



Control Number: 43041



Item Number: 48

Addendum StartPage: 0

SOAH DOCKET NO. 473-16-3809.WS
PUC DOCKET NO. 43041

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APPLICATION OF THE CITY OF § BEFORE THE STATE OFFICE
DORCHESTER TO AMEND A § PUBLIC UTILITY COMMISSION
CERTIFICATE OF CONVENIENCE § FILING CLERK
AND NECESSITY IN GRAYSON § OF
COUNTY (37917-C) § ADMINISTRATIVE HEARINGS

**MOTION OF CITY OF DORCHESTER, TEXAS
TO DISMISS INTERVENOR CITY OF HOWE, TEXAS**

NOW COMES the City of Dorchester, Texas (Dorchester) and files its Motion to Dismiss Intervenor City of Howe, Texas, and request remand to the Public Utility Commission of Texas (Commission) for further proceedings.

1. Background.

On January 14, 2016, the City of Howe (Howe) filed with the Commission its Request for Public Hearing. Howe is the only entity to request a contested case hearing on Dorchester's application to amend its Certificate of Convenience and Necessity (CCN). Based on Howe's request for a hearing, on April 25, 2016, the Commission issued an order referring this docket to the State Office of Administrative Hearings (SOAH) for a hearing on Dorchester's application before an Administrative Law Judge (ALJ).

In SOAH Order No. 1 (May 6, 2016), the ALJ ordered a telephonic Prehearing Conference to occur at 10:00 a.m. on May 20, 2016. However, Howe did not participate in this conference. When the ALJ called Howe's designated representative, City Administrator Joe Shephard, he declined to participate in the call. *See* SOAH Order No. 2 Memorializing Prehearing Conference (May 26, 2016). At that point during the telephonic prehearing conference, Dorchester moved to dismiss Howe and remand the proceeding to the Commission. *Id.* The ALJ requested that

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Dorchester file a written motion to remand by June 1, 2016. *Id.* In support of its Motion to Dismiss Howe, Dorchester would show as follows:

2. Dismissal for failure to appear.

A contested case may be disposed of if a party that is provided sufficient, reasonable notice of the time, date, and place of an administrative hearing fails to appear. *Fox v. Medina*, 848 S.W.2d 866, 871-72 (Tex. App. – Corpus Christi 1993, no writ). Howe was provided notice of the hearing in SOAH Order No. 1, but failed to appear – despite being called by the ALJ before the hearing began.

The Commission's procedural rules allow a party to move to dismiss a proceeding for failure to prosecute or other good cause shown. 16 TEX. ADMIN. CODE § 22.181(a)(1). Further, SOAH's rules for telephonic conferences state that failure to answer the telephone, failure to free the line for the proceeding, or failure to be ready to proceed constitutes a failure to appear, and grounds for default. 1 TEX. ADMIN. CODE § 155.405(f). Howe was contacted by phone at the scheduled time of the hearing, but did not free the line and was not ready to proceed. As such, SOAH rules provide for dismissal of Howe for failure to prosecute and for the ALJ to proceed in Howe's absence on a default basis. 1 TEX. ADMIN CODE § 155.501(a). Howe was the only entity to request a contested case hearing; in Howe's absence, the proceeding should return to the Commission. The ALJ should, therefore, announce Howe's default for failure to appear, recess the hearing, issue an order dismissing the case from the SOAH docket, and return the file to the Commission for further proceedings. *Id.* at § 155.501(d).

3. Howe has not demonstrated that it is an affected person.

Howe requested a public hearing in order “to present evidence on its CCN” because it alleges that Dorchester has presented a “visual depiction of an overlap between Howe’s CCN and the Dorchester’s CCN.”¹ The “List of Issues” filed by Howe on May 4, 2016 lists only three issues, each related to Howe’s own CCN area and the purported overlap with Dorchester’s CCN. Howe’s only two filings in this proceeding – its Request for a Public Hearing and its subsequent List of Issues – assert no other interest in this proceeding other than clarifying Howe’s own CCN boundary.

A person may only intervene in a Commission proceeding if that person has a right to participate, which is expressly conferred by statute, commission rule, or order, or other law, or if he or she has a justiciable interest which may be adversely affected by the outcome of the proceeding. 16 TEX. ADMIN. CODE § 22.103(b). A justiciable interest is akin to standing to maintain a suit, which consists of some interest peculiar to a person individually and not as a member of the general public.²

Howe has not asserted that it is an affected person and, therefore, entitled to intervention in this proceeding. It has not described the ways in which it would be affected if Dorchester’s application was granted. It has not identified a statute, rule, order, or other law granting it a right to participate, or a justiciable interest unique to Howe. Rather, Howe has asserted general concerns that its CCN and Dorchester’s CCN may overlap. As discussed further below, they do not. Moreover, the purpose of this proceeding is not to determine the boundary of Howe’s CCN area. Other legal recourse may be available to Howe for that purpose. Rather, the purpose of this

¹ Howe’s Request for a Public Hearing (January 14, 2016) at 1-2; 3.

² *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984).

proceeding is to determine whether Dorchester has met all legal requirements for its application to amend its CCN and decertify a portion of another CCN. *See* Commission Staff's List of Issues (May 4, 2016). Howe has not stated any personal interest in Dorchester's application. For this additional reason, Howe should be dismissed from this proceeding.

4. No overlap in CCNs.

Howe has asserted that Dorchester has "presented a visual depiction of an overlap between the City of Howe's CCN and the City of Dorchester's CCN."³ However, Dorchester has already addressed this claim to the Commission's satisfaction. Revised digital mapping was submitted to the Commission on May 12, July 20, and October 2, 2015. In response, Commission Staff determined that Dorchester's application was sufficient for filing,⁴ and the Commission issued Order No. 11, deeming Dorchester's application administratively complete.⁵ The Commission has, therefore, already determined that the area at issue in Dorchester's application does not overlap with Howe's CCN. Thus, the only issue raised by Howe – even if it were a relevant area of inquiry in this proceeding – is already moot. A case becomes moot and, therefore, appropriate for dismissal if a party seeks to obtain a judgment on some controversy, when in reality none exists. *Texas Health Care Info. Council v. Seton Health Plan Inc.*, 94 S.W.3d 841, 846-47 (Tex. App. – Austin 2002, pet. denied). Howe should therefore be dismissed from this proceeding.

³ Howe's Request for a Public Hearing (January 14, 2016) at 1-2; 3.

⁴ Commission Staff's Response to Order No. 10 (November 17, 2015).

⁵ Commission Order No. 11 Deeming Application Administratively Complete, Addressing Notice, and Establishing Procedural Schedule (Nov. 18, 2015).

5. If a MUD is located within the ETJ of two cities, it can choose from whom it receives service.

Finally, Howe vaguely alleges that Dorchester's application "involves matters within the City of Howe's Extra Territorial Jurisdiction (ETJ) and, thus, may relate to other matters and authority."⁶ Cottonwood Municipal Utility District No. 2 and Cottonwood Municipal Utility District No. 2B (the Districts) reside within the ETJs of both Howe and Dorchester.

A municipal utility district that is located within the ETJs of more than one municipality may, by resolution, select the municipality that may exercise authority within the district as a whole. TEX. WATER CODE § 54.0163. This statute requires the municipal utility district to file a certified copy of its board's resolution selecting the municipality with each municipality, as well as the real property records of the county in which it resides. The Districts have selected Dorchester to exercise authority over the district. *See* Exhibit A. The boards of the Districts adopted resolutions selecting Dorchester, notified Howe of their selection, and filed the appropriate documents in the real property records of Grayson County, Texas. *Id.* Howe, therefore, has no justiciable interest in the Districts' location within their ETJ, as the Districts have selected Dorchester's jurisdiction pursuant to Texas Water Code § 54.0163.

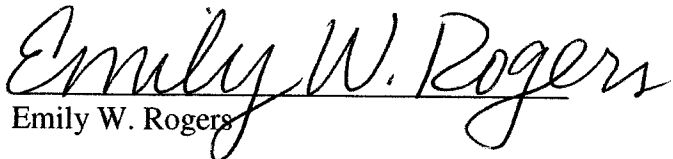
6. Conclusion.

For the reasons stated above, the Dorchester prays that Howe be dismissed from this proceeding, for the ALJs to recess the hearing and issue an order dismissing the case from the SOAH docket, and return the file to the Commission for further proceedings.

⁶ Howe's Request for a Public Hearing (January 14, 2016) at 2. The Commission Staff also raised its initial concern regarding the purported overlap of Dorchester and Howe's CCN areas. *See* Commission Staff's Recommendation on Sufficiency at 1-2 (February 10, 2015).

Respectfully submitted,

Emily W. Rogers
State Bar No. 24002863
erogers@bickerstaff.com
Joshua D. Katz
State Bar No. 24044985
jkatz@bickerstaff.com
Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

BY: 
Emily W. Rogers

CERTIFICATE OF SERVICE

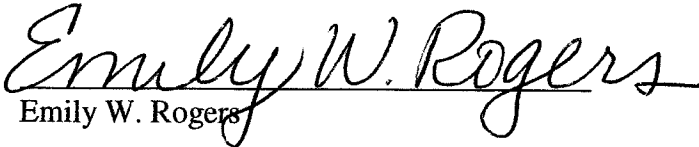
I hereby certify by my signature below that on the 1st day of June, 2016, a true and correct copy of the above and foregoing document was forwarded via hand delivery, facsimile, U.S. mail or electronic mail to the parties below:

Joe Shephard, City Administrator
City of Howe, Texas
PO Box 518
Howe, TX 75459

Angela Stepherson
Coats/Rose
Two Lincoln Centre
5420 LBJ Freeway, Suite 600
Dallas, TX 75240

Eddy Daniel
Daniel & Brown, Inc.
PO Box 606
Farmersville, TX 75442

Douglas Brown
Attorney – Legal Division
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, TX 78701


Emily W. Rogers

SK LAW



Sanford | Kuhl | Hagan | Kugle | Parker | Kahn LLP

1980 POST OAK BOULEVARD
SUITE 1380

HOUSTON, TEXAS 77056

(713) 850-9000

FAX: (713) 850-1330

www.sklaw.us

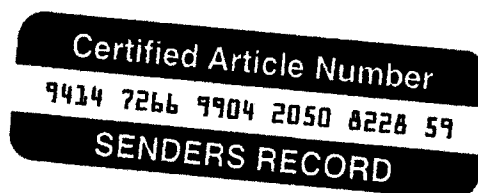
drews@sklaw.us

MARY B. DREWS

February 17, 2016

Via Certified Mail - RRR

Ms. Joy Stevens
City Secretary
City of Howe, Texas
116 E. Haning St.
Howe, Texas 75459



Re: Cottonwood Municipal Utility District No. 2 and Cottonwood Municipal Utility District No. 2B

Dear Ms. Stevens:

Enclosed for filing with the City of Howe, Texas is a certified copy of a Resolution Selecting Extraterritorial Jurisdiction adopted by the Board of Directors of Cottonwood Municipal Utility District No. 2 and a certified copy of a Resolution Selecting Extraterritorial Jurisdiction adopted by the Board of Directors of Cottonwood Municipal Utility District No. 2B. Each of these Resolutions has been filed in the Real Property Records of Grayson County, Texas.

Also enclosed are five copies each of a Certificate of City Secretary relating to the filing of each Resolution. Please execute and seal all Certificates and return them to me in the stamped, self addressed envelope, also enclosed, at your earliest convenience.

Thank you for your assistance with this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Mary B. Drews".

Mary B. Drews
Legal Assistant

Enclosures

**CERTIFICATE OF CITY SECRETARY
CITY OF HOWE, TEXAS**

I, the undersigned City Secretary of the City of Howe, Texas do hereby certify that the attached Resolution Selecting Extraterritorial Jurisdiction adopted by the Board of Directors of Cottonwood Municipal Utility District No. 2 of Grayson County has been filed with the City of Howe.

WITNESS MY HAND AND SEAL OF THE CITY OF HOWE, TEXAS, the _____ day
of _____, 2016.

City Secretary, City of Howe, Texas

(SEAL)

**CERTIFICATE OF CITY SECRETARY
CITY OF HOWE, TEXAS**

I, the undersigned City Secretary of the City of Howe, Texas do hereby certify that the attached Resolution Selecting Extraterritorial Jurisdiction adopted by the Board of Directors of Cottonwood Municipal Utility District No. 2B of Grayson County has been filed with the City of Howe.

WITNESS MY HAND AND SEAL OF THE CITY OF HOWE, TEXAS, the _____ day
of _____, 2016.

City Secretary, City of Howe, Texas

(SEAL)

2. Article Number



9414 7266 9904 2050 8228 59

3. Service Type **CERTIFIED MAIL®**

4. Restricted Delivery? (Extra Fee)

☐ Yes

1. Article Addressed to:

Ms. Joy Stevens
City Secretary
City of Howe, TX
116 E. Haning St.
Howe, TX 75459

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)

Michelle Hill

B. Date of Delivery

2-22-16

C. Signature

X

☐ Agent

☐ Addressee

D. Is delivery address different from item 1?

If YES, enter delivery address below:

☐ Yes

☐ No

Reference Information

3050 3048 JBK MD

**** Electronically Filed Document ****

Wilma Blackshear Bush
County Clerk
Grayson County

Document Number: 2016-3222
Recorded As : E-FILE RECORDINGS

Recorded On: February 17, 2016
Recorded At: 12:04:51 pm
Number of Pages: 4
Book-VI/Pg: Bk-OR VI-5759 Pg-938
Recording Fee: \$24.00

Parties:

Direct- COTTONWOOD MUNICIPAL UTILITY DIS
Indirect- COTTONWOOD MUNICIPAL UTILITY DIS

Receipt Number: 444499
Processed By: GAIL WHITE

Consideration Amount:\$0
Tax Code :
Tax Amount: \$0

Affidavit: NO

***** THIS PAGE IS PART OF THE INSTRUMENT *****

Any provision herein which restricts the Sale, Rental or use of the described REAL PROPERTY
because of color or race is invalid and unenforceable under federal law.

THE STATE OF TEXAS
COUNTY OF GRAYSON

I hereby certify that this instrument was FILED in the File Number sequence on the date/time
printed hereon, and was duly RECORDED in the Official Records of Grayson County, Texas.

Wilma Blackshear Bush

Wilma Blackshear Bush, Grayson County Clerk



COTTONWOOD MUNICIPAL UTILITY DISTRICT NO. 2 OF GRAYSON COUNTY


President, Board of Directors
Gary Baker

Steve Maglisceau

RESOLUTION
SELECTING EXTRATERRITORIAL JURISDICTION

STATE OF TEXAS §

COUNTY OF GRAYSON §

COTTONWOOD MUNICIPAL UTILITY
DISTRICT NO. 2 OF GRAYSON COUNTY §

WHEREAS, Cottonwood Municipal Utility District No. 2 of Grayson County (the "District") is located within the extraterritorial jurisdiction of the City of Dorchester and the City of Howe;

WHEREAS, the Board of Directors (the "Board") of the District is authorized by Chapter 54.0163 of the Texas Water Code, as amended, to select by resolution the municipality that may exercise authority within the District as a whole; and

WHEREAS, the Board of the District deems it appropriate to select the City of Dorchester as the municipality that may exercise such authority as the majority of the land within the District is located within the extraterritorial jurisdiction of the City of Dorchester.

IT IS, THEREFORE, ORDERED BY THE BOARD OF DIRECTORS OF COTTONWOOD MUNICIPAL UTILITY DISTRICT NO. 2 OF GRAYSON COUNTY THAT:

1. The Board of the District hereby selects the City of Dorchester as the municipality that may exercise authority within the District as a whole.
2. The effective date of such selection shall be February 3, 2016.
3. The Board of the District directs its attorney to file a copy of this Resolution with the City of Dorchester and the City of Howe and to record a certified copy of this Resolution in the Real Property Records of Grayson County, Texas.
4. The President or Vice President is authorized to execute and the Secretary or Assistant Secretary to attest this Resolution on behalf of the Board of the District and to do any and all things necessary to carry out the intent hereof.

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PASSED, ADOPTED and APPROVED this 3rd day of February, 2016.

ATTEST

Secretary, Board of Directors

(SEAL)

Steve Maglisceau

President, Board of Directors

Gary Baker

THE STATE OF TEXAS

COUNTY OF DALLAS

This instrument was affirmed and acknowledged before me on February 3, 2016, by Gary Baker, President, and Steve Maglisceau, Secretary, of the Board of Directors of Cottonwood Municipal Utility District No. 2 of Grayson County, in the capacity herein stated.



Linda S. Martin
Notary Public
STATE OF TEXAS

My Comm. Exp. 05/25/17

Linda S. Martin
NOTARY PUBLIC, STATE OF TEXAS

STAMP NAME AND DATE OF
EXPIRATION OF COMMISSION
BELOW:

**CERTIFICATE OF CITY SECRETARY
CITY OF DORCHESTER, TEXAS**

I, the undersigned City Secretary of the City of Dorchester, Texas do hereby certify that the attached Resolution Selecting Extraterritorial Jurisdiction adopted by the Board of Directors of Cottonwood Municipal Utility District No. 2 of Grayson County has been filed with the City of Dorchester.

WITNESS MY HAND AND SEAL OF THE CITY OF DORCHESTER, TEXAS, the
8th day of March, 2016.

Becky Vincent
City Secretary, City of Dorchester, Texas

(SEAL)

**** Electronically Filed Document ****

Wilma Blackshear Bush
County Clerk
Grayson County

Document Number: 2016-2953
Recorded As : E-FILE RECORDINGS

Recorded On: February 12, 2016
Recorded At: 09:03:57 am
Number of Pages: 5
Book-VI/Pg: Bk-OR VI-5758 Pg-406
Recording Fee: \$28.00

Parties:

Direct- COTTONWOOD MUD NO 2B
Indirect- COTTONWOOD MUD NO 2B

Receipt Number: 444207
Processed By: GAIL WHITE

Consideration Amount:\$0
Tax Code :
Tax Amount: \$0

Affidavit: NO

***** THIS PAGE IS PART OF THE INSTRUMENT *****

Any provision herein which restricts the Sale, Rental or use of the described REAL PROPERTY
because of color or race is invalid and unenforceable under federal law.

THE STATE OF TEXAS
COUNTY OF GRAYSON

I hereby certify that this instrument was FILED in the File Number sequence on the date/time
printed hereon, and was duly RECORDED in the Official Records of Grayson County, Texas.

Wilma Blackshear Bush

Wilma Blackshear Bush, Grayson County Clerk



CERTIFICATE FOR RESOLUTION
SELECTING EXTRATERRITORIAL JURISDICTION

THE STATE OF TEXAS

COUNTY OF GRAYSON

COTTONWOOD MUNICIPAL UTILITY DISTRICT NO. 2B OF GRAYSON COUNTY

§
§
§
§
§
§

We, the undersigned officers of the Board of Directors (the "Board") of Cottonwood Municipal Utility District No. 2B of Grayson County (the "District"), hereby certify as follows:

1. The Board convened in special session, open to the public, on the 3rd day of February, 2016 at a designated meeting place outside the boundaries of the District, and the roll was called of the members of the Board, to-wit:

Bruce Prine	-	President
Pat O'Hanlon	-	Vice President
Erik Norgello	-	Secretary
Michael Landgraf	-	Assistant Secretary
Kent Anderson	-	Assistant Secretary

All members of the Board were present, except the following Director(s): Landgraf, thus constituting a quorum. Whereupon, among other business, the following was transaction at such meeting:

RESOLUTION SELECTING EXTRATERRITORIAL JURISDICTION

was duly introduced for the consideration of the Board. It was then duly moved and seconded that such Resolution be adopted; and, after due discussion, such motion, carrying with it the adoption of said Resolution, prevailed and carried by the following vote:

AYES: 4

NOES: 0

2. A true, full, and correct copy of the aforesaid Resolution adopted at the meeting described in the above and foregoing paragraph is attached to and follows this Certificate; such Resolution has been duly recorded in said Board's minutes of such meeting; the above and foregoing paragraph is a true, full, and correct excerpt from the Board's minutes of such meeting pertaining to the adoption of such Resolution; the persons named in the above and foregoing paragraph are the duly chosen, qualified, and acting officers and members of the Board as indicated therein; each of the officers and members of the Board was duly and sufficiently notified officially and personally, in advance of the time, place, and purpose of such meeting and that such Resolution would be introduced and considered for adoption at such meeting and each of such officers and members consented, in advance, to the holding of such meeting for such purpose; such meeting was open to the public, as required by law, and public notice of the time, place and purpose of such meeting was given as required by V.T.C.A. Government Code, Chapter 551, as amended.

SIGNED AND SEALED this 3rd day of February, 2016.



Erik Norgello

Bruce Prine
President, Board of Directors
Bruce Prine

**RESOLUTION
SELECTING EXTRATERRITORIAL JURISDICTION**

STATE OF TEXAS §

COUNTY OF GRAYSON §

COTTONWOOD MUNICIPAL UTILITY
DISTRICT NO. 2B OF GRAYSON COUNTY §

WHEREAS, Cottonwood Municipal Utility District No. 2B of Grayson County (the "District") is located within the extraterritorial jurisdiction of the City of Dorchester and the City of Howe;

WHEREAS, the Board of Directors (the "Board") of the District is authorized by Chapter 54.0163 of the Texas Water Code, as amended, to select by resolution the municipality that may exercise authority within the District as a whole; and

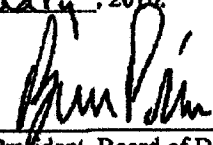
WHEREAS, the Board of the District deems it appropriate to select the City of Dorchester as the municipality that may exercise such authority as the majority of the land within the District is located within the extraterritorial jurisdiction of the City of Dorchester.

IT IS, THEREFORE, ORDERED BY THE BOARD OF DIRECTORS OF COTTONWOOD MUNICIPAL UTILITY DISTRICT NO. 2B OF GRAYSON COUNTY THAT:

1. The Board of the District hereby selects the City of Dorchester as the municipality that may exercise authority within the District as a whole.
2. The effective date of such selection shall be February 3, 2016.
3. The Board of the District directs its attorney to file a copy of this Resolution with the City of Dorchester and the City of Howe and to record a certified copy of this Resolution in the Real Property Records of Grayson County, Texas.
4. The President or Vice President is authorized to execute and the Secretary or Assistant Secretary to attest this Resolution on behalf of the Board of the District and to do any and all things necessary to carry out the intent hereof.

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PASSED, ADOPTED and APPROVED this 3rd day of February, 2016.



President, Board of Directors
Bruce Price

ATTEST:


Secretary, Board of Directors

Erik Nargello



THE STATE OF TEXAS §
 §
COUNTY OF DALLAS §

This instrument was affirmed and acknowledged before me on February 3, 2016, by Bruce Prine, President, and Erik Norgello, Secretary, of the Board of Directors of Cottonwood Municipal Utility District No. 2G of Grayson County, in the capacity herein stated.



NOTARY PUBLIC, STATE OF TEXAS

STAMP NAME AND DATE OF
EXPIRATION OF COMMISSION
BELOW:



**CERTIFICATE OF CITY SECRETARY
CITY OF DORCHESTER, TEXAS**

I, the undersigned City Secretary of the City of Dorchester, Texas do hereby certify that the attached Resolution Selecting Extraterritorial Jurisdiction adopted by the Board of Directors of Cottonwood Municipal Utility District No. 2B of Grayson County has been filed with the City of Dorchester.

WITNESS MY HAND AND SEAL OF THE CITY OF DORCHESTER, TEXAS, the
8th day of March, 2016.

Becky Vincent
City Secretary, City of Dorchester, Texas

(SEAL)