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Filing Date - 2024-07-18 11:34:13 AM

Control Number - 52758

Item Number - 79

**SOAH DOCKET NO. 582-24-16336
TCEQ DOCKET NO. 2024-0243-WR**

COMPLAINT OF MCALLEN PUBLIC	§	BEFORE THE STATE OFFICE
UTILITY FOR DENIAL OF WATER BY	§	
HIDALGO COUNTY WATER	§	
IMPROVEMENT DISTRICT NO. 3	§	OF
UNDER TEXAS WATER CODE	§	
§§ 11.041 AND 51.305(d)	§	ADMINISTRATIVE HEARINGS

**SOAH DOCKET NO. 473-22-1659.WS
PUC DOCKET NO. 52758**

PETITION OF MCALLEN PUBLIC	§	BEFORE THE STATE OFFICE
UTILITY APPEALING WHOLESALE	§	
WATER RATES CHARGED BY	§	OF
HIDALGO COUNTY WATER	§	
IMPROVEMENT DISTRICT NO. 3	§	ADMINISTRATIVE HEARINGS

COMMISSION STAFF’S INITIAL BRIEF ON CONSOLIDATION

I. INTRODUCTION

The Staff (Staff) of the Public Utility Commission of Texas (PUC) respectfully recommends that McAllen Public Utility’s (MPU) pending petition and complaint before the PUC and the Texas Commission on Environmental Quality (TCEQ) be joined for a hearing at this time for the limited purpose of resolving the jurisdictional issues pending in both proceedings. Specifically, the administrative law judges (ALJ) for the State Office of Administrative Hearings (SOAH) have authority to join these two proceedings for a hearing, because there are common issues of fact and law related to the PUC’s and the TCEQ’s interrelated jurisdiction and joinder will promote the fair and efficient handling of the jurisdictional issues. While Staff’s recommendation on joinder is limited at this time to the jurisdictional issues, Staff anticipates that it may potentially be necessary to consider whether and the extent to which the separate proceedings before the PUC and the TCEQ should be further joined or consolidated. Specifically, if it is determined that the PUC and the TCEQ have jurisdiction, whether that be in whole or in part, respectively over the appeal before the PUC and the complaint before the TCEQ, there may be further common issues of fact and law that may be appropriate to consider in a joint hearing.

II. BACKGROUND

On October 27, 2021, MPU filed a petition with the PUC under Texas Water Code (TWC) § 12.013, appealing the wholesale water rates charged by the Hidalgo County Water Improvement District No. 3 (District).¹ On April 19, 2022, MPU filed a first amended petition.² On December 1, 2023, the PUC relevantly issued a supplemental preliminary order, requesting the SOAH ALJs to conduct an evidentiary hearing, if necessary, and prepare an interim proposal for decision for consideration by the PUC regarding jurisdictional issues.³ On February 8, 2024, MPU filed a complaint with the TCEQ under TWC §§ 11.041 and 51.305(d), complaining of the District's denial of water and refusal to supply water at a reasonable, just, and non-discriminatory price.⁴ On May 28, 2024, the TCEQ referred the complaint to SOAH for a hearing on the issues addressed by TWC § 11.041 and scheduled a preliminary hearing for June 27, 2024 with the purpose, in part, to establish the TCEQ's jurisdiction.⁵

On June 27, 2024, the SOAH ALJ presiding over the TCEQ complaint held the preliminary hearing but withheld ruling on TCEQ's jurisdiction in light of the District's motion to dismiss for lack of jurisdiction and authority to grant the relief requested.⁶ The SOAH ALJ also withheld ruling on the motion to dismiss, taking into account the interrelation of the PUC's and the TCEQ's jurisdiction, and requested the parties to file briefs on whether the TCEQ matter should be consolidated with the PUC case.⁷ On June 27, 2024, the SOAH ALJ filed SOAH Order No. 1, establishing a deadline of July 18, 2024, to file an initial brief on whether the proceedings should be consolidated. Therefore, this pleading is timely filed.

¹ *Petition of McAllen Public Utility Appealing Wholesale Water Rates Charged by Hidalgo County Water Improvement District No. 3*, PUC Docket No. 52758, Petition (Oct. 27, 2021) (PUC Petition).

² *Id.*, McAllen Public Utility First Amended Petition (Apr. 19, 2022) (PUC First Amended Petition).

³ *Id.*, Supplemental Preliminary Order (Dec. 1, 2023).

⁴ *Complaint of McAllen Public Utility for Denial of Water by Hidalgo County Water Improvement District No. 3 Under Texas Water Code §§ 11.041 and 51.305(d)*, TCEQ Docket No. 2024-0243-WR (Feb. 8, 2024) (pending) (TCEQ Complaint).

⁵ *Id.*, Notice of Hearing (May 28, 2024).

⁶ *Id.*, SOAH Order No. 1 Memorializing Preliminary Hearing and Requiring Briefs (Jun. 27, 2024).

⁷ *Id.*

III. RESPONSE TO SOAH ORDER NO. 1

Staff recommends that the PUC and the TCEQ proceedings be joined for a hearing pursuant to SOAH's authority under 1 Texas Administrative Code (TAC) § 155.155(c) and Texas Rules of Civil Procedure (TRCP) 174(a). Under the former, a SOAH ALJ may order that cases be consolidated or joined for a hearing if (1) there are common questions of law or fact; and (2) consolidation or joint hearing will promote the fair and efficient handling of the matters.⁸ Under the latter, there is similar authority to order consolidation or a joint hearing of any or all matters if there are common questions of law or fact and consolidation or a joint hearing may tend to avoid unnecessary costs or delay.⁹ The PUC and the TCEQ also have procedural rules that establish the authority from the PUC and the TCEQ to consolidate cases.¹⁰ Overall, none of the aforementioned procedural rules limit the authority to consolidate or join proceedings to just cases that are referred from an individual state agency. Notably, SOAH has previously consolidated two enforcement cases brought against an individual by two separate state agencies and such consolidation was done for purposes of a hearing, because the enforcement actions were based on the same facts.¹¹

Based on the above authorities and precedent, Staff recommends that the PUC and the TCEQ proceedings be joined specifically at this time for a hearing for the limited purpose of resolving the interrelated jurisdictional issues pending in both proceedings. In contrast to the District's assertions, interagency coordination would not be challenging, because the proceedings are considering different issues.¹² Conversely, both proceedings are currently pending determinations as to whether and the extent to which the PUC and the TCEQ have jurisdiction, with the TCEQ proceeding also pending a determination as to whether MPU has stated a claim for which relief can be granted.

⁸ 1 TAC § 155.155(c).

⁹ Tex. R. Civ. P. 174(a).

¹⁰ See 16 TAC § 22.34(a) and 30 TAC § 80.13(a).

¹¹ See *Texas Board of Professional Engineers, Petitioner v. James A. Babb, P.E., Respondent*, SOAH Docket No. 460-15-4426, 2016 WL 453530 at *1 (Jan. 19, 2016) (TBPE Proposal for Decision); see also *Texas Department of Insurance, Petitioner v. James A. Babb, P.E., Respondent*, SOAH Docket No. 454-15-3902.C, 2016 WL 359074 at *1 (Jan. 19, 2016) (TDI Proposal for Decision).

¹² Hidalgo County Water Improvement District No. 3's Response to SOAH Order No. 1 at 1-2 (Jul. 16, 2024).

Regarding MPU's requested relief in the TCEQ proceeding, MPU relevantly requests the TCEQ to determine a reasonable, just, and non-discriminatory price,¹³ while the District asserts that the PUC, and not the TCEQ, has the authority to fix water rates.¹⁴ However, not only does MPU request the TCEQ to set rates in the TCEQ proceeding, but also requests the PUC set rates in the PUC proceeding.¹⁵ Separately, there is a dispute in the TCEQ proceeding between MPU and the District regarding the interpretation of the Attorney General's Opinion related to the overlapping jurisdiction between the PUC and the TCEQ. Specifically, in the context of an appeal of rates charged by a water control and improvement district, the Attorney General concluded that, pursuant to the requirement under TWC § 51.305(d), such an appeal must be filed under TWC § 11.041 with the TCEQ if the appeal involves an allocation of operations and maintenance (O&M) expenses of a district's water delivery system, and that otherwise the appeal must be heard by the PUC.¹⁶ MPU asserts that the restrictive language in TWC § 51.305(d) does not limit the TCEQ's jurisdiction only to review of operations and maintenance (O&M) allocations,¹⁷ while the District argues that any appeal against a water control and improvement district other than a specific challenge to O&M allocations must be brought before the PUC.¹⁸ Further, in regards to MPU's interpretation of the Attorney General Opinion, the District argues that MPU took a conflicting position in the PUC proceeding and conceded that the TCEQ's jurisdiction is limited to review of allocation of O&M expenses.¹⁹

Further and probably the most significant of the overlapping jurisdictional issues, the District asserts that, because TWC § 12.013(a) gives the PUC the sole jurisdiction to set rates for any purpose mentioned in Chapter 11 or 12 of the TWC, the PUC must, pursuant to TWC

¹³ TCEQ Complaint at 16; *see also* TCEQ Docket No. 2024-0243-WR, McAllen Public Utility's Response to Hidalgo County Water Improvement District No. 3's Motion to Dismiss at 2, 6, and 9 (Jun. 25, 2024) (Response to Motion to Dismiss).

¹⁴ *Id.*, Hidalgo County Water Improvement District No. 3's Motion to Dismiss the Petition of McAllen Public Utility at 7-9 (Jun 18, 2024) (Motion to Dismiss); *see also* TCEQ Docket No. 2024-0243-WR, Reply to McAllen Public Utility's Response to Hidalgo County Water Improvement District No. 3's Motion to Dismiss the Petition of McAllen Public Utility at 2-5 (Jun. 28, 2024) (Reply to Response to Motion to Dismiss).

¹⁵ *See* PUC Petition at 16-17 and PUC Amended Petition at 7.

¹⁶ Tex. Att'y Gen. Op. JS-0004 (Jun. 27, 2023).

¹⁷ Response to Motion to Dismiss at 7.

¹⁸ Motion to Dismiss at 5; *see also* Reply to Response to Motion to Dismiss at 3-4.

¹⁹ Motion to Dismiss at 6 (citing to PUC Docket No. 52758, McAllen Public Utility's Statement of Position at 1-2 (Feb. 9, 2024)).

§ 12.013(g), first determine that a contractual rate harms the public interest.²⁰ Staff understands the District to argue that, even if the TCEQ has jurisdiction under TWC § 11.041 to hear MPU's complaint, before the PUC can set just and reasonable rates, it must determine whether the contractual rates harm the public interest. Due to the seemingly conflicting directives in these two statutes, Staff anticipates that the PUC and the TCEQ would ultimately need to determine the order in which the complaint is heard by the TCEQ and the public interest is considered by the PUC.

Given that the supplemental preliminary order on jurisdictional issues in the PUC proceeding is not exhaustive and parties may raise and address any issues relevant to the PUC petition,²¹ Staff respectfully recommends that the preceding jurisdictional issues pending in the TCEQ complaint are ultimately relevant to the PUC's determination of its jurisdiction over MPU's appeal and complaint of the District's rates or prices charged to MPU, whether that determination is in relation to the pending PUC petition under TWC § 12.013 or the pending TCEQ complaint under TWC § 11.041(a). Since there may be such an overlap in the consideration of the jurisdictional issues, the issues become common questions of fact and law that can be addressed in a more fair and efficient manner without unnecessary expense or delay through consolidation or a joint hearing, such that the SOAH ALJs are within their authority to order that the proceedings be consolidated or joined for a hearing.

More specifically, Staff recommends that the proceedings be joined for a hearing simply to resolve the jurisdictional issues. And such an order would not result in a merger of the proceedings.²² Therefore, there would be no concerns with the substantive review of the TCEQ proceeding interfering or confusing the issues related to the PUC's pending public interest proceeding. Even if the SOAH ALJs issue an order on consolidation, such that the proceedings are merged into a single action, such an order would not be binding for the remainder of a consolidated proceeding, and the case may subsequently be severed.²³ So from a procedural standpoint and in the interest of efficiency and regulatory cooperation, consolidation or a joint hearing will benefit

²⁰ Motion to Dismiss at 7-9.

²¹ PUC Docket No. 52758, Supplemental Preliminary Order at 3

²² *Buttery v. Betts*, 422 S.W.2d 149, 151 (Tex. 1967).

²³ *Hamilton v. Hamilton*, 280 S.W.2d 588, 591 (Tex. 1955); *see also* 1 TAC § 155.155(d), Tex. R. Civ. P. 174(b), 16 TAC § 22.34(b), and 30 TAC § 80.13(b).

the PUC and the TCEQ in the processing of MPU's petition and complaint, respectively, in regard to the jurisdictional determinations.

Conversely, if consolidation or a joint hearing is not ordered to resolve these jurisdictional issues, the PUC and the TCEQ run the risk of rendering inconsistent determinations on jurisdiction. To highlight that risk, MPU, by maintaining parallel proceedings with the PUC and the TCEQ, currently seeks to have both the PUC and the TCEQ set rates in each of their respective proceedings.²⁴ And the PUC and the TCEQ may independently determine that each has its own authority to set rates in each particular proceeding. Outside of sending these jurisdictional issues to the Attorney General at this time, the only other way to effectively prevent the risk of inconsistent determinations by the PUC and the TCEQ is to consolidate, or in this case, join the proceedings for a hearing to resolve the jurisdictional issues.

IV. CONCLUSION

For the reasons detailed above, Staff respectfully requests the entry of an order joining the PUC and the TCEQ proceeding for a hearing to resolve the jurisdictional issues.

²⁴ *Supra* notes 13 and 15.

Dated: July 18, 2024

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 will be provided to all parties of record via electronic mail on July 18, 2024.

/s/ Scott Miles
Scott Miles