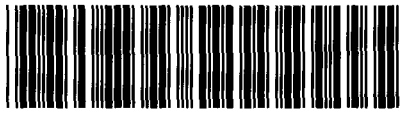
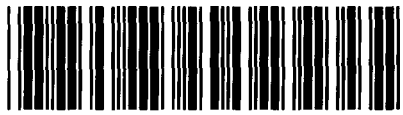


Control Number: 49189



Item Number: 211

Addendum StartPage: 0

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

2020 JAN -3 PM 2:04

APPLICATION OF THE CITY OF AUSTIN DBA AUSTIN WATER FOR AUTHORITY TO CHANGE WATER AND WASTEWATER RATES	§ § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

SPECIAL APPEARANCE OF THE CITY OF AUSTIN D/B/A AUSTIN WATER: RESPONSE TO DISTRICTS' APPEAL OF INTERIM ORDER NO. 13

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, the City of Austin (City) d/b/a Austin Water (AW or Austin Water) and makes this special appearance for the limited purpose of submitting this Response to Districts' Appeal of Interim Order No. 13 (Interim Appeal) filed on December 30, 2019. Pursuant to 16 Tex. Admin. Code (TAC) § 22.123(a)(4) a response to an appeal of an interim order is due within five working days of the filing of the appeal.[1] Therefore, this response is timely filed.

On December 2, 2019, Austin Water withdrew its request for approval to increase the rates set by the Public Utility Commission (Commission) in Docket No. 42857, *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*. This action legally concludes Docket No. 49189 and ends the Commission's jurisdiction. As such, the Districts' appeal is moot.

I. THE CITY IS ENTITLED TO WITHDRAW ITS APPLICATION UNDER TWC § 13.044(B)

The Public Utility Commission's jurisdiction under Section 13.044(b) of the Texas Water Code is limited to the City seeking approval to increase rates that were previously set under this section. Specifically, Section 13.044(b) provides that the Commission may fix the rates to be charged by a municipality in response to an appeal under this section. The Commission took such action in Docket No. 42857. The law goes on to state "the municipality may not increase such

[1] The Commission was closed on December 31, 2019 and January 1, 2020.

rates without the approval of the utility commission." At this time, the City does not intend to increase "such rates" set in Docket No. 42857 and, therefore, is no longer seeking "approval of the utility commission." Withdrawal of the application concludes this proceeding and removes the Commission's jurisdiction over this matter. Accordingly, Austin Water is not requesting further action.[2]

According to the Districts, "the City's situation is no different than any other utility that files an application with the Commission."[3] This is incorrect. Unlike investor owned utilities, the Commission does not have plenary jurisdiction over municipally owned utilities. For example, an investor owned utility may not change rates without Commission approval. Furthermore, the Commission retains the authority to require an investor owned utility to demonstrate that its rates are reasonable at any time. In contrast, the Texas Water Code limits the Commission's ratemaking authority over municipalities to certain types of appeals and places specific limitations on the actions the Commission may take in those appeals. Significantly, the Commission does not possess the authority to require a rate review. Section 13.044(b) states clearly that the Commission's authority in Docket No. 49189 is limited to approving a proposed increase by the City.[4] Because the City is no longer seeking to increase its rates to the Districts, jurisdiction is no longer conferred on the Commission.

Notwithstanding this lack of jurisdiction, and without waiving this point, Austin Water will address the claims contained in the Districts' interim appeal for the limited purpose of demonstrating that even if the Commission did have continuing jurisdiction over this matter, Austin Water is entitled to withdraw without good cause under 16 TAC §22.181(g)(1) and with good cause under 16 TAC §22.181(g)(4).

---

[2] Contrary to the Districts' statements, Austin Water did not "request" permission to withdraw its application. *See* Districts' Interim Appeal at 4, 8.

[3] Districts' Interim Appeal at 8.

[4] Although Section 13.044(b) states that the City may not increase the rates set by the Commission in Docket No. 42857 without first obtaining Commission approval, the City was not required to file their rate application until, and unless, such approval is sought by the City.

II. A PARTY DOES NOT PRESENT ITS DIRECT CASE WHEN IT FILES AN APPLICATION

Pursuant to 16 TAC §22.181(d), dismissal of a proceeding may be based upon "lack of jurisdiction," "moot questions or obsolete petitions", "failure to prosecute" or "other good cause shown." As discussed above, the City is no longer prosecuting this case thus terminating the Commission's jurisdiction. In addition, 16 TAC §22.181(g)(1) provides that a party that initiated a proceeding may withdraw its application without prejudice to refiling "at any time before that party present[s] its direct case." This section provides an absolute right to withdrawal without requiring a party to request approval or demonstrate good cause. The Districts assert that by filing its application, the City has "presented its direct case" under § 22.181(g)(1).[5] This is incorrect. The Administrative Law Judges (ALJs) properly concluded that the words "present[ing] its direct case" means "presented at the hearing on the merits."[6] This interpretation is supported by the words in subsection (g)(1), the remainder of section (g) and precedent. Specifically, subsection (g)(1) provides that a party that initiated a proceeding may withdraw its "application" at any time before that party has "presented its direct case." The rule clearly contemplates a distinction between filing an application and presenting a party's direct case. Notably, a party that files an application is not required to present a direct case. They retain the right to offer testimony and other evidence included in their application as part of their direct case once the hearing on the merits commences. Together, such evidence forms the basis for the Commission to make a decision on the case. Not until a party makes such an offering at the hearing is a party's direct case defined (i.e. presented). The Districts incorrectly equate filing an application with presenting a direct case at a hearing.

Under the Districts' interpretation, a party would have to demonstrate good cause to withdraw from the moment an application was filed. This would render subsection (g)(1) pointless and is inconsistent with the remainder of the rule. Section (g) is divided into four relevant subsections. Each subsection sets out the terms for withdrawal of an application. Each subsection

---

[5] Districts' Interim Appeal at 8.
[6] SOAH Order No. 13 at 4.

makes it more difficult to withdraw a case as the case progresses procedurally. As noted, subsection (g)(1) allows a party to withdraw without requiring a party to "request" approval or demonstrating good cause at "any time before that party has presented its direct case." The next subsection, (g)(2), sets outs the grounds for withdrawal "after the presentation of [a party's] direct case, but prior to the issuance of a proposed order or proposal for decision." Subsection (g)(2) picks up where subsection (g)(1) stops (i.e. after the hearing on the merits but before the proposal for decision is issued). Therefore, a review of the entirety of section (g) further confirms the ALJs' interpretation.

Finally, the ALJs correctly point out that the Districts' interpretation of the rule is at odds with Commission precedent.[7] Significantly, just two months ago, in Docket No. 49094, the ALJ in that case granted dismissal of the proceeding under § 22.1841(g)(1) on the basis that the withdrawing party "ha[d] not yet presented their direct case *at a hearing on the merits* in th[e] proceeding" affirming the ALJs' interpretation of the rule in this proceeding.[8] In contrast, the Districts presented no precedent or authority supporting their suggested interpretation of the rule.

III. THE DISTRICTS' INTERPRETATION OF § 22.181(G)(4) IS ERRONEOUS

The Districts argue that 16 TAC § 22.181(g)(4) 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.[9] The ALJs correctly determined that the Districts' interpretation of the rule is inconsistent with the text of the rule and would produce unreasonable outcomes. As noted above, subsection (g) is divided into four subsections with each section establishing a progressively higher standard for withdrawing a case depending upon where the case is procedurally. In short, the further along the case is, the higher the burden on the party

---

[7] SOAH Order 13 at 5 citing *Application of Entergy Texas, Inc., for Authority to Change Rates*, Docket No. 44704, SOAH Order No. 4, Dismissing Case Without Prejudice (July 20, 2015).

[8] *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 (Nov. 5, 2019). (emphasis added).

[9] Districts' Interim Appeal at 5-7.

seeking withdrawal. Subsection (g)(4) creates the highest burden on a party in situations where the Commission is scheduled to consider a matter important to Commission jurisprudence.[10]

The ALJs also properly recognized that the Districts' interpretation would produce unreasonable outcomes. Under their interpretation, placing a preliminary order on an open meeting agenda or an appeal of any kind, even if it occurs when a case has just been filed, would trigger the highest level of scrutiny in order for a withdrawal to occur. This would occur regardless of whether the appeal was granted and regardless of the nature of the matter that was subject of the appeal.[11] Such an interpretation would effectively nullify subsections (g)(1)-(3).

IV. EVEN IF § 22.181(G)(4) DID APPLY, GOOD CAUSE EXISTS FOR DISMISSAL

The City did not address good cause when it withdrew its application because such a showing is not required under the law or rules. However, even if the Commission concludes that it retains jurisdiction over this matter and subsection (g)(4) applies to this case, good cause exists for granting a dismissal of this case. Initially, the City notes that the decision to withdraw this application was not taken lightly. Several specific reasons supported the City's decision:

1. This case impacts just four customers;

2. The total requested increase of $3.18 million is relatively small;

3. Neither the law nor the Commission's rules provide guidance for how the case is to be processed;

4. There is no jurisdictional deadline. The current procedural schedules contemplates the proceeding lasting well over a year;

5. By withdrawing its application, no party is prejudiced because the rates set previously by the Commission will not change. In particular, costs associated with the Berl Handcox Water Treatment Plant are currently not included in rates charged to the Districts.

---

[10] See SOAH Order No. 13 at 6.
[11] See SOAH Order No. 13 at 6.

6. The City has already responded to almost 600 discovery questions and made 95 filings. Together, the City has already spent a considerable amount in rate case expenses. Despite Commission precedent, both the Districts' and the Commission Staff filed direct testimony taking the position that rate case expenses are not recoverable in this matter. This is contrary to their prior positions. If the City were to proceed with this case, it is possible that the City will incur expenses in excess of the rate change and will not be allowed to recover those expenses.

7. The decision to include a review of costs associated with the Berl Handcox Water Treatment Plant significantly extends the procedural schedule and increases rate case expenses. The City is unaware of the Commission conducting a prudence review in any prior appeal of a municipal utilities' rates. Additionally, in two meetings with the Commission Staff prior to the filing of the application, the City was not encouraged to include prudence testimony in its application. Based upon the foregoing reasons, the costs and benefits associated with this case have materially changed since the filing of the application on April 15, 2019. Together, these reasons provide good cause for dismissing this proceeding.

In support of its arguments, Districts raise a number of reasons for not allowing the City to withdraw its application. None of these reasons support such a finding. First, the Districts claim that the impact on the Districts' rates from the City's expenditures on the Berl Handcox Water Treatment Plant (a.k.a. WTP4) are "of extreme importance to the rates that the City may charge the Districts."[12] This is incorrect. As the Districts are aware, their rates do not contain any costs associated the Berl Handcox Water Treatment Plant as determined by the Commission in Docket No. 42857. Similarly, because such costs are not currently included in rates, and will not be included following dismissal, it is not a "matter of significant public interest" as the Districts claim.[13] Finally, the Districts allege that it is important for the Commission to resolve the many issues in this case because it will impact the Districts' contract renewal negotiations in the future.[14]

---

[12] Districts' Interim Appeal at 6.
[13] Districts' Interim Appeal at 6.
[14] Districts' Interim Appeal at 7.

Each of the four Districts in this case currently have contracts with the City that expire at various times over the next five years. Regardless, such claims are irrelevant to this proceeding and do not form a basis for continued litigation over rates that the City no longer seeks approval from the Commission to change.

V. CONCLUSION

The Public Utility Commission's jurisdiction under Section 13.044(b) of the Texas Water Code is limited to the City seeking approval to increase rates that were previously set under this section. At this time, the City does not intend to increase "such rates" set in Docket No. 42857 and, therefore, is no longer seeking "approval of the utility commission." Withdrawal of the application concludes this proceeding and removes the Commission's jurisdiction over this matter. Accordingly, the Districts' motion is moot. Even if, however, the Commission had jurisdiction to do so, and considered this matter under 16 TAC § 22.181, the City has satisfied the requirements for withdrawing this application.

Respectfully submitted,

LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)

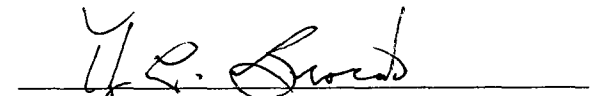
THOMAS L. BROCATO
tbrocato@lglawfirm.com
State Bar No. 03039030

CHRISTOPHER L. BREWSTER
cbrewster@lglawfirm.com
State Bar No. 24043570

ATTORNEYS FOR AUSTIN WATER

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, a true and correct copy of the foregoing document has been served on all parties of record via electronic mail.



THOMAS L. BROCATO