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DOCKET NO. 49732

COMPLAINT OF PAUL HAWKINS
AGAINST MONARCH UTILITIES I,
L.P.

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PUBLIC UTILITY COMMISSION
OF TEXAS

COMMISSION STAFF'S BRIEF ON EFFECTIVE DATE ISSUES

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Staff's Brief on Effective Date Issues. In support thereof, Staff shows the following:

I. INTRODUCTION

On July 15, 2019, Paul Hawkins (Mr. Hawkins) filed a formal complaint against Monarch Utilities I, L.P. (Monarch) regarding pass-through water charges. Mr. Hawkins filed the formal complaint pursuant to 16 Texas Administrative Code (TAC) § 22.242. On August 6, 2019, Monarch filed its response to the complaint.

On March 12, 2020, a Briefing Order was issued, requiring any interested party to file a brief addressing certain issues identified by the Commission by March 26, 2020. This brief is therefore timely filed.

II. DISCUSSION

On February 20, 2019, Monarch filed an application seeking approval to implement a new combined pass-through rate with a proposed effective date of March 1, 2019.¹ Mr. Hawkins' complaint raises the issue of whether Monarch was permitted to begin charging the combined pass-through rate before receiving final Commission approval of this new rate.² At the open meeting on March 12, 2020, the Commission considered a memorandum issued by Chairman Deann Walker.³ At the direction of the Commission, the Office of Policy and Docket Management issued a briefing order posing the following questions:

¹ Application of Monarch Utilities I, L.P. for a Pass Through Gallonage Charge, Tariff Control No. 49242 (pending).

² Docket 49732, AIS Item 18, Open Meeting Cover Sheet - March 12, 2020 - Agenda Item No. 1, Memorandum of Chairman Deann T. Walker at 000000003 (Mar. 11, 2020).

³ *Id.*

1. Does the following language in Monarch's current tariff constitute Commission authorization for an effective date of a pass-through charge other than the date of approval of that charge by the Commission under 16 TAC § 24.25(h):⁴

To implement, all notice requirements must be met. The utility may begin to charge the new filed WPC on the proposed effective date in the notice. Implementation of this WPC adjustment provision shall be governed by 16 TAC § 24.21(h)

In answering this issue, please address whether the Commission order approving Monarch's tariff is the type of order referenced in 16 TAC § 24.25(h).

A. History of 16 TAC § 24.25(h).

The evolution of the current version of 16 TAC § 24.25(h) could help inform the answer to the questions posed in the Briefing Order depending on when the quoted provision in Monarch's tariff was added. Chapter 24 of the Commission's rules was renumbered effective October 17, 2018. Prior to that, 16 TAC § 24.25(h) was 16 TAC § 24.21(h). As recently as 2015, 16 TAC § 24.21(h) authorized "a utility that purchased water or sewage treatment to include a provision in its tariff to pass through to its customers changes in such costs," and enumerated procedures to be used to include a pass-through provision in a tariff.⁵ However, the 2015 version of the rule specifically stated that a pass-through provision or a proposed change in the calculation of the pass-through rate must be approved in a rate proceeding.⁶ Once the pass-through revision was approved, a revision to the rate was eligible for administrative approval outside of a base rate proceeding.⁷ The provision regarding the effective date of a tariff change was included in 16 TAC § 24.21(i) in 2015.⁸

⁴ Monarch's Response to Order No. 1, Exhibit A at 10 (Aug. 6, 2019).

⁵ Project No. 48371, Order Adopting Amendments to §§ 24.3, 24.8, 24.14, 24.21, 24.23, 24.31, 24.32, 24.34, 24.41, 24.44, 24.72, 24.73, 24.102, 24.109, 24.111, 24.114, 24.131, 24.150; Repeal of §§24.11, 24.22, 24.25, 24.26, 24.27, 24.28; and §§24.11, 24.22, 24.26, 24.28, 24.33, 24.36 as Approved at the August 14, 2015 Open Meeting at 139 (Aug. 24, 2015).

⁶ *Id.* at 38.

⁷ *Id.* at 139-40.

⁸ *Id.* at 141.

In Project No. 45112, the Commission moved the language regarding purchased water and sewage treatment pass-through provisions from 16 TAC § 24.21(h) to 16 TAC § 24.25(b)(2)(E).⁹ In doing so, the Commission authorized both the implementation of a new pass-through provision and the revision of an existing provision as a minor tariff change eligible for administrative approval.¹⁰ Moving this language also resulted in moving the effective date language from 16 TAC § 24.21(i) to 16 TAC § 24.21(h).¹¹ In Project No. 47303, the paragraphs in 16 TAC § 24.25(b)(2) were re-lettered and paragraph (E) became paragraph (F).¹²

Based on the foregoing history, if the provision in Monarch’s tariff titled “Water Pass-Through Gallonage Charge Adjustment” was added to the tariff and approved prior to December 15, 2016, it is likely that at the time it was written, the reference to 16 TAC § 24.21(h) was a reference to the version of 16 TAC § 24.21(h) that barred implementation of a new pass-through provision outside a base rate proceeding. Further, this citation in the tariff should have been updated as the provisions of 16 TAC § 24.21(h) were moved to 16 TAC § 24.25(b)(2)(E) and then (F). Therefore, this provision should actually read “Implementation of this WPC adjustment provision shall be governed by 16 TAC § 24.25(b)(2)(F).”

Nevertheless, this citation has not been updated, and the plain language of Monarch’s tariff contains two seemingly contradictory statements. First, it states that Monarch may begin charging a purchased water pass-through provision on the effective date in the notice provided to customers. Second, it states that implementation of the purchased water pass-through provision is governed by 16 TAC § 24.25(h), which establishes the effective date of a tariff change as the date of approval by the regulatory authority, unless otherwise specified by the regulatory authority, in a commission order, or in a rule.

⁹ *PUC Rulemaking Proceeding to Amend Chapter 24 for Water/Sewer Pass Through Clauses and Surcharge Rules* Project No. 45112, Order Adopting Amendment to §24.21 as Approved at the November 10, 2016 Open Meeting at 26-28 (Nov. 14, 2016).

¹⁰ *Id.* at 26.

¹¹ *Id.* at 31.

¹² *Amendments to 16 TAC § 24.21 for a Pass Through Provision Formula and to Implement House Bill 1083 to Allow a Utility to Establish Reduced Water Utility Rates Funded by Donations for Elderly Customers Pursuant to TWC § § 13.182 and 13.189*, Project No. 47303, Order Adopting Amendment to § 24.21 as Approved at the December 14, 2017 Open Meeting at 23-25 (Dec. 18, 2017).

B. Procedures in 16 TAC § 24.25(b)(2)(F) to Implement a Pass-Through Rate.

The rule governing the process to be used to implement a pass-through rate is 16 TAC § 24.25(b)(2)(F). While this rule requires a utility to file a written notice with the Commission and provide notice to customers “prior to the beginning of the billing period in which the [pass-through] revision takes effect[,]”, it does not specify how far in advance of the billing period the notice must be provided.¹³ In other words, it does not require that the effective date proposed by the utility allow sufficient time for the Commission to review and approve the requested pass-through provision, nor does it allow for a suspension of the proposed effective date. Instead, 16 TAC § 24.25(b)(2)(F) is silent on whether a utility may collect a proposed pass-through rate in the period between the effective date in the notice and the date the pass-through application is approved by the Commission.¹⁴

Absent any specific guidance on the effective date in 16 TAC § 24.25(b)(2)(F), it is reasonable to apply 16 TAC § 24.25(h) to an application to implement or revise a pass-through provision. Accordingly, a proposed pass-through rate is not effective until the Commission approves it, regardless of the effective date in the notice provided to customers, unless otherwise stated in a Commission rule or specified by the Commission in an order or by some other method.¹⁵ Because Monarch’s tariff is approved by the Commission, one could argue that the provision authorizing the collection of the pass-through rate beginning on the effective date included in the notice to customers falls within the “unless otherwise specified by the regulatory authority” exception in 16 TAC § 24.25(h). However, this interpretation would be at odds with the explicit reference to 16 TAC § 24.21(h) (now 16 TAC § 24.25(h)) also contained in the tariff.

In addition, there is nothing to indicate that Commission approval of tariff language in a proceeding where the specific language is not relevant to the application under review is the type of approval contemplated as an exception to 16 TAC § 24.25(h). For example, the tariff Monarch

¹³ 16 TAC § 24.25(b)(2)(F)(i)-(ii).

¹⁴ One possible way to address this ambiguity would be to approve the requested pass-through rate as an interim rate effective on the date in the notice provided to customers and subject to refund or true-up once the application receives final approval.

¹⁵ 16 TAC § 24.25(h).

provided in its response to Mr. Hawkins' complaint was approved in Tariff Control No. 48329.¹⁶ In that docket, Monarch sought approval of a Federal Tax Change Credit Rider in compliance with the accounting orders issued in Project No. 47945.¹⁷ The tariff approved by the Commission included the language that is subject of this brief; however, the Federal Tax Change Credit Rider at issue in Docket No. 48329 was on a completely separate page of the tariff (page 2) than the purchased water pass-through provision (page 4).¹⁸ Further, no part of the Commission's review of the application in Docket No. 48329 involved questions of law or fact related to a pass-through rate to recover the costs of purchased water or fees like groundwater conservation district fees.

Thus, it is reasonable to look at the type of docket in which a tariff provision was approved in order to determine if Commission approval of the tariff constitutes an exception to the effective date provision in 16 TAC § 24.25(h). If the tariff provision was approved in a docket where the Commission's review was directly related to the subject of the tariff language, then it is reasonable to treat approval of the tariff as an exception. When applied to the facts of this case, the only time Commission approval of Monarch's tariff would constitute an exception to 16 TAC § 24.25(h) would be in a proceeding to implement or revise a pass-through provision. Because this is the first time Monarch has applied to implement the pass-through provision at issue in this case, Staff does not believe that there has been a proceeding before this Commission where approval of Monarch's tariff would qualify as an exception to 16 TAC § 24.25(h) under the "unless otherwise specified" provision.

2. Does any other language in Monarch's current tariff constitute such authorization? In answering this issue, please identify any such language.

No other language in Monarch's current tariff constitutes authorization to begin charging rates without Commission approval.

¹⁶ *Application of Monarch Utilities I, L.P. for a Minor Tariff Change to Implement a Federal Tax Change Credit Rider*, Tariff Control No. 38329, Water and Sewer Tariffs Filed in Accordance with Final Order (Feb. 25, 2019).

¹⁷ Proceeding to Investigate and Address the Effects of Tax Cuts and Jobs Act of 2017 on the Rates of Texas Investor Owned Utility Companies, Project No. 47945, Amended Order Related to Change in Federal Income Tax Rates (Feb. 15, 2018) and Second Order (Aug. 30, 2018).

¹⁸ Monarch's Response to Order No. 1, Exhibit A at 8, 10 (Aug. 6, 2019).

III. CONCLUSION

The language in Monarch's tariff regarding the effective date of a pass-through charge is contradictory. To resolve this contradiction, it is reasonable to apply the effective date provision of 16 TAC § 24.25(h) because the tariff language regarding the effective date in the proposed notice is derived from 16 TAC § 24.25(b)(2)(F), and this rule does not directly address when a pass-through provision becomes effective. Although 16 TAC § 24.25(h) creates certain exceptions to the blanket rule that a tariff change is effective on the date approved by the Commission, none of those exceptions apply in this case.

Dated: March 26, 2020

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on March 26, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ John Harrison

John Harrison