



Control Number: 49189



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

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| APPLICATION OF THE CITY OF | § | BEFORE THE STATE OFFICE |
| AUSTIN DBA AUSTIN WATER FOR | § | |
| AUTHORITY TO CHANGE WATER | § | OF |
| AND WASTEWATER RATES | § | |
| | § | ADMINISTRATIVE HEARINGS |

**COMMISSION STAFF'S RESPONSE TO 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'S APPEAL OF INTERIM ORDER NO. 13**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Response to 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's (collectively, the Districts) Appeal of Interim Order No. 13. In support thereof, Staff shows the following:

I. BACKGROUND

On December 2, 2019, the City of Austin dba Austin Water (Austin Water) filed a letter withdrawing its application for a wholesale water and wastewater rate increase and requesting the dismissal of this case without prejudice under 16 Texas Administrative Code (TAC) § 22.181. State Office of Administrative Hearings (SOAH) Order No. 12, issued December 3, 2019, established December 6, 2019, as the deadline to object to the withdrawal, and the Districts timely filed their objection. SOAH Order No. 13, issued December 16, 2019, granted Austin Water's request to dismiss the application without prejudice, stayed the dismissal to allow for an opportunity to appeal SOAH Order No. 13 to the Commission, and abated the procedural schedule for this proceeding.

The Districts filed their appeal of SOAH Order No. 13 on December 30, 2019. Under 16 TAC § 22.123(a)(4), a response to an appeal must be filed within five working days. Five working days from December 30, 2019, is January 8, 2020.¹ Therefore, this pleading is timely filed.

¹ The Commission was closed for business on December 31, 2019, and January 1, 2020.

II. ARGUMENT

Staff agrees with the SOAH Administrative Law Judges (ALJ) who interpreted “presented its direct case,” as used in 16 TAC § 22.181(g)(1),² to refer to the presentation of an applicant’s direct case at the hearing on the merits.³ This interpretation is supported not only by the precedent from Docket No. 44704 noted by the ALJs, but by orders issued in Docket Nos. 49094, 47182, 46716, and 45660 as well.⁴ The Districts have not cited to any precedent stating an alternative meaning of “presented its direct case.” Thus, the ALJs’ interpretation should be upheld by the Commission.

Staff also supports the ALJs’ interpretation of 16 TAC § 22.181(g)(4). The current version of this rule was adopted in Project No 46199.⁵ As originally proposed, the rule read as follows:

(g) Withdrawal of application. An application may be withdrawn in accordance with this subsection.

(1) 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.

(2) After the presentation of its direct case, but prior to the issuance of a proposed order or proposal for decision **or after the matter has otherwise been set on an open meeting agenda**, a party may request to withdraw its application with or without prejudice to refile of same, and withdrawal may be granted only upon a finding of good cause by the presiding officer.

(3) A request to withdraw an application after a proposed order or proposal for decision has been issued **or after the matter has otherwise been set on an open meeting agenda** requires 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.

² See 16 TAC § 22.181(g)(1).

³ SOAH Order No. 13 Dismissing Case Without Prejudice Based on Withdrawal; Staying Dismissal to Allow Opportunity for Interim Appeal; Abating Procedural Schedule at 5 (Dec. 16, 2019) (SOAH Order No. 13).

⁴ *Complaint of Sheretta D. Williams and Michael L. Williams, Jr. Against Southwestern Electric Power Company*, Docket No. 49094, SOAH Order No.5 Granting Complainants’ Withdrawal of Complaint at 1 (Nov. 5, 2019); *Ratepayers’ Appeal of the Decision by Kempner Water Supply Corporation to Change Rates*, Docket No. 47182 SOAH Order No. 5 Canceling Hearing on the Merits and Dismissing Case at 1 (Apr. 4, 2019); *Application of AEP Texas to Amend a Certificate of Convenience and Necessity for the Bonilla to Ladekidde Double-Circuit 345 kV Transmission Line in Cameron and Willacy Counties*, Docket No. 46716, SOAH Order No. 8 Canceling Hearing and Dismissing Case at 1 (Aug. 18, 2017); *Application of San Jo Utilities, Inc. for a Rate/Tariff Change*, Docket No. 45660, SOAH Order No. 4 Acknowledging Withdrawal of Application and Dismissing Case at 1 (Jan. 26, 2017).

⁵ *Rulemaking to Amend 16 Texas Administrative Code §§ 22.181 and 22.182*, Project No. 46199 (Dec. 19, 2016).

(4) If an application is authorized to be withdrawn, the presiding officer shall issue an order of dismissal stating whether the dismissal is with or without prejudice. Such order must, if applicable, specify the facts on which good cause is based and the basis of the dismissal and is the final order of the commission subject to motions for rehearing under §22.264 of this title.⁶

In response to comments submitted by AT&T, the Commission struck the phrase “after the matter has otherwise been set on an open meeting agenda” from subsections (g)(2) and (3) and added the existing version of subsection (g)(4) to prescribe the standard to be used to evaluate a request for withdrawal that is filed after a matter has been set 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.⁷

The decision to replace “after the matter has otherwise been set on an open meeting agenda” with an entirely new subsection clearly demonstrates that the Commission intended 16 TAC § 22.181(g)(4) to enumerate the specific circumstances under which placing an application on an open meeting agenda triggers the need for a finding of good cause before the Commission may grant the withdrawal of an application. The Districts argue that the intent of this rule is “to prevent withdrawal of applications when significant issues are in dispute and have been considered by the Commission.”⁸ However, there is nothing in the Order of Adoption to suggest that subsection (g)(4) was intended to supplant subsection (g)(1) once the Commission has ruled on an interim order.⁹ In this case, the Commission issued its Order on Interim Appeal on November 21, 2019.¹⁰ Accordingly, it is proper to evaluate Austin Water’s request for withdrawal under 16 TAC § 22.181(g)(1) rather than 16 TAC § 22.181(g)(4).

⁶ Project No. 46199, Proposal for Publication of Repeal of § 22.181, New § 22.181, and Amendment to § 22.182 as Approved at the September 8, 2016 Open Meeting at 7-8 (Sep. 8, 2016) (emphasis added).

⁷ Project No. 46199, Order Adopting Repeal of § 22.181, New § 22.181, and Amendment to § 22.182 as Approved at the December 16, 2016 Open Meeting at 4-5 (Dec. 19, 2016).

⁸ 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’s Appeal of SOAH Order No. 13 at 6-7 (Dec. 30, 2019).

⁹ As the ALJs note, the language in the second sentence of subsection (g)(4), which references the “importance of the matter being addressed to the jurisprudence of the commission and the public interest,” suggests that the intent of this rule is to prevent a party “from avoiding imminent Commission consideration of a matter important to Commission jurisprudence.” SOAH Order No. 13 at 6.

¹⁰ Order on Interim Appeal (Nov. 21, 2019).

III. CONCLUSION

For the reasons detailed above, Staff respectfully requests that the Commission deny the Districts' appeal of SOAH Order No. 13 and affirm the dismissal of this docket without prejudice.

Dated: January 8, 2020

Respectfully Submitted,

PUBLIC UTILITY COMMISSION OF TEXAS LEGAL DIVISION

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on January 8, 2020, in accordance with 16 TAC § 22.74.


Eleanor D'Ambrosio