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OPEN MEETING COVER SHEET COMMISSIONER MEMORANDUM

MEETING DATE: May 23, 2024

DATE DELIVERED: May 22, 2024

AGENDA ITEM NO.: 2


CAPTION: Docket No. 53485 – Application of Gideon Water LLC for a Certificate of Convenience and Necessity in Montgomery County

DESCRIPTION: Chairman Thomas Gleeson Memorandum

Public Utility Commission of Texas

Memorandum

TO: Commissioner Lori Cobos
Commissioner Jimmy Glotfelty
Commissioner Kathleen Jackson

FROM: Chairman Thomas J. Gleeson 

DATE: May 22, 2024

RE: May 23, 2024 Open Meeting—Agenda Item No. 2
Docket No. 53485—*Application of Gideon Water, LLC for a Certificate of Convenience and Necessity in Montgomery County*

Before the Commission is a joint appeal of Order No. 21. I believe that the appeal of should be denied. I voted to add this item to the open meeting agenda so that the parties would understand my reason for recommending denial of this appeal.

On April 12, 2022, Gideon Water filed an application to obtain a water certificate of convenience and necessity (CCN) in Montgomery County. On March 31, 2023, Commission Staff filed its final recommendation with attached map, certificate, and Gideon Water's tariff. On July 31, 2023, a Notice of Approval was filed issuing CCN number 13304 to Gideon Water and approving a tariff for the company. On October 25, 2023, 86 days after the tariff was approved, Gideon Water filed a request for reconsideration to modify the tariff's language, arguing that it includes language that is different from the language the parties had agreed to. The Commission ALJ denied Gideon Water's request because it was untimely—corrections to a notice of approval must be filed within 15 days of the notice of approval being filed, and a motion for rehearing must be filed within 25 days after the date the notice of approval was signed. On March 6, 2024, Gideon Water and Commission Staff filed a joint motion for 1) an order *nunc pro tunc* to remove the language stating that 10,000 gallons of water is included for all meter sizes and 2) to reopen the record to admit and approve a corrected tariff. In Order No. 20, the Commission ALJ denied the joint motion for an order *nunc pro tunc* because the correction to the tariff would require additional judicial reasoning. The ALJ also denied the motion to reopen the record.

The joint appellants assert that the incorrect tariff was approved. However, Commission Staff, in its final recommendation, stated that Gideon Water consented to the tariff attached to Staff's recommendation. The tariff attached to Commission Staff's recommendation, as well as the tariff attached to and approved by the Notice of Approval,

include the language that Gideon Water and Commission Staff seek to correct by order *nunc pro tunc*.

The doctrine of *nunc pro tunc* is a Latin expression that means *now for then* that allows courts to give an action retroactive legal effect as though it had been performed at a precise earlier date. An order *nunc pro tunc* is designed to correct clerical errors in a judgment after a court's plenary power has expired. In the context of the Commission proceedings, an order *nunc pro tunc* would allow the Commission to correct a clerical error where reference to the record shows what the Commission intended to order but the order does not properly reflect the Commission's decision. After reviewing the relevant parts of the record in this case, I do not believe that an order *nunc pro tunc* can be used to modify Gideon Water's tariff.

In this case, the Notice of Approval granted relief consistent with the relief requested by the parties in the form of Commission Staff's final recommendation and the final map, certificate, and tariff, attached to the final recommendation. The parties assert that the tariff proposed by the parties contained an error, and that this can be corrected via an order *nunc pro tunc* because the judgment rendered by the ALJ was to approve the application, including Gideon's proposed rates. I disagree. As specified in ordering paragraph 2 of the Notice of Approval, it was the map and tariff that were approved and not the application. This has been the standard practice for many years precisely because what the Commission ultimately approves may differ from what was in the original application. Commission orders include findings of fact that address the application and requested relief; however, it is the ordering paragraphs that control and specify what is approved by the Commission.

I agree with the ALJ's analysis in order No. 20 that stated correcting the tariff approved by the Notice of Approval would require, at a minimum, the consideration of documents that were filed after the date of the Notice of Approval and that were not admitted as evidence into the record of this proceeding. No corrections or motions for rehearing were filed by the required deadlines. The Notice of Approval filed on July 31, 2023, became final, and the docket was closed. Therefore, it is legally improper to substantively modify Gideon Water's tariff to remove language that was included in the tariff approved by Notice of Approval. Additionally, the joint motion to reopen the record to allow the parties correct the tariff is also legally improper.

I believe this appeal should be denied. This is a difficult decision, but I believe it is the legally correct one. The effect of denying this appeal while regrettable was also avoidable. The parties should have ensured that the tariff filed with their agreement accurately reflected their agreement. Additionally, it is possible that the error at issue here could have been considered after the Notice of Approval was filed if one of the parties had filed a timely motion for rehearing. At this point, however, I believe the Commission must deny the appeal. If the Commission agrees that the appeal should be denied, I recommend a simple order denying the appeal. As stated above, I have filed this memo so that the parties understand my reason for recommending denial of the appeal.

I look forward to our discussion at the open meeting tomorrow.