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Texas Railroad Commission Rules Mandating Restricted Discovery

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I. INTRODUCTION

On December 9, 2014, the Commissioners of the Railroad Commission of Texas ("RRC") voted unanimously to adopt two new procedural rules which impose certain limitations on discovery in gas utility rate cases before the RRC. The RRC, in so doing, delayed the effective date of the new rules to September 1, 2015, anticipating legislative push-back given a certain amount of controversy that had surrounded the rulemaking. While legislation was proposed which would have nullified the new rules, it went nowhere in the 2015 legislative session, so the new rules will take effect almost at the exact same time the presentation is given which relates to this paper.

The two new rules, which are the subject of this paper, were codified as Sections 1.86 and 1.87 of Title 16, Texas Administrative Code. Rule 1.86 imposes presumptive alignment, for purposes of discovery, of certain municipal intervenors in gas utility ratemaking cases. Rule 1.87 then imposes certain limitations on the number of discovery requests those aligned parties may propound.

This paper will attempt to set out the procedural context for these new rules, to summarize the arguments made both for and against their adoption, and to explain what the new rules do and do not do. The paper cannot offer any insight as to how they work in practice, as they had not yet taken effect as of the paper's due date.

During the same rulemaking, the RRC also amended an existing rule which relates to ratemaking cost recovery.¹ That rule change is beyond the scope of this paper, but occasional reference to it will be made as it was part of the same ratemaking proceeding.

II. PROCEDURAL CONTEXT FOR THE NEW RULES

A. The Railroad Commission and Gas Utility Rate Cases

Rules 1.86 and 1.87 will only apply "to proceedings brought pursuant to Texas Utilities Code, §103.055 and §104.102."² This means, from the outset, that these discovery limitations do not apply to the myriad other types of contested cases adjudicated by the RRC.³

¹ 16 TEX. ADMIN. CODE §7.5530.

² Rule 1.86(c); Rule 1.87(g). Complete copies of the new Rules as adopted are attached to this Paper at Appendix A.

³ Unlike many other Texas agencies, contested cases before the RRC are presided over by administrative law judges at the RRC, rather than by SOAH ALJs. We call them Hearings Examiners. Typically, the bulk of a Hearings Examiner's docket will be cases related to the exploration and production of oil and gas, rather than gas utility matters. This has been the subject of some discussion during past Sunset Review of the RRC, with

Chapter 103 of the Utilities Code sets out a municipality's "exclusive original jurisdiction over the rates, operations, and services of a gas utility within the municipality." TEX. UTIL. CODE §103.001. It also provides that a municipality may surrender its exclusive original jurisdiction to the RRC. TEX. UTIL. CODE §103.003. At any rate, Section 103.055 provides that any party to a municipal ratemaking proceeding may appeal the decision to the RRC. TEX. UTIL. CODE §103.055. New rules 1.86 and 1.87 will apply to those appeals.

Chapter 104 of the Utilities Code provides that the RRC "is vested with all the authority and power of this state to ensure compliance with the obligations of gas utilities under this subtitle" and that it "may establish and regulate rates of a gas utility." TEX. UTIL. CODE §104.001. It further provides that the RRC "shall ensure that each rate a gas utility or two or more gas utilities jointly make, demand, or receive is just and reasonable." TEX. UTIL. CODE §104.003. Section 104.102 of the Utilities Code requires gas utilities to file a statement of intent with the RRC before increasing its rates. TEX. UTIL. CODE §104.102. This filing normally triggers the RRC hearing process, so to the extent new rules 1.86 and 1.87 apply to proceedings under §104.102 of the Utilities Code, they apply to original ratemaking proceedings, in addition to the appeals of municipal proceedings discussed above.

RRC hearings conducted pursuant to both 103.055 and 104.102 will be required by statute to be conducted on a somewhat abbreviated time table. TEX. UTIL. CODE §103.055(c) (setting out a 185 day schedule from the date appeal is perfected in municipal appeals); TEX. UTIL. CODE §104.106 (RRC "shall . . . decide the questions as quickly as possible."). This characteristic of these hearings was the basis for some of the opposition to both new rules, as discussed below.

B. RRC DISCOVERY: WHAT IS AN RFI?

As noted above and discussed in more detail below, new Rule 1.87 states that a "reasonable limitation" on requests for information ("RFI"s) propounded to a party is "no more than 600 total RFIs, with no more than 75 RFIs propounded by a single party in one calendar week." Rule 1.87(b). But what is an RFI? Existing RRC Rule 1.81 states:

some suggesting that the utility cases might be transferred to SOAH, where the ALJs routinely deal with rate cases involving other agencies, such as the PUC. To date, none of those suggestions has gained traction, but the RRC is up for sunset review again during the 2016-2017 cycle.

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