportunity to appeal the dismissal.

SIGNED December 16, 2019.



CHRISTIAAN SIANO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS