



Control Number: 42946



Item Number: 20

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014.



McKAMIE KRUEGER, LLP

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PUBLIC UTILITY COMMISSION
2007 N. Collins Blvd.; Suite #501
Richardson, Texas 75080
FILING CLERK 214-253-2600
Julie@mckamiekrueger.com

July 1, 2011

Via Facsimile # 512-239-6972
And CMRRR # 7010 1060 0000 2963 8036

Executive Director
Texas Commission on Environmental Quality
Water Supply Division
Utilities and District Section, MC-153
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application Nos. 36966-W and 36967-S; Application by Providence Village Water Control & Improvement District and Mustang Special Utility District for Sale, Transfer, Merger Approval (the "STM Application")

Dear Executive Director:

On behalf of the Town of Providence Village ("Town") I am writing in response to the correspondence dated May 11, 2011 filed by Mustang Special Utility District ("Mustang") regarding the Town's request for a public hearing in connection with the above referenced STM Application. The Town urges the Executive Director to hold a public hearing regarding the STM Application for all of the reasons stated in the Town's April 22, 2011 correspondence and for the reasons set forth herein.

Based on Mustang's May 11, 2011 correspondence there is clearly a disagreement, or at best uncertainty, as to whether Mustang has the financial or technical capabilities to provide retail water and sewer utility services within the Town of Providence Village. Each of the specific criteria set forth by TCEQ regulations as to why a public hearing should be held are detailed in our April 22, 2011 correspondence and we will not repeat it here for the sake of brevity. Given the disagreement as to the true facts and condition surrounding Mustang's capabilities, a public hearing is the most appropriate setting to determine the facts and decide whether Mustang has technical or financial capability to provide retail services in the Town.

Most of the arguments set forth by Mustang in their correspondence to TCEQ seeking to prohibit the public hearing process places reliance on the contractual relationship between the two applicants, Mustang and Providence Village Water Control and Improvement District of Denton County ("WCID"). Enclosed herewith you will find the Town's Original Petition filed in district court against the WCID seeking declaratory relief that the contract between the WCID

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and Mustang is actually void and seeking injunctive relief to enjoin the STM Application.

The TCEQ should not grant the STM Application without a public hearing, particularly when the legality of the underlying contract relied upon by both applicants as the basis for the STM Application is under court review to determine whether it is void.

Sincerely yours,

McKAMIE KRUEGER, LLP



JULIE Y. FORT

JYF/tld
Enclosure
cc:

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CAUSE NO. 2011-60876-393

FILED
2011 JUN 29 11 09:22
DENTON COUNTY

PROVIDENCE VILLAGE
Plaintiff,

IN THE DISTRICT COURT

V.

PROVIDENCE VILLAGE
WATER CONTROL AND
IMPROVEMENT DISTRICT OF
DENTON COUNTY f/k/a DENTON
COUNTY FRESH WATER SUPPLY
DISTRICT NO. 9 & MUSTANG
SPECIAL UTILITY DISTRICT
Defendants.

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DENTON COUNTY, TEXAS

393 JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

COMES NOW Providence Village, Plaintiff, complaining of Defendants Providence Village Water Control and Improvement District of Denton County and Mustang Special Utility District, and would respectfully show the Honorable Court:

DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level III. TEX. R. CIV. P. 191.

PARTIES, JURISDICTION, AND VENUE.

2. Plaintiff Providence Village is a Type A municipality with its principal place of business at 1745 FM 2931, Providence Village, Texas, 76227.

3. Defendant Providence Village Water District is a Water Control and Improvement District with its principal place of business in Denton County, Texas. It may be served by serving its President, John Mitchell, at 1208 Oakcrest Drive, Providence Village, Texas, 76227.

COPY

4. Defendant Mustang Special Utility District is a Special Utility District with its principal place of business at 7985 FM 2931, Aubrey, Texas, 76227. It may be served with process by serving Chris Boyd, its general manager, at 7985 FM 2931, Aubrey, Texas, 76227.

5. This Court has jurisdiction over the parties and the subject matter.

6. Venue is proper in Denton County pursuant to TEX. CIV. PRAC. & REM. CODE §15.0002(a)(1) because all or a substantial part of the acts and/or omissions described herein occurred in Denton County.

INTRODUCTION

7. This dispute turns on the rights of citizens to organize themselves into a city, elect officials, and then have those elected officials determine what best meets their current needs. Years ago, two unrelated entities executed a contract mandating the transfer of water and sewer services enjoyed by the people of Providence Village to Mustang Special Utility District on October 1, 2011. According to the contract, this transfer must take place whether the Town or the Providence Village Water Control and Improvement District—acting through their elected officials—believes that such a transfer is in the best interests of their constituents. If the transfer is accomplished, neither the local district nor the Town will have control over their water and sewer services, even though much of the infrastructure was financed with bonds still being repaid by these citizens' taxes.

8. Fortunately, well-settled Texas law prohibits such an unfair outcome. The “reserved powers doctrine” prohibits an elected body from “tying the hands” of future elected bodies—in other words, a board or council cannot deprive officials to be elected in the future

from exercising their discretion in the best interests of the people they were elected to serve. Under this doctrine, the contract purporting to limit the Providence Village Water District's ability to maintain control of the Town's water and sewer services is void. The Town asks this Court to enforce this long-standing principle and declare the offending contract void.

STATEMENT OF FACTS

9. Providence Village is a Type A, general law municipality located in Denton County. It was first developed as a master-planned community in 2000. By 2004, its citizens began working toward self-government, finally voting to incorporate in 2010.

10. While developing Providence Village, the developer formed a special taxing district denoted "Denton County Fresh Water Supply District 9." It was renamed "Providence Village Water Control and Improvement District" in late 2010, signifying its road and police powers. The District has provided retail water and wastewater services for the community that became Providence Village since its inception. The District holds Certificates of Convenience and Necessity Nos. 13020 and 20922, under which it currently provides water and wastewater services to 1,846 retail water customers and 1,612 retail sewer customers, all within the Town of Providence Village. The District's service area also includes undeveloped portions of the Town upon which approximately 300 new houses are expected to be built in the coming years.

11. Mustang Special Utility District, established under the provisions of Chapter 65, Texas Water Code, is also a retail public utility. As a retail public utility, it holds Certificates of

Convenience and Necessity Nos. 11956 and 20930 to provide retail water and wastewater service to certain areas within and around Denton County.

12. The District and Mustang are parties to a “Merged, Amended, and Restated Agreement Related to Water and Sanitary Sewer Service” dated March 15, 2005 (“the Agreement”). The Agreement mandates that the District, without regard to what it believes to be prudent:

- Convey all of its right, title, and interest to all sanitary sewer facilities acquired by the District through its outstanding bonds to Mustang effective October 1, 2011;
- Lease to Mustang all of its right, title, and interest to all water distribution and storage facilities, including land, for successive 25-year terms (which automatically renew; significantly, only Mustang can ever break the lease);
- File, with Mustang, an application with the TCEQ to transfer its CCNs to Mustang;
- Periodically raise its water and sewer service rates to “achieve rate parity” with Mustang before the transfer date, regardless of whether such rate increases are otherwise necessary and/or justified.

If the District fulfills its purported obligations under the Agreement, the water and wastewater services within the Town’s jurisdiction will be transferred to Mustang, rather than remaining subject to local control.

13. Texas law prohibits a governmental entity from contracting away the exercise of a governmental function, including the provision of water and wastewater services. This prohibition, known as the “reserved powers doctrine,” deems it fundamentally unfair to permit an elected body to control the discretion of future elected bodies. The Agreement purports to “tie the hands” of the District’s current leadership with respect to the transfer of its CCNs, entering a lease with Mustang, and setting rates. Under this “reserved powers doctrine,” then,

the Agreement is void. The Town asks this Court to declare the rights and obligations of all affected parties with respect to the Agreement; specifically, the Town asks the Court to hold the Agreement void under the reserved powers doctrine.

14. The District and Mustang filed an "Application for Sale, Transfer, or Merger of a Retail Public Utility" with the TCEQ, asking that the District's CCNs be transferred to Mustang, so that Mustang will have the right to control water and wastewater services within the jurisdictional limits of the Town of Providence Village. The Town of Providence Village, seeking to control all governmental functions within its boundaries, opposes such transfer and filed a protest with the TCEQ. To date, the TCEQ has not transferred the CCNs; however, a ruling may be imminent. The Town asks this Court to enjoin transfer of the CCNs until the parties' rights and obligations may be fully and finally determined by this Court.

CAUSES OF ACTION

A. Request for Declaratory Relief

15. Plaintiffs seek declaratory relief and ask that the Court declare the rights and obligations of the parties with respect to the agreements between and among them, including, but not limited to, the following:

- The Agreement violates the reserved powers doctrine because it restricts the District's exercise of its governmental functions.
- The Agreement is void.
- The District has no contractual obligation to Mustang to transfer its CCNs to Mustang.

- The District has no contractual obligation to Mustang to raise its rates to achieve parity with Mustang's rates.

B. Request for Temporary Injunctive Relief

16. The Town asks this Court to temporarily enjoin the transfer of the District's CCNs to Mustang until the validity and effect of the contracts between and among the parties can be finally judicially determined.

17. The Town has a probable right to relief. Long-settled Texas law prohibits a governmental entity from entering into a contract which limits its free exercise of governmental and/or police powers. This prohibition, termed the "reserved powers doctrine," instructs that any contract restricting a governmental entity's discretion in carrying out its governmental functions is void as against public policy. The Agreement at issue mandates the transfer of the District's CCN's to Mustang at a certain time and on certain terms; furthermore, it mandates rate increases based on Mustang's rate structure, rather than on the District's determination of what is prudent. Because the Agreement violates the reserved powers doctrine, it is void as against public policy, and the Town has a probable right to relief.

18. The TCEQ could rule on the application to transfer the District's CCNs to Mustang at any time; stated differently, the Town faces imminent harm. An injunction is necessary to preserve the status quo until this court can determine the validity and effect of the Agreement.

19. An injury is "irreparable" as to establish the need for a temporary injunction, if damages would not adequately compensate the injured party or if damages cannot be measured by any certain pecuniary standard. Here, the damage would be the loss to the Town and its residents caused by the wrongful transfer of the District's CCN to Mustang. Such damage

cannot be quantified by any certain pecuniary standard; thus, the injury is "irreparable" for purposes of injunctive relief.

20. The Town asks the Court to temporarily enjoin (1) the District from transferring CCN Nos. 13020 and 20922, (2) Mustang from accepting the transfer of CCN Nos. 13020 and 20922, and (3) the TCEQ from taking any action with respect to CCN Nos. 13020 and 20922 until the validity and effect of the Agreement can be fully and finally judicially determined.

ATTORNEY'S FEES

21. Plaintiff is entitled to all reasonable and necessary attorneys' fees incurred by or on behalf of Plaintiff herein, including all fees necessary in the event of an appeal of this case to the Court of Appeals and the Supreme Court of Texas, as the Court deems equitable and just, as provided by Chapter 37 of the Texas Civil Practice and Remedies Code.

CONCLUSION AND PRAYER FOR RELIEF

The Agreement, if allowed to stand, deprives the currently-elected officials of the Town and the Providence Village Water District from acting in the best interests of the people who elected them. It purports to substitute for local authority that of a third party's former governing members. Texas law prohibits such an outcome. The Town of Providence Village asks this Court to apply well-settled law and void the Agreement.

THEREFORE, the Town of Providence Village asks this Court to grant it declaratory and injunctive relief as set forth above, for its attorney's fees and costs of court, and for such other relief to which it may be entitled.

Respectfully submitted,

PHILIP MACK FURLOW, P.C.

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ATTORNEYS FOR PLAINTIFF

OFFICIAL RECEIPT



Sherri Adelstein
Denton County District Clerk
1450 E McKinney St, Ste 1200,
Denton TX 76209
940-349-2200

Payor
Furlow, Philip Mack
1415 N Locust ST
Denton, TX 76201

Receipt No.
2011-13778
Transaction Date
06/29/2011

Description	Amount Paid
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Providence Village
2011-60876-393

New Suit	233.00
Citation (Civil)	16.00
Consolidated State Fee-Civil	50.00
Court Records Preservation Fee (Civil)	10.00
DC - Records Management and Preservation (Civil)	5.00
District Clerk Filing Fee (Civil)	50.00
Indigent Services Fee-Civil (new suit)	10.00
Judicial Service Fee (Civil)	42.00
Law Library Fee (Civil)	15.00
Mediation Fee (Civil)	10.00
Records Management and Preservation (Civil)	5.00
Security Fee - Courthouse (Civil)	5.00
Stenographer Fee (Civil)	15.00
SUBTOTAL	233.00
Remaining Balance Due: \$0.00	

PAYMENT TOTAL **233.00**

Check (Ref #1315) Tendered	233.00
Total Tendered	233.00
Change	0.00

06/29/2011
09.24 AM

Cashier
Station 11-00328

Audit
10463471

OFFICIAL RECEIPT