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BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATION OF TIMBERCREST PARTNERS LLC FOR
AUTHORITY TO CHANGE RATES

SOAH ORDER NO. 7
DENYING MOTION TO DEEM RATES APPROVED

On September 22, 2022, Timbercrest Partners, LLC filed a motion to deem rates approved and dismiss this matter under 16 Texas Administrative Code section (Rule) 24.33. Staff of the Public Utility Commission of Texas (Commission) responded on September 29, 2022. For the reasons set out below, the motion is denied.

I. BACKGROUND

Timbercrest filed its application for authority to change rates on January 17, 2020. Timbercrest supplemented its application and issued a revised notice of intent with a proposed effective date of December 8, 2020.¹ On

¹ Revised Proof of Notice (Nov. 11, 2020).

March 18, 2021, the Commission administrative law judge (ALJ) suspended the effective date of the proposed rates “until the earlier of the date established under 16 TAC § 24.33(a)(2), or the issuance of an order setting interim or final rates.”² Because that authorizes the Commission to suspend the effective date “for not more than 265 days from the proposed effective date,” Timbercrest’s effective date was suspended until the earlier of August 30, 2021, or the issuance of an order setting interim or final rates prior to that date.³

On May 4, 2021, this matter was referred to the State Office of Administrative Hearings (SOAH). At a prehearing conference on July 12, 2021, the pending effective date was raised in the context of setting a procedural schedule. Timbercrest’s counsel made the following representation:

Ms. Shea: I’ll just—I think I’ve mentioned this to Mr. Parrish before—we haven’t put rates in effect and don’t intend to until we get a final order. So, although August 30 is the effective date, if we move passed that, it’s not really so much of an issue because they don’t want to have to address refunds if there are potential refunds. We’d rather try and settle this and move on.

At the conference, the parties chose to pursue mediation instead of setting a procedural schedule. Accordingly, this matter was abated and referred to mediation.⁴

² Order No. 10 (Mar. 18, 2021).

³ SOAH Order No. 2 [misnumbered] at 1 (May 14, 2021). August 30, 2021, is 265 days after Timbercrest’s proposed December 8, 2020 effective date.

⁴ SOAH Order No. 3 (Jul. 12, 2021).

No order was issued setting interim or final rates in this matter before August 30, 2021, the date to which Timbercrest's effective date had been suspended.

This matter remained abated until August 2, 2022, when a prehearing conference convened and the abatement was lifted at Timbercrest's request. At the conference, Timbercrest's counsel represented that Timbercrest had foregone charging the proposed rates on the effective date in favor of seeking a final resolution to this matter, as illustrated in the following conversation:

Judge Siano: Ms. Shea, it appears that the effective date has passed –

Ms. Shea: Long ago.

Judge Siano: and, has the Applicant started charging the proposed rates?

Ms. Shea: They have not. They – their preference was to wait for an order, so they have not, even though they are authorized to do so.

Judge Siano: Alright. I just wanted to clarify that.

Timbercrest then requested a hearing on the merits in November or December. The parties agreed on a November 8, 2022 hearing date. The parties also agreed to confer and submit a proposed procedural schedule the day following the prehearing conference.

The ALJ deferred memorializing the prehearing conference until after receipt of the proposed schedule; however, none was filed. Accordingly, the ALJ issued an order to submit a proposed schedule by September 9, 2022, or seek an

extension.⁵ On that date, Staff submitted an agreed procedural schedule. The order adopting the procedural schedule was signed on September 13, but due to a technical filing error, was not issued until September 23, 2022.⁶ In the meantime, Staff re-urged adoption of the procedural schedule, and Timbercrest filed the motion that is the subject of this order.

II. APPLICABLE LAW

With five customers, Timbercrest is a Class D utility and therefore governed by Texas Water Code section 13.1872.⁷ Rate applications filed under that section are subject to section 13.1871, which provides in relevant part:⁸

- (g) After written notice to the utility, the utility commission may suspend the effective date of a rate change for not more than 265 days from the proposed effective date. If the utility commission does not make a final determination on the proposed rate before the expiration of the suspension period, the proposed rate shall be considered approved. This approval is subject to the authority of the utility commission thereafter to continue a hearing in progress.

⁵ SOAH Order No. 5 (Aug. 31, 2022).

⁶ SOAH Order No. 6 (Sept. 13, 2022).

⁷ TWC § 13.002(4-d).

⁸ TWC § 13.1872(c)(2).

The Commission has implemented this language in Rule 24.33 as follows:

- (a) Regardless of, and in addition to, any period of suspension ordered under subsection (b) of this section, after written notice to the utility, the commission may suspend the effective date of a rate change for not more than:

- (2) 265 days from the date the proposed rates would otherwise be effective for an application filed under TWC §§ 13.1871, 13.18715, or 13.1872(c)(2).

- (e) If the commission does not make a final determination on the proposed rate before the expiration of the suspension period described by subsections (a) and (d) of this section, the proposed rate will be considered approved. This approval is subject to the authority of the commission thereafter to continue a hearing in progress.

III. ARGUMENT

Timbercrest essentially argues that because its rates are “considered approved” at the expiration of the suspension period, the proposed rates are the legal rates and there is no need for a hearing. Timbercrest also chronicles its regulatory exhaustion, stressing that this matter was filed nearly three years ago, protested only by an ever-changing Staff, and met with frustrated attempts at informal resolution.

While agreeing that the rates should be deemed approved, Staff argues that this matter should not be dismissed. Instead, Staff argues that the “approval” is not dispositive because this approval-by-law occurred during “a hearing in progress” which the Commission has authority to continue.⁹ To reach this assertion, Staff first argues that the proper date on which the rates are “considered approved” was September 20, 2022. Staff offers no explanation for arriving on this date, but implies that the abatement tolled the suspension period. Staff then argues that because a hearing on the merits was set (as agreed to by the parties during the August 2, 2022 prehearing conference) before the end of the suspension period (September 20, 2022) the Commission “should retain authority to continue with the scheduled hearing and ultimately issue a final order on Timbercrest’s application.”¹⁰

Staff also argues that Timbercrest has already agreed to a procedural schedule which sets a hearing for November and should be deemed to have waived its right to invoke the 265-day deadline. Staff asserts that “parties should not be able to bind themselves and others to a hearing schedule that extends beyond the 265-day deadline contemplated by Rule 24.33, only to later proclaim that the same schedule should be invalidated as a matter of law.”¹¹

Neither party cited any precedent in support of their positions.

⁹ TWC § 13.1871(g).

¹⁰ Staff Response at 2 (Sept. 29, 2022).

¹¹ Staff Response at 2 (Sept. 29, 2022).

IV. ANALYSIS

Under the Water Code and Commission's rules, the Commission may suspend the effective date of a rate change for a Class D water utility for not more than 265 days from the proposed effective date, at which time, unless an exception applies, the proposed rates are "considered approved."¹² However, this limitation on the Commission does not mean that the utility cannot extend the deadline by agreement or waiver.

"[W]aiver is an intentional relinquishment or surrender of a right that is at the time known to the party making it."¹³ Waiver is shown by "a clear, unequivocal and decisive act of a party showing a purpose or acts which amount to an estoppel on his part."¹⁴ Timbercrest asserts that it did not waive any right.¹⁵ The ALJ disagrees.

The issue of the statutory deadline was raised by the court on two occasions: first at the July 14, 2021 prehearing conference, and again at the August 2, 2022 prehearing conference. On both occasions, Timbercrest volunteered to forego its right to have its rates approved by that deadline and stated its intent to wait for a final order. Staff and the court reasonably relied on these representations in deciding to pursue mediation, abatement, and ultimately setting a procedural schedule with a hearing on the merits to be convened after the effective date.

¹³ *Estes v. Wilson*, 682 S.W.2d 711, 714 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

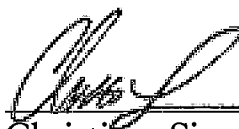
¹⁴ *Id.*

¹⁵ Timbercrest Partners Motion to Decm Rates Approved at 2, n. 7.

Reliance on such representations is essential for the fair administration of these proceedings.

Therefore, the ALJ finds that Timbercrest waived its right to approval of its rates by operation of law and is estopped from asserting this right prior to the initiation of the agreed date for the hearing on the merits.¹⁶ Additionally, regardless of whether the rates are considered approved by operation of law, dismissal is not required under Rule 24.33. Accordingly, Timbercrest's motion to deem its rates approved and dismiss this case is DENIED.¹⁷

SIGNED OCTOBER 6, 2022.

A handwritten signature in black ink, appearing to read 'Christiaan Siano', is written over a horizontal line.

Christiaan Siano,
Presiding Administrative Law Judge

¹⁶ The ALJ does not address the circumstances under which the waiver may be withdrawn or rescinded.

¹⁷ Because the ALJ finds Timbercrest's waiver dispositive, the ALJ does not address the parties' remaining arguments.