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# Public Utility Commission of Texas


## Commissioner Memorandum

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PUBLIC UTILITY COMMISSION  
FILING CLERK

**TO:** Commissioner Arthur C. D'Andrea  
Commissioner Shelly Botkin

**FROM:** Chairman DeAnn T. Walker 

**DATE:** January 13, 2021

**RE:** January 14, 2021 Open Meeting – Item No. 3, 4, and 5  
Docket No. 49596 – *Application of Mark Patterson for Temporary Rates for a Nonfunctioning Utility*  
Docket No. 49758 – *Application of Mark Patterson for Temporary Rates for a Nonfunctioning Utility*  
Docket No. 49759 – *Application of Mark Patterson for Temporary Rates for a Nonfunctioning Utility*

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There are three proposed orders addressing temporary rates posted on this open meeting for the Commission's consideration. Before addressing any of these orders, I would like to address temporary rates in a general and conceptual manner.

The Commission is directed in Texas Water Code § 13.046(a) to establish procedures by rule to allow for temporary rates to provide the revenue necessary to bring a nonfunctioning utility into compliance with Commission and Texas Commission on Environmental Quality (TCEQ) rules: conversion to a utility that provides continuous and adequate service to its customers in a manner that conforms to applicable regulatory requirements. The Commission's temporary-rate rule, 16 Texas Administrative Code (TAC) 24.363, allows recovery of the reasonable costs that are necessary to allow the utility to provide service to customers and to bring the utility into compliance with applicable rules.

A temporary rate may be charged to customers immediately upon sending notice to the Commission.<sup>1</sup> Prior Commission approval is not required but the Commission must subsequently rule on the reasonableness of the temporary rate. Notice of the temporary rate must be sent to customers no later than the first bill that includes the temporary rate.<sup>2</sup> The temporary-rate rule states that the Commission will issue an order on reasonableness with 90 days of receiving notice,<sup>3</sup> but that is not happening for reasons discussed below. In making its ruling on reasonableness, the Commission may consider information submitted by any entity affected by the temporary rates.<sup>4</sup>

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<sup>1</sup> 16 Tex. Admin. Code § 24.363(a).

<sup>2</sup> *Id.* § 24.363(b).

<sup>3</sup> *Id.* § 24.363(c).

<sup>4</sup> *Id.*

In practice, only the temporary manager or receiver of the nonfunctioning utility submits information. However, the temporary-rate rule does not identify the type of information that is necessary for the Commission to make the required ruling on reasonableness; in fact, the rule does not require that any information be submitted. Nor does the rule specify when information must be submitted. These shortcomings in the rule are one cause of the problematic nature of this type of case.

We have seen enough nonfunctioning utilities to understand that the lack of financial resources is usually the biggest obstacle to restoring the utility to a viable, ongoing utility that can provide a quality service to its customers. The only practical source of money available to most of these utilities is through rates—loans from banks or other entities appear to be a rarity. Thus, implementing sufficient rates as soon as possible is paramount to put the utility on the road to recovery. However, this road might include another entity purchasing the utility. The purchasing entity may have a strong balance sheet and be capable of providing needed financial resource. Or the purchasing entity may need the utility to have adequate rates and be a financially viable business. These are factors that will influence the design of temporary rates. If an entity purchases the nonfunctioning utility and is required to obtain the approval of the Commission under Texas Water Code § 13.301, the Commission must in that proceeding rule on the reasonableness of temporary rates (if it has not already) and determine how long the temporary rates will remain in place for the purchaser.<sup>5</sup> Thus, the process for temporary rates must address this possibility.

However, the Commission must also ensure that temporary rates are fair to customers. While it is likely in many cases that substantial increases in rates will be required, the temporary-rate process must allow the Commission to ensure that temporary rates are set at a reasonable level—which I believe is not a rate to recover a revenue requirement based on a historical test year. A reasonable temporary rate must first be set to recover the expected, or predicted, amount of revenues necessary to restore the utility to good standing but must also be subject to reconciliation after an appropriate period of time. The timing of the reconciliation should depend on the total amount of revenue to be recovered through the temporary rate, the size of the rate increase borne by customers, and the comfort level of the Commission with the experience of the temporary manager and the quality of the information provided to the Commission. In my opinion, subjecting temporary rates to reconciliation is a component necessary to find the temporary rate reasonable.

The information available to a temporary manager at the time temporary rates are implemented is likely sparse and incomplete. As we have seen in prior cases, the quality and quantity of information subsequently submitted by a temporary manager to support temporary rates has usually been insufficient. And even after the Commission Staff has made tremendous efforts to gather additional information and repackaged it into a better form, the Commission has often found the information to still be lacking. Docket No. 49596<sup>6</sup> has already been remanded twice. I do not believe that multiple remands are the appropriate way to address the problems with this type of proceeding. The Commission must make a course correction to put this industry and the Commission on a path to make the temporary rate process efficient. My hope is that with this

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<sup>5</sup> Tex. Water Code § 13.046(d).

<sup>6</sup> *Application of Mark Patterson for Temporary Rates for a Nonfunctioning Utility*, Docket No. 49569 (pending).

memorandum the Commission will begin this course correction. However, it will take some time to make the changes that will allow us to reach this goal.

We need to recognize that a temporary-rate proceeding is not a base-rate case, and we cannot demand the same type and quality of historical information. We also need to establish flexible requirements to recognize that there may be little to no historical financial or operational records for the nonfunctioning utility. We must also provide clear guidance on the type of information needed to support estimated costs for needed repairs or replacement of facilities. Estimated costs will be required for many nonfunctioning utilities, but the information required should reflect the cost of specific items: a \$300 repair should not require the same information as a \$30,000 item. And we need to recognize that an experienced temporary manager may have personal knowledge of the costs of certain types of repairs of equipment. Ultimately, we will need to provide guidance in more detailed rules, develop a standard filing package, and perhaps even develop an instruction manual to educate temporary managers to assist them in determining an appropriate temporary rate and to educate them on the type of information needed and how to put a high-quality filing together to support temporary rates.

I believe that we must recognize the fact that the Commission will lack sufficient information in setting the initial temporary rates. The reality is that many nonfunctioning utilities have scant financial and operational records. Thus, a temporary manager must make decisions about temporary rates on uncertain information. However, I believe that, even with any resulting uncertainty, a ruling on the reasonableness of a temporary rate can be made by reconciling the revenues produced by a temporary rate with the cost actually incurred to restore the nonfunctioning utility. That is, the reasonableness of the rates must rest on a future reconciliation when time to develop adequate financial and operation information has passed. The period before this reconciliation may need to vary depending on the amount of revenue required, the time to complete the restoration, the quality of the information provided, or other factors as necessary. The reconciliation can protect ratepayers so that they pay only a reasonable amount necessary to restore a quality utility service.

But just as important, the reconciliation allows the Commission to find temporary rates are reasonable without continuing remands to develop a more complete factual record. An objective that in fact may not be possible at that time. Thus, I believe that the Commission should be willing to find temporary rates imposed by a temporary manager that are made subject to reconciliation to be reasonable based a less robust set of facts than we would see in a typical rate case.

This is especially true right now. The Commission cannot wait to act on all temporary rate proceedings until all of the necessary rules, forms, instructions, and procedures are put into place. But I believe that, through the use of a reconciliation, the Commission can move forward on pending cases even where the underlying information is not where we would like it to be.

I am providing recommendations for the three cases at this open meeting by separate memorandums.

I look forward to discussing this matter with you at the open meeting.