

Opinion issued June 30, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-18-00556-CV

ENERGY TEXAS, INC., Appellant

V.

**THE PUBLIC UTILITY COMMISSION OF TEXAS, THE OFFICE
OF PUBLIC UTILITY COUNSEL, INTERVENOR, AND TEXAS
INDUSTRIAL ENERGY CONSUMERS, INTERVENOR, Appellees**

**On Appeal from the 250th District Court
Travis County, Texas¹
Trial Court Case No. D-1-GN-16-006058**

¹ Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 18–9083 (Tex. June 19, 2018); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Third District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

MEMORANDUM OPINION

Appellant, Entergy Texas, Inc. (“Entergy”), challenges the trial court’s judgment affirming the final order of appellee, the Public Utility Commission of Texas (“PUC”), which modified and approved Entergy’s application for a transmission cost recovery factor (“TCRF”), with an effective date of April 14, 2016. In its sole issue, Entergy contends that the trial court erred in affirming the PUC’s final order because the PUC violated its own rule and acted arbitrarily and capriciously.

We affirm.

Background

In its petition, Entergy asserted that it had exhausted its administrative remedies, and it sought judicial review of a final order of the PUC.² The PUC answered, generally denying the allegations in Entergy’s petition and asserting certain affirmative defenses. Appellees, the Office of Public Utility Counsel and Texas Industrial Energy Consumers, both intervened in Entergy’s suit.

In its briefing in the trial court regarding whether the PUC erred in making its final order, Entergy explained that it is an investor-owned electric utility. It provides “bundled” electrical services to over 420,000 retail customers, mainly in southeast

² See TEX. UTIL. CODE ANN. § 15.001; TEX. GOV’T CODE ANN. §§ 2001.174, 2001.176.

Texas.³ As a bundled utility, Entergy provides service, from generation to delivery of power, to all requesting customers in its service area at a regulated rate.⁴ The PUC regulates Entergy’s provision of services to Texas retail customers and the rates it charges. The Public Utility Regulatory Act, found in Chapter 11 of the Texas Utilities Code, confers this regulatory authority on the PUC.

Electric utility rates typically are set through a standard regulatory process designed to provide the utility a “reasonable opportunity to earn a reasonable return” on invested capital plus operating expenses. A rate case setting a utility’s base rates involves complex calculations and takes considerable time. The rate case accounts for a utility’s cost of rendering service to the public during a historical “test” year and operates only prospectively. In the time between these base rate cases, a utility bears the risk that its operating expenses will exceed the expectations built into its existing base rate and its customers bear the corresponding risk that operating

³ Entergy is not among the investor-owned utilities that the Texas Legislature required to “unbundle” their generation, transmission, distribution, and customer service functions in 1999 as part of an effort to introduce competition into the Texas retail electric industry. *See* TEX. UTIL. CODE ANN. § 39.001–39.917. It remains subject to traditional cost-of-service rate regulation. *Id.* §§ 39.452(a), 39.453.

⁴ *See Office of Pub. Util. Counsel v. Pub. Util. Comm’n*, 104 S.W.3d 225, 227–28 (Tex. App.—Austin 2003, no pet.); *see generally* TEX. UTIL. CODE ANN. § 36.003(a) (“The regulatory authority shall ensure that each rate electric utilities . . . jointly make, demand, or receive is just and reasonable.”).

expenses will be less than expected, causing an overcharge relative to those expenses.⁵ This phenomenon is known as “regulatory lag.”⁶

To ameliorate the risks created by regulatory lag, the Texas Legislature authorized the PUC to allow some utilities to recover certain costs without having to adjudicate a full base rate case. These include riders for transmission costs, distribution costs, purchased power capacity costs, and fuel factor costs.⁷ The PUC promulgated rules corresponding to each provision that govern the processing of applications for these riders.⁸ Under Texas Utilities Code section 36.209, a bundled utility subject to traditional rate regulation may recover transmission investment costs through a rider added to the utility’s base rate. Section 36.209(b) and the TCRF rule allow these electric utilities, after notice and hearing, to recover each year their reasonable and necessary expenditures for transmission infrastructure improvement costs and changes in wholesale transmission charges.

On September 11, 2015, Entergy applied for a TCRF seeking a rate increase of more than \$13 million. Its application proposed an effective date of October 16, 2015, thirty-five days after it filed its application.

⁵ *City of El Paso v Pub. Util. Comm’n*, 344 S.W.3d 609, 612 (Tex. App.—Austin 2011, no pet.).

⁶ *See Entergy Tex., Inc. v. Pub. Util. Comm’n*, 490 S.W.3d 224, 227–28 (Tex. App.—Austin 2016, pet. denied).

⁷ *See* TEX. UTIL. CODE ANN. §§ 36.203, 36.205, 36.209, 36.210.

⁸ *See* 16 TEX. ADMIN. CODE §§ 25.237–25.239, 25.243.

On September 17, 2015, the PUC suspended the proposed effective date for 120 days, to February 13, 2016, and referred the case to the State Office of Administrative Hearings (“SOAH”). The SOAH assigned the case to an administrative law judge, who set a schedule that suspended the proposed effective date thirty more days, until March 14, 2016—185 days after Entergy filed its application.

After an evidentiary hearing, the administrative law judge issued a February 25, 2016 proposal for decision that recommended approval of the rate increase but for a lower amount than Entergy sought. In the transmittal letter accompanying the recommendation, the administrative law judge also concluded that no deadline applied to deciding the Entergy’s TCRF application. On the same day, the PUC issued a memorandum stating that it would consider the proposal at the PUC’s next open meeting, scheduled for April 14, 2016—one month after the March 14, 2016 effective date set in the PUC order suspending the proposed effective date.

Entergy responded to the PUC’s memorandum, asserting that the suspension period prescribed in the PUC’s rule governing the form and filing of tariffs sets a mandatory deadline for the PUC to act on its application.⁹ In reply, the PUC stated

⁹ *Id.* § 25.241.

that it agreed with the administrative law judge's conclusion that no deadline applied to the application.

The PUC approved the interim TCRF rates sought by Entergy at its April 14, 2016 meeting, making them effective as of that date. It issued a final order in the case on July 20, 2016 approving the application as modified and rejecting Entergy's application for temporary rates on equitable grounds. The final order declared an effective date for the interim rate of April 14, 2016 and set a schedule for Entergy's compliance tariff filing.¹⁰

The final order on rehearing that issued on October 7, 2016 declared April 14, 2016 as the effective date for the interim rate increase, rejecting by implication Entergy's request for an effective date of March 14, 2016. Average monthly revenues under the approved rider amount to about \$875,000.

¹⁰ That portion of the order declared,

No later than 10 days after the date of the tariff filing, Staff shall file its comments recommending approval, modification, or rejection of the individual sheet of the tariff proposal. Responses to the Staff's recommendation shall be filed no later than 15 days after the filing of the tariff. The [PUC] shall by letter approve, modify, or reject each tariff sheet, effective the date of the letter.

Entergy filed its TCRF rider, "Schedule TCRF," with a transmittal letter noting its approval "on March 9, 2017 in the Final Order in [Docket No. 46357]." The transmittal letter asks that the schedule be "file-stamp[ed] and place[d] in Entergy Texas, Inc.'s tariff book."

Entergy moved for a second rehearing, re-urging the PUC to declare an effective date of March 14, 2016. That motion was overruled by operation of law, and Entergy sought judicial review of the PUC's final order.

Judicial Review of PUC Order

In its sole issue, Entergy argues that the trial court erred in affirming the PUC's final order because the PUC violated its own rule and acted arbitrarily and capriciously by refusing to authorize Entergy to implement a new tariff within 185 days of the date Entergy filed its application to increase rates for recovering costs associated with new transmission construction.

A. Interpretation of PUC Rules

Entergy asserts that the PUC violated its rule governing the form and filing of tariffs in refusing to authorize Entergy to recover its costs under the TCRF beginning no later than the 185th day after Entergy filed its application, that is, by March 14, 2016.

Our review is governed by the substantial-evidence rule. TEX. UTIL. CODE ANN. § 15.001; TEX. GOV'T CODE ANN. § 2001.174. Under a substantial-evidence review, a court may not reverse the case unless it prejudices the substantial rights of the appellant and is

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;

(C) made through unlawful procedure;

(D) affected by other error of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 2001.174(2).

This appeal does not involve any factual issues; the success of Entergy’s argument turns solely on the proper interpretation of the PUC’s administrative rules. We interpret administrative rules and regulations, “like statutes, under traditional principles of statutory construction,” considering them “as a whole rather than their isolated provisions.” *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438–39 (Tex. 2011); *see Zimmer US, Inc. v. Combs*, 368 S.W.3d 579, 582–83 (Tex. App.—Austin 2012, no pet.). Our goal is to ascertain and give effect to the agency’s intent as expressed by the regulatory language. *TGS-NOPEC*, 340 S.W.3d at 439.

We presume that the rules’ language was chosen with care, with each word included (or omitted) purposefully. *See id.* Undefined terms are typically given their ordinary meaning, but if the term’s use in context makes a different or more precise definition apparent, we apply that meaning. *See id.* Thus, if a statute or rule “uses a term with a particular meaning or assigns a particular meaning to a term, we apply that meaning.” *Id.*

When a rule is unambiguous, we follow its plain language. *Id.*; *see Zimmer*, 368 S.W.3d at 583. When a rule or regulation is ambiguous, vague, or leaves room for policy determinations, we defer to the agency’s interpretation unless it is plainly erroneous or inconsistent with the regulatory language. *TGS-NOPEC*, 340 S.W.3d at 438; *Zimmer*, 368 S.W.3d at 583; *see also Harris Cty. Appraisal Dist. v. Tex. Workforce Comm’n*, 519 S.W.3d 113, 119 (Tex. 2017) (“If an agency does not follow the clear, unambiguous language of its own regulation in making a decision, the agency’s action is arbitrary and capricious and will be reversed.”).

Entergy claims that PUC rule 25.241, governing the form and filing of tariffs, imposes a 185-day mandatory effective date for its rate increase. *See* 16 TEX. ADMIN. CODE § 25.241(i). That rule declares:

No jurisdictional tariff change may take effect prior to 25 days after filing without [PUC] approval. The requested date will be assumed to be 35 days after filing unless a different date is requested in the application. The [PUC] may suspend the effective date of the tariff change for 120 days after the requested effective date and may extend that suspension another 30 days if required for final determination. In the case of an actual hearing on the merits of a case that exceeds 15 days, the suspension date is extended two days for each one day of actual hearing in excess of 15 actual hearing days.

Id. According to Entergy, because this rule provides that the PUC may suspend a tariff change for up to 185 days, a TCRF application must become effective if the PUC has not acted by the 185th day after filing.

Observing that all rates and charges to retail customers are ultimately memorialized in tariffs filed with the PUC, Entergy asserts that “tariff” as used in Rule 25.241 includes the TCRF rate increase approved by the PUC. It argues that, because Rule 25.241 requires the approved TCRF rate to be memorialized in a tariff, the rule also governs the timetable for its TCRF application. Entergy’s urged interpretation of “tariff” fits with Texas Utilities Code section 11.003(16), which defines “rate” as including any “tariff” or “charge.” TEX. UTIL. CODE ANN. § 11.003(16). That definition suggests that “tariff,” “rate,” and “charge” may be used interchangeably, but under the PUC rules, “tariff” has its own definition, which is not so expansive. The PUC rule defines a “tariff” as “[t]he schedule of a utility . . . containing all rates and charges stated separately by type of service, the rules and regulations of the utility, and any contracts that affect rate, charge, terms or conditions of service.” 16 TEX. ADMIN. CODE § 25.5(129).

Rule 25.241, entitled “Form and Filing of Tariffs,” accords with the administrative definition. It requires every electric utility to “file with the [PUC] filing clerk five copies of its tariff containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service.” *Id.* § 25.241(c)(1). The rule requires that a tariff contain sections and subsections setting forth:

- (1) a table of contents;
- (2) a list of the cities and countries in which service is provided;

- (3) a brief description of the utility’s operations;
- (4) the rate schedules; and
- (5) the service regulations, including the service agreement forms.

Id. § 25.241(d). Rule 25.241, subsection (d), shows that “tariff,” as used in the PUC rules, is a term of art that refers to the comprehensive collection of tariff filings made by a utility.

Rule 25.241 refers to utility filings seeking to change individual rates and charges not simply as tariffs, but as “proposed tariff revisions” and “tariff filings.” *See Id.* § 25.241(c), (e). Proposed tariff revisions constitute requests for a change in rate and may be subject to notice before the PUC approves or rejects them.¹¹ *Id.* § 25.241(c)(1), (h), (i). Tariff filings are sometimes subject to docketing. *Id.* § 22.33(b).¹²

¹¹ Rule 25.241, subsection (c), states in pertinent part:

Each revision shall be accompanied by a cover page which contains a list of pages being revised, a statement describing each change, its effect if it is a change in an existing rate, and a statement as to impact on rates of the change by customer class, if any. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

Id. § 25.241(c)(1).

¹² Entergy argues in its reply brief that Rule 22.33(a)’s use of “applications” includes its TCRF application, but that provision applies only to undocketed applications and thus does not apply here. *See id.* Further, Rule 22.33, subsection (b), of the rule refers to “a tariff filing made in compliance with a . . . final order of the

Rule 25.241 has a separate provision addressing the kinds of tariff filings that include the one that Entergy would make in its TCRF case; “tariff filings in response to [PUC] orders.” The rule instructs the utility on the procedure for making a tariff filing after the PUC has ruled, not before. It dictates the content of tariff filings made when the PUC has already approved the requested rate changes.¹³ *See id.* § 25.241(c) (explaining tariff filing in response to PUC order must “comply with the provisions of the order,” including effective date, wording, and “all other rules in this chapter”).¹⁴

The rules governing other cost-factor adjudications also support our conclusion that Rule 25.241(i)’s procedural schedule does not apply to Entergy’s TCRF application. Each of those rules contains its own procedural schedule, as shown below:

commission,” and makes clear that it does not require a second docketing. *Id.* § 22.33(b).

¹³ The Texas Utilities Code defines “order” as “all or part of a final disposition by a regulatory authority in a matter other than rulemaking, without regard to whether the disposition is affirmative or negative or injunctive or declaratory. The term includes . . . the setting of a rate.” TEX. UTIL. CODE ANN. § 11.003(13).

¹⁴ Tariff filings in response to [PUC] orders “shall include a transmittal letter stating that the tariffs attached are in compliance with the order, giving the docket number, date of the order, a list of tariff sheets filed, and any other necessary information. The tariff sheets . . . shall include only changes ordered.” 16 TEX. ADMIN. CODE § 25.241(e).

<p>Fuel factors (16 TEX. ADMIN. CODE § 25.237)</p>	<p>Petitions to revise fuel factors: Upon filing, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows: (A) within 60 days after the petition was filed, if no hearing is requested and (B) within 90 days after the petition was filed, if hearing is timely requested, with hearing to be held no later than the first business day after the 45th day after filing.</p>
<p>Purchased power capacity factor (“PCRf”) (16 TEX. ADMIN. CODE § 25.238)</p>	<p>On filing of a petition for establishment of a PCRf rider, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows, except where good cause supports a different procedural schedule: (1) within 60 days, if no hearing is requested within 30 days of filing and (2) within 120 days, if hearing is timely requested, with hearing to be held no later than the first business day after the 45th day after filing.</p>
<p>Distribution cost recovery factor (“DCRF”) (16 TEX. ADMIN. CODE § 25.243)</p>	<p>For [PUC] processing of application, (A) challenge to sufficiency of application for DCRF (deemed sufficient if 30-day deadline not met); (B) discovery, including technical conference, if requested (limiting number of requests for information and requests for admissions of fact); and (C) requiring effective date of September 1 or, if electric utility does not offer customer choice, 145 days after application filed, absent good cause for later date.</p>

In contrast to these other cost-factor rules, the TCRF rule contains no procedural schedule. *Id.* § 239. But Entergy’s interpretation would place the procedural schedules in the other cost-factor rules in direct conflict with Rule 25.241(i). These cost-factor regulations make plain that the timetable set forth in Rule 25.241, subsection (i), does not apply to proceedings under the cost-factor rules that already have their own procedural schedules, and nothing suggests it was meant to apply differently to the TCRF rule.

We also observe that the decision to leave the TCRF rule without a procedural schedule was a deliberate one. In the order adopting Rule 25.239, the PUC found that establishment of a procedural schedule for TCRF applications was not warranted because each utility has different levels of costs and thus, the applications require varying amounts of time for review. TEX. PUB. UTIL. COMM'N, *Order Adopting New § 25.239 as Approved at the December 7, 2007, Open Meeting*, 2007 WL 4439466 (Dec. 11, 2007). Entergy's urged construction thus disregards the PUC's express rejection of a fixed procedural schedule for TCRF applications.

Accordingly, we conclude that the PUC acted within its discretion in declining to interpret that provision as setting a schedule for adjudicating Entergy's TCRF application.

B. Consistency of the PUC's Practice

Entergy further asserts that not applying Rule 25.241's procedural schedule to Entergy's TCRF application is inconsistent with the PUC's treatment of other TCRF applications, where it has "repeatedly applied Rule 25.241(i) in extending the effective date." Entergy cites four examples of TCRF proceedings in which the PUC has used Rule 25.241's timetable and argues that the PUC's unexplained failure to follow its own precedent from those proceedings amounts to arbitrary and capricious conduct warranting reversal.

Neither Texas Utilities Code section 25.239 nor 16 Texas Administrative Code section 239 has a procedural schedule, and neither refers to Rule 25.241(i). The PUC's 2007 order adopting the Administrative Code's TCRF section declined to include a fixed procedural schedule, signifying that the PUC could select an appropriate schedule for a TCRF application depending on the circumstances presented. Because the PUC left the length of the schedule to the adjudicator's discretion, the use of Rule 25.241(i)'s procedural schedule in some cases does not preclude the use of different procedural schedules in others. *See, e.g., Citizens Against Landfill in Hempstead v. Tex. Comm'n on Env'tl. Quality*, No. 03-14-00718-CV, 2016 WL 1566759, at *7 (Tex. App.—Austin Apr. 13, 2016, no pet.) (mem. op.) (explaining agency would have reversibly erred by adhering to informal policy of returning application after finding two deficiencies without considering individual circumstances, because policy was not promulgated into rule under Administrative Procedure Act).

And, because the TCRF rule permits the exercise of discretion in scheduling, *Oncor Electric Delivery Co. v. Public Utility Commission*, cited by Entergy, is distinguishable. 406 S.W.3d 253, 264–69 (Tex. App.—Austin 2013, no pet.). There, the appellate court held that a requirement that certain expenses receive prior authorization before they could be recovered in rates amounted to a new policy because it strayed from prior practice without notice to Oncor or explanation of the

departure. *Id.* Entergy has not shown that the PUC failed to consider variations among TCRF cases in declining to apply Rule 25.241(i)'s procedural schedule here. We therefore conclude that the PUC did not act arbitrarily and capriciously in doing so.

We hold that the trial court did not err in affirming the PUC's final order.

We overrule Entergy's sole issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss

Justice

Panel consists of Justices Keyes, Goodman, and Countiss.