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STATE OFFICE

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OF

ADMINISTRATIVE HEARINGS

DISTRICTS' APPEAL OF INTERIM ORDER NO. 13

Districts filed this Appeal timely.²

I. BACKGROUND

1. In January 2016, the Commission set the wholesale water and sewer rates that the City of Austin dba Austin Water (“City”) may charge the Districts, which was the first case of its

¹ See SOAH Order No. 13 Dismissing Case Without Prejudice Based on Withdrawal; Staying Dismissal to Allow Opportunity for Interim Appeal; Abating Procedural Schedule (December 16, 2019).

² 16 TAC § 22.4(a).

kind proceeding and decided under Texas Water Code (“TWC”) § 13.044.³ Once those rates were set, both TWC § 13.044 and the Commission’s Order on Rehearing required the City to receive Commission approval before increasing those rates.

2. Under the requirements of TWC § 13.044, a municipality must obtain Commission approval before the municipality may increase rates that the Commission set as the result of an appeal.⁴
3. On April 15, 2019, and as required by TWC § 13.044, the City filed its Application for Authority to Change Water Rates, which presented its direct case including the Direct Testimony of David A. Anders, the Direct Testimony of Joseph H. Gonzales, the Direct Testimony of Richard D. Giardina, the Direct Testimony of Dan Wilkerson, the Direct Testimony of Dennis P. Waley, the Direct Testimony of Stephen J. Coonan, and the Direct Testimony of Tab R. Urbantke.⁵ The City’s Application was also the first of its kind filed under TWC § 13.044.
4. On May 14, 2019, Districts filed a Motion to Intervene, as the City’s Application sought to change Districts’ water and wastewater rates.⁶
5. On July 22, 2019, Commission Counsel Stephen Journeay signed the Order of Referral, which referred this docket to the State Office of Administrative Hearings (“SOAH”).⁷
6. On August 8, 2019, the Commission issued its Preliminary Order, which included its List of Issues.⁸

³ *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 Appealing the Wholesale Water and Wastewater Rates Imposed by the City of Austin*, Docket No. 42857, Order on Rehearing (Jan. 14, 2016).

⁴ TWC. § 13.044(b).

⁵ See Application of the City of Austin dba Austin Water for Authority to Change Water and Wastewater Rates (“Application”) at 1-2 and 14-416 (Apr. 15, 2019).

⁶ See Districts’ Motion to Intervene (May 14, 2019).

⁷ See Order of Referral (July 22, 2019).

⁸ See Preliminary Order (August 8, 2019).

7. On August 7, 2019, the ALJs held the first prehearing conference at which they adopted the initial procedural schedule.⁹
8. A lengthy and vigorous discovery period followed the first prehearing conference, resulting in numerous discovery disputes and Motions to Compel.¹⁰
9. On October 21, 2019, the ALJs held a second prehearing conference to address ongoing discovery issues and to adopt a second revised procedural schedule.¹¹
10. On October 24, 2019, the Districts and the Staff of the Public Utility Commission (“Staff”) filed a Joint Appeal of Interim Order No. 7 (“Joint Appeal”), which appealed the ruling of the Administrative Law Judges (“ALJs”) in SOAH Order No. 7, which denied the Districts’ Motion to Compel the City to Respond to its Sixth Request for Information, specifically appealing the ALJs’ ruling pertaining to prudence issues and the Handcox Water Treatment Plant, formerly known as Water Treatment Plant 4 (“WTP4”).¹²
11. On November 7, 2019, the Districts filed the direct testimony and exhibits of its witnesses, Jay Joyce and David Malish.¹³
12. On November 14, 2019, the Commissioners heard, considered, and granted the Joint Appeal, concluding that the Districts’ questions about the issues regarding WTP4 were relevant and discoverable.¹⁴
13. On November 15, 2019, Staff filed the direct testimony and workpapers of its witnesses, Debi Loockerman, Brian T. Murphy, Emily Sears, William B. Abbott, and Greg Charles.¹⁵

⁹ See SOAH Order No. 2 Adopting Agreed Procedural Schedule Setting Hearing on the Merits (August 12, 2019).

¹⁰ See SOAH Order No. 5 Ruling on Districts’ Motion to Compel Austin Water to Respond to Districts’ First, Second, Third, Fourth, and Fifth RFIs; and Setting Deadline for Objections to the City of Austin’s Direct Testimony (October 9, 2019); SOAH Order No. 7 Ruling on Districts’ Motions to Compel Austin Water to Respond to Districts’ Sixth, Seventh, and Eighth RFIs, and Discussing Motions Pending for Sanctions (October 14, 2019).

¹¹ See SOAH Order No. 9 Memorializing Second Prehearing Conference; Adopting Second Revised Procedural Schedule (October 23, 2019).

¹² See Joint Appeal of Interim Order No. 7 (October 24, 2019).

¹³ See Direct Testimony of Jay Joyce on Behalf of Districts (November 7, 2019); Direct Testimony of David Malish, P.E., on Behalf of Districts (November 7, 2019).

¹⁴ See Order on Interim Appeal (November 21, 2019).

¹⁵ See Direct Testimony and Workpapers of Debi Loockerman (November 15, 2019); Direct Testimony of Brian T. Murphy (November 15, 2019); Direct Testimony of Emily Sears (November 15, 2019); Workpapers of Emily

14. On November 19, 2019, the ALJs held the third prehearing conference to address the Commission's granting of the Joint Appeal and to adopt a revised procedural schedule, allowing for discovery and testimony filings related to issues surrounding WTP4.¹⁶
15. On November 20, 2019, the ALJs entered SOAH Order No. 11, which set the revised procedural schedule as agreed to by the parties at the November 19, 2019 hearing.¹⁷
16. On December 2, 2019, the City submitted a letter filing advising the ALJs that it "withdraws its application... without prejudice" and cited 16 TAC § 22.181(g)(1) ("Request").
17. On December 3, 2019, the ALJs entered SOAH Order No. 12, which set a deadline of December 6, 2019, to object to the City's requested withdrawal.¹⁸
18. On December 6, 2019, Districts' filed their Response to the City's Request to Withdraw Application.¹⁹
19. On December 16, 2019, the ALJs entered SOAH Order No. 13 Dismissing Case Without Prejudice Based on Withdrawal; Staying Dismissal to Allow Opportunity for Interim Appeal; Abating Procedural Schedule ("SOAH Order No. 13").

II. ARGUMENT

In SOAH Order No. 13, the ALJs improperly granted the City's Request under 16 TAC § 22.181(g)(1), which allows a party to withdraw its application without good cause only if it has not presented its direct case. The Districts contend that the ALJs applied the incorrect rule. Because the Commission considered an appeal of an interim order during the Commission's open meeting on November 14, 2019, 16 TAC § 22.181(g)(4) is the rule that governs any withdrawal in this case. In addition, even if 16 TAC § 22.181(g)(1) is the applicable rule, Districts contend that

Sears (November 15, 2019); Direct Testimony and Workpapers of William B. Abbott (November 15, 2019); Direct Testimony of Greg Charles (November 15, 2019).

¹⁶ See SOAH Order No. 11 Memorializing Third Prehearing Conference; Revising Procedural Schedule and Record Close Date; Continuing Hearing on the Merits (November 20, 2019).

¹⁷ See *id.*

¹⁸ See SOAH Order No. 12 Ruling on Motions to Strike; Discussing Withdrawal (December 3, 2019).

¹⁹ See Districts' Response to City of Austin d/b/a Austin Water's Request to Withdraw Application (December 6, 2019).

the City presented its direct case with the Commission on April 15, 2019 when it filed its Application. Because the City has already presented its direct case, the City may not withdraw without a good cause showing pursuant to 16 TAC § 22.181(g)(2). The City has provided no showing of good cause for withdrawal of its Application.

A. Austin May Withdraw Only Upon Commission Finding of Good Cause

During an open meeting on November 14, 2019, the Commission considered the Joint Appeal of Interim Order No. 7. Afterward, the Commission issued its Order on Interim Appeal, which made the information related to WTP4 and its prudence relevant to this docket.²⁰ Section 22.181(g)(4) of the Commission’s Procedural Rules states the following:

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.²¹

Given that the application was placed on an open meeting agenda for consideration of an appeal of an interim order, only the Commission may grant the City’s Request and only if the Commission finds that there is good cause to do so.

In December 2016, the Commission published its “Order Adopting Repeal of §22.181, New § 22.181, and Amendment to § 22.182 as Approved at the December 16, 2016 Open Meeting” as part of Project No. 46199. In the Order, the Commission expressed its intent to “clarify procedures that apply to motions to dismiss and motions for summary decision.”²² The Commission revised the procedures for withdrawal of an application and, crucially, added § 22.181(g)(4) as detailed above, to clarify the intended meaning of § 22.181(g)(2) and § 22.181(g)(3). The Commission struck the phrase “after the matter has otherwise been set on an open meeting agenda” from both §§ 22.181(g)(2) and (g)(3) and inserted the current language in § 22.181(g)(4). By doing so, the Commission made 16 TAC § 22.181(g)(4) the proper subsection

²⁰ Order on Interim Appeal at 2 (Nov. 21, 2019).

²¹ 16 TAC § 22.181(g)(4) (emphasis added).

²² Order, Project 46199 (Dec. 16, 2016) at 4-5.

under which the City may request withdrawal in the present case.²³ In the present case, this matter has been set on the Commission open meeting agenda for consideration of an appeal of an interim order, which makes 16 TAC §22.181(g)(4) the avenue under which the City must seek withdrawal of any application.

The City's filing makes no assertion regarding good cause, and the City did not offer anything of substance in its Request that would indicate any reason for withdrawing, other than its request to do so. The City has an affirmative duty to make clear its basis for withdrawing its Application in order for the Commission to find good cause. Furthermore, compelling reasons exist to not allow the City to withdraw its Application.

The City filed this request to withdraw its Application a mere eight working days after the open meeting during which the Commission considered the Joint Appeal and just six working days after the City agreed to a new procedural schedule so that it could address the issues raised in the Joint Appeal. The impact on the Districts' rates from the City's expenditures on WTP4 and, more importantly, whether those expenses were prudent are of extreme importance to the rates that the City may charge the Districts. The City made no effort to explain why the Commission should grant it leave to withdraw its application at this point in time, nor has the City made a good cause showing for withdrawal after all parties have filed their direct testimony for the majority of the case. The City filed its Application on April 15, 2019, and the parties have poured hundreds of manhours and spent hundreds of thousands of dollars on this case to date. This matter is of utmost importance to customers of the City and concerns matters of significant public interest, including whether the City spent over one-half billion dollars for additional treatment capacity that was neither prudent nor necessary.

The ALJs concluded that 16 TAC §22.181(g)(4) did not apply because they construed 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.²⁴ The ALJs construction inserts language where none exists and undermines the intent of the rules

²³ See *id.*

²⁴ See SOAH Order No. 13, at 5.

to prevent withdrawal of applications when significant issues are in dispute and have been considered by the Commission. This case presents that exact situation in a case of first impression before the Commission under TWC 13.044, where the Commission has granted the appeal of an interim order and issued a preliminary order with threshold legal and policy issues.

Looking beyond this case, it is important for the Commission to resolve the many issues in this proceeding because of the far-reaching impact it will have on the Districts in negotiating contract renewals and rates for water and wastewater service in the future. The Districts' contracts will expire soon: Travis County Water Control and Improvement District No. 10 in August 2020, Wells Branch Municipal Utility District in March 2021, North Austin Municipal Utility District No. 1 in November 2023, and Northtown Municipal Utility District in August 2025. The Commission's decision on what costs the City may allocate to the Districts, what are the reasonable and necessary costs of providing water and sewer service to the Districts, and whether the City's rates are consistent with ratemaking principles²⁵ are all questions of paramount importance to the Districts, the City, and the Commission.

B. The ALJs' Misplaced Reliance on 16 TAC § 22.181(g)(1)

SOAH Order No. 13 relied upon 16 TAC § 22.181(g)(1) for allowing the City to withdraw its application without prejudice at this time in the process. However, 16 TAC § 22.181(g)(1) provides that “[a] party that initiated a proceeding may withdraw its application without prejudice to refiling of same, at any time *before that party has presented its direct case*. A party may agree to withdraw its application with prejudice.”²⁶ In its request to withdraw, the City specifically requested that the Application be withdrawn without prejudice. To withdraw its application under 16 TAC § 22.181(g)(1), the City must not have filed its direct case.

When deciding that “good cause” is not required for the City to withdraw its Application, the ALJs conclude that “. . . ‘presented’ instead means presented at the hearing on the merits” under 16 TAC § 22.181(g)(1). However, the ALJs' interpretation leads to an unjust and illogical outcome. If the Commission were to allow the City to withdraw its Application at this time without

²⁵ Preliminary Order (Aug. 8, 2019) at 3-6.

²⁶ 16 TAC § 22.181(g)(1) (emphasis added).

good cause, the Commission would be effectively announcing that all utilities would have *carte blanche* to game the process. Using the ALJs' approach, utilities could apply for a rate change, force the Commission and any intervenors to expend significant resources to develop and pre-file testimony objecting to the application, and then simply withdraw the application without prejudice when the utility realized it could not prevail at hearing. The utility could then resubmit a corrected and modified application to address its deficiencies and shortcomings and then force the Commission and intervenors through the whole process once again. Such a result cannot be the intent of the rule.

The City claims that the Commission has jurisdiction only because the City filed its rate application. By withdrawing its application, the City claims the Commission no longer has jurisdiction over the application. However, the City's situation is no different than any other utility that files an application with the Commission, and every other utility that files its direct case with an application must show good cause to withdraw its application. The City, too, must comply with the Commission's rules.

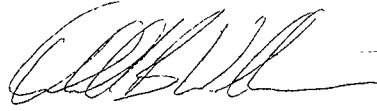
As noted above, however, the City has already presented its direct case, with the inclusion of the direct testimonies of David A. Anders, Joseph H. Gonzales, Richard D. Giardina, Dan Wilkerson, Dennis P. Waley, Stephen J. Coonan, and Tab R. Urbantke.²⁷ The City lacks any basis to claim that its direct case has not been presented. Thus, the City cannot rely upon 16 TAC § 22.181(g)(1) for its withdrawal of the application.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, 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 pray that the Commission grant this appeal of interim SOAH Order No. 13, deny the City of Austin d/b/a Austin Water's request to withdraw its application, and grant the Districts such other relief to which they may be entitled.

²⁷ Application at 14-416 (Apr. 15, 2019).

Respectfully submitted,



Randall B. Wilburn

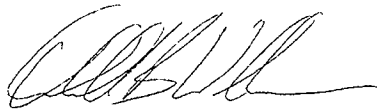
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ATTORNEYS FOR DISTRICTS

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this the 30th day of December 2019.



Randall B. Wilburn