



Control Number: 43114



Item Number: 19

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PUC DOCKET NO. 43114

APPLICATION OF CITY OF
MIDLOTHIAN AND MOUNTAIN PEAK
SPECIAL UTILITY DISTRICT FOR
SALE, TRANSFER AND MERGER OF
CERTIFICATE RIGHTS IN ELLIS
COUNTY (36233-C)

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PUBLIC UTILITY COMMISSION
OF TEXAS

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MOUNTAIN PEAK SPECIAL UTILITY DISTRICT'S RESPONSE TO ORDER NO. 2

TO THE HONORABLE JUDGE SUSAN E. GOODSON:

NOW COMES, Mountain Peak Special Utility District ("Mountain Peak") and files this Response to Order No. 2, which provided Mountain Peak and the City of Midlothian with a deadline to "clarify the intent of the Application and to provide proof of notice issued."

I. The Parties' Intent:

**To best serve existing and potential customers
without altering their previously-established relationship**

A. The 1996 Contract

On November 4, 1996, Midlothian and Mountain Peak entered into a contract (the "Contract") wherein they agreed to support each other's application to amend their respective CCNs. The Contract identifies a "dual certificated area" where Midlothian would serve industrial customers and Mountain Peak would serve non-industrial customers, and established the boundaries of the areas in which each would otherwise provide service. Reaching such an agreement allowed Midlothian and Mountain Peak to make long-term planning decisions and to develop the necessary infrastructure which would most effectively provide the services for the public without risk of infringement by the other or duplication of cost or other inefficiencies.

In its May 28, 1997 Order (Docket No. 96-1192-UCR)(the "Mountain Peak Order"), the Texas Natural Resource Conservation Commission adopted and approved of the Contract. A

copy of the Contract and Order approving same was submitted to the Texas Commission on Environmental Quality (*see* PUC Docket Item No. 7, p. 4¹).

B. A Hotel and Another Agreement

In 2008 a hotel developer was thinking about building a hotel near Midlothian. If constructed, the hotel would provide economic benefits to the growing City and could serve to attract and encourage other development. The proposed location of the hotel was in the dual-certificated area, meaning that Mountain Peak would provide water service to the non-industrial hotel. Though Midlothian could readily provide water to the development area, Mountain Peak could not, and Midlothian feared that adding the cost to the developer of paying Mountain Peak to lay a new water lines and build infrastructure would be enough to scare the developer into building its hotel near another city. Here is how the parties explained the situation in their Application (*see* PUC Docket Item No. 1, p. 153 “Attachment 7, Question I A.1, A.2”):

The City of Midlothian (CCN 11706) and Mountain Peak Special Utility District (CCN 10908) have a dually certificated area located primarily within the corporate limits of the City of Midlothian (TCEQ Docket No. 97-0457-UCR). This area is designated such that the City of Midlothian (City) is responsible for providing water service to industrial customers only, with Mountain Peak Special Utility District (Mt. Peak) providing water service to other-than-industrial customers. Presently, there is an approximate 43 acre area within this dually certificated area that is planned to develop as other-than-industrial. At the present time, Mt. Peak does not have any infrastructure in this area and as a result of the construction of a new U.S. Highway, the cost to extend their infrastructure to serve this area would be substantial. However, the City currently does have infrastructure in place adjacent to this area and can provide service to this area at minimal costs. No customers currently exist within this area.

In addition to this area, there is an approximate 119 acre area that is exclusively within the corporate limits of the City and primarily within the City's certificated area, which is comprised mostly of a new residential development named Cotton Creek Ranch. This development consists of 116 residential lots and one (1) park lot. Based on current CCN boundaries, Mt. Peak is responsible for providing water service to approximately 16 lots, while the City is responsible for providing service to the remaining lots. Mt. Peak currently has infrastructure along the southern boundary of this development and can readily provide service to the remaining 100 lots. The infrastructure within this development was installed by a developer and can easily be transferred from the City to

¹ All pagination references includes the cover page showing “Control Number 43114.”

Mt. Peak since it is not a major part of the City's distribution system. Presently, three (3) customers exist within this area.

The area that is being transferred to the City is currently zoned as a planned development, which should include both retail and commercial uses. Although it is anticipated that a hotel and restaurant will be located within this area, the types of retail and commercial developments are not known. This area has been included in the City's long term water planning.

The area that is being transferred to Mt. Peak is zoned residential, and includes 100 residential lots, one (1) park lot, and one private residential lot.

Presently, there are three (3) customers within this area. It is anticipated that within one year, there will be a total of 10 customers within this area and 50 customers within five years.

So, in continuing with the theme of regional cooperation embodied by the Contract, Mountain Peak and Midlothian entered into the *Retail Water Service Area Agreement Among the City of Midlothian and Mountain Peak Special Utility District* executed by the City on June 2, 2008 (signed by MPSUD on May 28, 2008) (the "Agreement"). See PUC Docket Item No. 1, p. 27. This Agreement contemplated the transfer of the service areas described in more detail above. Midlothian would be in a better position to court a hotel and Mountain Peak would gain 119 acres (and its three existing customers) closer to its infrastructure.²

II. Procedure: Texas Water Code Section 13.248

Having reached the Agreement, the parties then needed to document and present their arrangement with the TCEQ. The Application seemed like the appropriate method. After having reviewed the Application, the TCEQ wrote to the parties and implied that it may make more sense to proceed under Section 13.248 of the Texas Water Code. See PUC Docket Item No. 9 ("... we need to verify whether the parties want to process this as a Sale, Transfer or Merger or a Texas Water Code 13.248 application . . ."). Mountain Peak and Midlothian agreed with the TCEQ that Section 13.248 would make more sense: using Section 13.248 would avoid an expensive and drawn

² The Agreement was amended in 2012, but no substantive change to the parties' intentions with regard to the properties in this proceeding was made. A copy of the supplement to the Agreement is attached.

out decertification and/or amendment proceeding which would consume time and resources of the parties and the Commission.

Section 13.248 of the Texas Water Code provides, “*Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the utility commission after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.*” This Section contemplates that both utilities already hold CCNs – as both Mountain Peak and Midlothian do, and had held for a decade at the time of the Application – so there is *no need* for the TCEQ to (re)examine the factors of Sections 13.241 and 13.246. Mountain Peak and Midlothian long ago demonstrated that they have the financial, managerial, and technical capability to provide continuous and adequate water service.³

Commission Staff references a statement from the Preliminary Order for PUC Docket No. 42861 that Section 13.248 “does not contain the standards for revocation or amendment of a CCN.”⁴ However, the issue framed in the *City of Georgetown* was specific to the facts of the case, where Chisholm Trail Special Utility District intended to *disappear*, which is not the case here. The concern of the Commission was summed up in its question to the applicants: “Is an application to approve a contract between two retail public utilities proposing that the entire service area, all of the customers and the entire CCN of one of the retail public utilities will be transferred to the other

³ See also PUC Docket Item No. 3, which is a March 25, 2008 letter from the TCEQ to Midlothian informing the City that, “your public water supply continues to merit recognition as a “Superior” system,” and PUC Docket Item No. 11, page 2, which is a December 18, 2009 TCEQ Interoffice Memorandum stating that, “Mountain Peak SUD has demonstrated adequate financial, managerial and technical capability to provide service to the area contracted for transfer.”

⁴ Commission Staff’s Response to Order No. 1 at 2 (Docket Item No. 16). (citing PUC Docket No. 42861, Preliminary Order at 7, *In the matter of the Application from the City of Georgetown, Certificate of Convenience and Necessity (CCN) No. 12369, to Acquire Facilities and Transfer and Cancel CCN No. 11590 Held by Chisholm Trail Special Utility District in Bell, Burnet, and Williamson Counties, Texas*).

utility properly brought under TWC § 13.248.” (Emphasis supplied.) As the Preliminary Order reflects:

The statutory language [in Section 13.248] suggests that the legislature intended this provision to apply to a transfer between two retail public utilities that will both continue to serve, not a consolidation of one retail public utility into another as is sought in this docket. Consequently, the Commission finds that TWC § 13.248 does not apply here.

The concern in Docket No. 42861 was one of scope, and is not an issue in the present docket. The area of land to be serviced by Midlothian under the Agreement was an undeveloped 43 acres already located within the dual certificated area. The 119 acres to be serviced by Mountain Peak had three existing customers, who, according to the Schedule of Existing Residential Water/Wastewater Rates (PUC Docket Item No. 1, p. 35), would pay a *lower* rate by switching from Midlothian to Mountain Peak.

The Application contemplated the transfer, between two established retail water suppliers, of small service areas with very few customers. This was, and still is, exactly the type of arrangement Section 13.248 was meant to cover.

III. Notice

The Application was filed with proposed forms of *Notice to Current Customers, Neighboring Systems and Cities*. See PUC Docket Item No. 1, p. 15. While the Application contains these forms of notice, there is nothing in the record to show that the TCEQ ever instructed the parties to *send* the notices.⁵ Once the TCEQ suggested, and the parties agreed, that it would be more efficient to process the application under Water Code Section 13.248, the issue of sending and publishing notice was no longer raised by the TCEQ or the parties.

⁵ See also *TCEQ General Information and Instructions on the Application for Sale, Transfer or Merger of a Retail Public Utility*, TCEQ-10516-Instructions (Revised 11/02), p. 3 (“Do not send these proposed notices or maps or publish, if applicable to neighboring cities and utilities or customers until you are notified to do so in writing by the Commission staff after the proposed notices have been reviewed.”)

Regarding the form of a map, the parties separately agreed to a modified Consent Form Map in this matter. *See* Docket Item No. 13, with Mountain Peak's conditional concurrence to the Consent Form stating it concurs with the April 15, 2011 staff memorandum, "provided that this concurrence does not ratify or affect any portion of the respective CCNs which are not directly depicted on the portion of the map shown." It is believed that the City of Midlothian agreed to that conditional concurrence. *See* Docket Item No. 12, page 22.

Conclusion

The confusion regarding this docket and the Application seems to come from 1) the form of the Application used, 2) the passage of time – both while the TCEQ was communicating with the parties and in the last few years when communications ceased, and 3) the comments from the parties to the Consent Form Map, even though the parties both agree to the conditional version of the map. Mountain Peak stands ready to assist the Commission in clarifying this confusion and in completing the approval of the Application, and it believes approval can and should be granted under Texas Water Code Section 13.248.

While the Mountain Peak believes the areas subject to the Agreement, as amended in 2012, can be incorporated into the appropriate areas of the parties' certificates of convenience and necessity through Section 13.248 without any notice being issued, to the extent that notice may not have been approved, Mountain Peak suggest the following steps are appropriate: within fourteen (14) days of being ordered to do so, the parties will submit a proposed form of notice, with a list of proposed recipients, for the Staff to review and comment upon.

Mountain Peak respectfully reserves its right to remain involved with the decision-making process regarding this matter and respond to any Staff recommendations.

Respectfully submitted,

/s/ Read Cook

MILLER MENTZER WALKER, P.C.

David A. Miller

State Bar No. 14067025

dmiller@milmen.com

Read Cook

State Bar No. 24053151

rcook@milmen.com

P.O. Box 130

Palmer, Texas 75152

T: (972) 845-2222

F: (972) 845-3398

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September 2015, a true and correct copy of the foregoing document was served on the individuals listed below by hand delivery, email, facsimile or First Class Mail.

Patrick W. Lindner

Paul M. Gonzalez

Davidson, Troilo, Ream, & Garza, P.C.

7550 West IH-10, Suite 800

San Antonio, Texas 78229-5815

Telephone: (210) 349-6484

Facsimile: (210) 349-0041

Email: plindner@dtrglaw.com

pgonzalez@dtrglaw.com

Attorneys for the City of Midlothian, Texas

Douglas Milton Brown

Attorney-Legal Division

Public Utilities Commission of Texas

1701 N. Congress Ave.

P.O. Box 13326

Austin, Texas 78711-3326

Telephone: (512) 936-7203

Facsimile: (512) 936-7268

Email: Douglas.Brown@puc.texas.gov

Attorney for Commission Staff

/s/ Read Cook

Read Cook

**RETAIL WATER SERVICE AREA
AGREEMENT AMONG THE CITY OF MIDLOTHIAN AND
MOUNTAIN PEAK SPECIAL UTILITY DISTRICT**

THIS AMENDMENT is made between the City of Midlothian, a Texas home rule municipality (the "City") and Mountain Peak Special Utility District ("Mountain Peak"), collectively the "Parties," pursuant to the following considerations:

WHEREAS, the City and Mountain Peak entered into an agreement ("Retail Water Service Area Agreement Among the City of Midlothian and Mountain Peak Special Utility District," referred to as "Agreement") that was executed on May 28, 2008 by Mountain Peak and on June 2, 2008 by the City; and

WHEREAS, as part of this Agreement, the City has agreed to transfer approximately 119 acres of land known as Cotton Creek Ranch PD to Mountain Peak and Mountain Peak has agreed to grant the City the exclusive right to provide water service to approximately 43 acres within the Dual Certificated Area; and

WHEREAS, as part of this Agreement, Mountain Peak has agreed to grant the City the right to provide water service to 25 acres of land, south of Old Fort Worth Highway and west of U.S. Highway 287 under certain conditions set forth within the Agreement; and

WHEREAS, paragraph 7 states that the Agreement will expire unless the Texas Commission on Environmental Quality (TCEQ) approves the Agreement on or before March 1, 2009 (or until such later date on which the TCEQ acts on the application, provided the application therefore is still pending and the Parties are exercising due diligence to prosecute it); and

WHEREAS, paragraph 8 states that the transfers and agreements by this Agreement will be effective upon approval by the TCEQ; and

WHEREAS, the TCEQ has reviewed this Agreement and the applications submitted by the Parties and has revised and submitted a map depicting the effective areas to the Parties; and

WHEREAS, the Parties agree that the areas covered by the Agreement have been accurately depicted on the map submitted by the TCEQ; however, the Parties are not in agreement with the overall map; and

WHEREAS, the Parties have an agreement (the "Dual Certification Agreement") dated November 4, 1996, that provides that either Party may consent on a case-by-case basis to the other Party providing water service within the "Dual Certificated Area"; and

WHEREAS, Mountain Peak is currently providing retail water service to all of Cotton Creek Ranch and certain contiguous lands; and

WHEREAS, the City is ready, willing and able to serve the approximate 43 acres within the "Dual Certificated Area" (*the triangular acreage between U.S. Highway 287, Business 287/Main Street and U.S. Highway 67*); and

WHEREAS, the Parties wish to complete the transfer detailed in the "Agreement" without the provision of receiving approval by the TCEQ.

NOW THEREFORE, the Parties, for good and valuable consideration, agree to amend the "Agreement" as follows:

Paragraph 1 shall be amended as follows:

1. The City hereby transfers and conveys to Mountain Peak, ~~subject to the approval described in paragraph 7 below,~~ the approximate 119 acres of its CCN known as Cotton Creek Ranch PD and the contiguous area west of U.S. Highway 287, as shown on Exhibit "A" that is attached.

Paragraph 3 shall be amended as follows:

3. Mountain Peak also agrees to cede to the City the exclusive right to provide water service to up to 25 acres, the location and boundaries of which are to be determined by the City in its sole discretion, provided (a) the City provides a written notice (the "Service Notice") to Mountain Peak of any proposed tract with a description and survey or plat of the land involved (a "Proposed Tract"); (b) the Proposed Tract is located within one-quarter mile south of Old Fort Worth Highway and/or one quarter mile west of U.S. Highway 287 (the "Option Area") and, together with any previously designated Proposed Tracts, does not exceed an aggregate area of 25 acres; (c) the Proposed Tract is contiguous to any previously designated Proposed Tracts ~~located such that it has roadway frontage and is in a shape that will not leave isolated or difficult-to-serve pockets (including flagged lots) of the remainder of the Dual Certificated Area and flag lots~~ or the Option Area for service by Mountain Peak (and if Mountain Peak does not object via written notice to the City within 30 days of its receipt of the Service Notice, the Proposed Tract will be conclusively presumed to be acceptable); and (d) to the extent the City has not provided retail water service to any portion of the Option Area or to any Proposed Tract within two five years after the date the Texas Commission on Environmental Quality ("TCEQ") approves the application described in paragraph 7 below, that the last Party executes this Amended Agreement, the right of the City to provide retail water service in the Option Area as described in this paragraph 3 expires and reverts back to the original dual service agreement.

Paragraph 4 shall be amended as follows:

4. Mountain Peak agrees to allow any person wanting service within the 43-acre tract and the Option Area described above to connect to the City, subject to the terms of this Agreement. ~~pending the approval by TCEQ of this Agreement. The Parties understand that this is a temporary connection and will cooperate to return to the status quo prior to this Agreement if it is not approved by TCEQ and implemented in its entirety.~~

Paragraph 5 shall be amended as follows:

5. ~~Subject to approval of the transfers described in this Agreement by TCEQ, All water distribution infrastructure, such as pipelines, valves, and fire hydrants, owned by the City and located exclusively within the Cotton Creek Ranch Subdivision being transferred to the CCN of Mountain Peak are hereby transferred, assigned and conveyed to Mountain Peak, "as is, where is", with no express or implied warranties, except as to ownership.~~

Paragraph 7 shall be deleted in its entirety:

7. ~~Section 13.248 TCEQ Approval. Within forty five (45) days following the execution of this Agreement the Parties will jointly file the appropriate documents requesting approval of this retail service area agreement pursuant to Section 13.248 of the Texas Water Code. The Parties will fully cooperate with each other regarding this application and not take any action to directly or indirectly oppose this application. Each party will pay their respective costs relating to the application. This Agreement will expire, except for paragraph 4 above, unless TCEQ approves the agreements described herein which are subject to its approval on or before March 1, 2009 (or until such later date on which the TCEQ acts on the application, provided the application therefore is still pending and the Parties are exercising due diligence to prosecute it).~~

Paragraph 8 shall be amended as follows:

8. Effective Date: This agreement amendment is enforceable among the Parties following the execution of this Agreement. ~~The transfers and agreements contemplated by this Agreement will be effective upon approval by the TCEQ.~~

All other provisions of said "Agreement" shall remain in full force and effect.

EXECUTED by the City of Midlothian on this the 8TH day of MAY, 2012.

City of Midlothian

By: Bill Houston

Bill Houston, Mayor

ATTEST: [Signature]
City Secretary



EXECUTED by Mountain Peak Special Utility District on this the 12 day of June, 2012.

Mountain Peak Special Utility District

By: Clyde Bryant
Clyde Bryant, President

ATTEST:
Secretary

Ann Majors