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BEFORE THE
PUBLIC UTILITY COMMISSION
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APPLICATION OF THE TOWN OF §
PROVIDENCE VILLAGE TO OBTAIN §
CERTIFICATES OF CONVENIENCE §
AND NECESSITY AND REQUEST §
TO DECERTIFY A PORTION OF §
MUSTANG SPECIAL UTILITY §
DISTRICT'S CERTIFICATE OF §
CONVENIENCE AND NECESSITY IN §
DENTON COUNTY §

PUBLIC UTILITY COMMISSION

OF TEXAS

**MUSTANG SPECIAL UTILITY DISTRICT'S REPLY
TO TOWN OF PROVIDENCE VILLAGE'S RESPONSE TO MOTION
TO INTERVENE AND BRIEF REGARDING ADMINISTRATIVE COMPLETENESS**

TO THE HONORABLE JUDGE GOODSON:

Mustang Special Utility District ("Mustang") submits this Reply to the Town of Providence Village's Response to Mustang's Motion to Intervene, Comments Regarding Administrative Completeness, Processing of Petition and Procedural Schedule. For the reasons set forth below, Mustang again urges that the PUC find that the 13.255 Application is not administratively complete unless and until Providence Village Water Control and Improvement District of Denton County (the "WCID") joins the Application, as required by Section 13.255 of the Texas Water Code. Mustang further responds to the procedural schedule proposed by Providence Village.

ADMINISTRATIVE COMPLETENESS

Whether the WCID is a Franchised Utility

In its Response, Providence Village asserts that Mustang is "playing with semantics since the definition of "Effective Date" merely states the truism that the *exclusive* franchise cannot exist until Mustang is de-certificated." To the contrary, Mustang is merely citing the clear and unambiguous requirements of Section 13.255, and the terms of the Franchise Agreement

attached to the Town's 13.255 Application. Section 13.255(i) of the Texas Water Code provides in relevant part:

(i) In the event that a municipality files an application for single certification on behalf of a franchised utility, ***the municipality shall be joined in such application by such franchised utility . . .*** .(emphasis added).

Section 13.255 does not refer to a "proposed" or "contingent" franchised utility. Instead, it requires that there be a franchised utility. It cannot be disputed that the WCID is not a franchised utility under the Franchise Agreement submitted by Providence Village with its 13.255 Application. By its very terms, the Franchise Agreement states that it is not effective until the first day following the date of an order by PUC decertificating Mustang for the lands within the Town of Providence Village. Thus, the franchise is not yet effective, and the WCID is not yet a franchised utility. Until there is a franchised utility, it is not possible for a franchised utility to join the Application, and the Application cannot be declared administrative complete.

Providence Village attempts to circumvent the clear and unambiguous language by asserting that an "exclusive" franchise cannot exist until Mustang is de-certificated. Mustang has never asserted otherwise. Section 13.255 does not require that an "exclusive" franchised utility join the 13.255 Application. Instead, it merely requires that a franchised utility join the 13.255 Application. The WCID is not yet a franchised utility because the franchise is not effective. Providence Village and the WCID could have made the franchise effective immediately upon execution of the franchise agreement. They did not do so. Therefore, the franchise is not effective and there is no franchised utility.

Although it would have been simple to make the Franchise Agreement effective upon its execution, Providence Village and the WCID intentionally did not do so because the WCID's acceptance of a franchise while Mustang remains certificated would constitute a breach of the

2005 Contract and 2007 Amendment attached to Mustang's Motion. However, Section 13.255 of the Water Code does not allow such circumvention. Instead, it requires that there be a franchised utility. Since the WCID's franchise is not yet effective, there can be no franchised utility to join the 13.255 Application, and it cannot be declared administratively complete.

The WCID Has Failed to Join the Application

Providence Village's Response also affirms that the 13.255 Application cannot be declared administrative complete because the WCID has failed to join the 13.255 Application, as required by Section 13.255(i).

First, Providence Village asserts that the WCID has "consented" to the 13.255 Application. The statute does not require "consent." It requires joinder. The WCID has not done so.

Even more telling, every "fact" cited by Providence Village reveals that the WCID has not joined the 13.255 Application:

1. The Town's April 30, 2014 notice letter is a letter from the Town, not the WCID.
2. The Franchise Agreement "accepted" by the WCID is not effective for all of the reasons set forth above. Moreover, the Franchise Agreement does not state that the WCID agrees to join the 13.255 Application. In fact, the Franchise Agreement does not even mention the 13.255 Application.
3. Mustang's May 30, 2014 letter is a letter by Mustang, not the WCID.
4. The fact that the Town provided a copy of its 13.255 Application to the WCID again represents an action by the Town, not the WCID.

In summary, every "fact" relied upon by Providence Village constitutes actions taken by entities other than the WCID and cannot constitute joinder of the 13.255 Application by the WCID.

Providence Village recites that Section 13.255(b) requires the municipality to file the 13.255 Application. Mustang has never asserted otherwise. Section 13.255(i), however, requires

that the franchised utility *join* the application. There must be some type of affirmative action by the franchised utility to join in the application. The WCID has not done so.

Contrary to Providence Village's assertions, Mustang does not assert that Providence Village change the form of the PUC's 13.255 application. Instead, Mustang asserts that the WCID must join the 13.255 Application as required by statute. This joinder could take many forms, including by letter, ordinance, contract or resolution. In the current matter, however, the WCID has taken no action to join the 13.255 Application. Instead, it executed a franchise agreement that is not effective and only becomes effective if and when PUC decertificates Mustang. Such decertification can occur through proceedings other than by a 13.255 proceeding, including an application by Mustang. As noted, the Franchise Agreement, which is not yet effective by its own terms, does not even reference a 13.255 proceeding and therefore cannot constitute "joinder" of such a proceeding.

Mustang asserted in its Motion that that joinder of the 13.255 Application by a franchised utility is critical since the statute makes the franchised utility responsible for payment of compensation awarded in the proceeding. Providence Village says such an argument is "unrealistic." To the contrary, it is mandated by statute. Mustang agrees that the statute contemplates participation by the franchised utility in the process. But this is exactly why joinder is necessary.

In summary, until the WCID affirmatively joins the 13.255 Application as required by Section 13.255(i), the application cannot be declared administrative complete.

PROCESSING OF APPLICATION

Procedural Schedule

Neither Order No. 1 nor Order No. 2 provides Mustang the opportunity to submit comments regarding processing of the 13.255 Application, establishment of a proposed procedural schedule, or the proposed Notice of Application. Mustang asserts that as the decertificated utility, it should be given an equal right to participate in the administrative process, and that it is prejudicial for Mustang to not be given such opportunity.

Providence Village provides for a hearing on the merits to be conducted on Day 65 of this proceeding, and a Proposal for Decision to be issued on Day 75. Providence Village provides for identification of an independent appraiser, but fails to address the central role of such appraiser in the 13.255 process. Under Sec. 13.255(l), the amount of compensation to be awarded to the decertificated retail public utility under Sec. 13.255(g) is to be determined by an independent appraiser selected by the retail public utility (Mustang). The PUC has no discretion to modify or reject the appraiser's report. As a result, Mustang asserts that the hearing process should be structured to provide for the submission of information to, and determination by, the independent appraiser so that a final decision of the PUC incorporating the appraiser's valuation may be issued by the end of the 90 day period. The PUC's role is to establish jurisdiction, determine dispositive and jurisdictional matters, and render a final decision incorporating the appraiser's findings. As a result, Mustang proposes the following procedural schedule:

- Day 1: Date of Administrative Completeness (or lack thereof).
- Day 2: Issuance of Notice of Hearing. *See* 16 TEX. ADMIN. CODE § 24.120(b); 16 TEX. ADMIN. CODE § 22.54(a).
- Day 12: Deadline for Intervention; Preliminary Hearing is held at which parties are designated and a procedural schedule is established. *See* 16 TEX. ADMIN. CODE § 22.54(a).

- Day 25: Deadline for Submission of Dispositive/Jurisdictional Motions.
- Day 30: Deadline for Mustang to select independent appraiser.
- Day 50: Deadline for all parties to submit reports to independent appraiser identifying adequate and just compensation to be provided to Mustang.
- Day 60: Deadline for all parties to respond to appraiser submissions of the other parties.
- Day 70: Deadline for appraiser to issue final compensation decision.
- Day 75: Proposal for decision is issued incorporating appraiser's compensation. *See* 16 TEX. ADMIN. CODE § 22.261.
- Day 80: Deadline for submissions of any exceptions to Proposal for Decision. *See* 16 TEX. ADMIN. CODE § 22.261.
- Day 90: PUC Order. *See* 16 TEX. ADMIN. CODE § 22.263.

Adequacy of Notice

The draft Notice of Application (Item No. 2 in this Docket) recites that the Town of Providence Village seeks to obtain new water and sewer certificates of convenience and necessity. This is legally and factually incorrect. The Town of Providence Village seeks to cancel the water and sewer CCNs of Mustang. It does not seek the issuance of any new CCNs.

In fact, the 13.255 Application seeks certification of an entity (the WCID) that is already certificated for the same lands that are the subject of the 13.255 Application. This is one of the legal issues that the Honorable Administrative Law Judge will be asked to rule upon-- whether the 13.255 decertification process allows for decertification of a retail public utility when neither the municipality or the "franchised" utility will become newly certificated as a result of the proceeding. In fact, Providence Village does not seek certification and the WCID already holds CCNs for the lands that are the subject of the 13.255 Application. Thus, the Town of Providence Village has filed a 13.255 Application solely to decertificate an existing water and sewer CCN

holder. No new CCNs will be issued as a result of the 13.255 Application, which is clearly contrary to the statutory framework contemplated by Section 13.255 of the Texas Water Code.

In summary, the draft Notice is legally and factually incorrect. The Town of Providence Village does not seek a new CCN either for itself or a franchised utility. Instead, it merely seeks to decertificate an existing CCN holder that is dually certificated for the lands that are the subject of the application. To be accurate, the Notice should recite that the Town of Providence Village has filed an application to decertificate a retail public utility so that the WCID remains the sole certificated retail public utility.

PRAYER

MUSTANG SPECIAL UTILITY DISTRICT respectfully requests that the Honorable Administrative Law Judge: (i) find that the Application is not administratively complete unless and until the WCID becomes a franchised utility and joins the application in accordance with the requirements of Section 13.255(i) of the Texas Water Code; (ii) issue a correct notice of the Application to Mustang and other entities in accordance with the requirements of Section 13.255(b) of the Texas Water Code if it every becomes administrative complete; and (iii) upon designation of all parties, establish a proper procedural schedule if this matter is not otherwise dismissed on jurisdictional or procedural grounds.

Respectfully submitted,

JACKSON WALKER L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 2014, 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.

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