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APPLICATION OF CITY OF HEATH TO  
AMEND A CERTIFICATE AND  
NECESSITY AND TO DECERTIFY A  
PORTION OF FORNEY LAKE WATER  
SUPPLY CORPORATION'S SERVICE  
AREA IN WOCKWALL COUNTY

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PUBLIC UTILITY COMMISSION  
PILING CLERK  
OF TEXAS

**COMMISSION STAFF'S RESPONSE TO THE CITY OF HEATH'S  
PARTIAL MOTION FOR SUMMARY DECISION**

COMES NOW the Staff ("Staff") of the Public Utility Commission of Texas ("Commission"), representing the public interest and files this Response to the City of Heath's Partial Motion for Summary Decision and would show the following:

**I. BACKGROUND**

On March 16, 2015, the City of Heath ("Heath") filed an application pursuant to TEXAS WATER CODE ("TWC") § 13.255 for the single certification of areas in Rockwall County, including areas currently certificated to Forney Lake Water Supply Corporation ("Forney Lake").<sup>1</sup> In its application, Heath indicated that Forney Lake possesses "water lines crossing some of these tracts."<sup>2</sup>

On April 8, 2015, Staff filed a recommendation indicating that Heath's application should not be deemed to be administratively complete as filed.<sup>3</sup>

Also on April 8, 2015, Heath filed a pleading requesting that the Commission "determine as a matter of law, that single certification as requested by Heath, would not result in property of

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<sup>1</sup> Application to Obtain or Amend a Certificate of Convenience and Necessity (CCN) Under Water Code Section 13.255 (Mar. 16, 2015) ("Application").

<sup>2</sup> *Id.* at 2.

<sup>3</sup> Commission Staff's Response to Order No. 1 (Apr. 8, 2015).

[Forney Lake] being rendered useless or valueless”<sup>4</sup> Whether any property belonging to Forney Lake will be rendered valueless or useless is a question of fact to be adjudicated as part of this proceeding.<sup>5</sup> In an abundance of caution, Staff interprets Heath’s request regarding this issue as a motion for summary decision pursuant to 16 TAC § 22.182<sup>6</sup> and now files a timely response to the motion.<sup>7</sup>

## II. ARGUMENT

### 1. Summary of Heath’s motion and the standards for summary decision.

By claiming that TWC § 13.255(b) permits certification of the area to Heath as to only new customers, Heath misinterprets the provisions of TWC § 13.255, and, therefore, Heath has not met its burden to support summary decision as to this issue. As such, the Commission should not grant Heath’s motion to the extent one is raised at this time.

Although Heath admits that Forney Lake possesses “water lines crossing some of these tracts,”<sup>8</sup> Heath states that the Commission should determine as a matter of law that a single certification of the affected area would not result in Forney Lake’s property being rendered valueless or useless.<sup>9</sup> Heath supports this contention by stating that Heath has only sought certification to serve new customers in the affected area and that, if Forney Lake is currently providing service to customers in the area, Forney Lake can continue to do so.<sup>10</sup> Heath further states that it has not requested the transfer of any of Forney Lake’s property to Heath.<sup>11</sup>

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<sup>4</sup> City of Heath’s Response to Order No. 1 (Apr. 8, 2015) (“Motion”).

<sup>5</sup> TWC § 13.255(c).

<sup>6</sup> 16 TAC § 22.182 permits the presiding officer to grant summary decision on an issue before the Commission if the moving party is entitled to a decision in its favor “as a matter of law.” Because Heath has requested a determination on a pending issue “as a matter of law,” Motion at 2, Staff recommends that it is prudent to treat Heath’s request as a motion for summary decision.

<sup>7</sup> 16 TAC § 22.182(c) requires that the response to a motion for summary decision shall be filed within the time set by the presiding officer. Because the presiding officer has not specified a deadline to respond, the deadline to respond is five working days after receipt of the motion. 16 TAC § 22.78(a).

<sup>8</sup> Application at 2.

<sup>9</sup> Motion at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

The Commission's rules state that summary decision may be granted as to an issue for which "there is no genuine issue as to any material fact" and for which "the moving party is entitled to a decision in its favor, as a matter of law."<sup>12</sup> A moving party has the burden to demonstrate that an issue is eligible for summary decision according to this standard.<sup>13</sup> In meeting this burden, the moving party "shall specifically describe the facts upon which the motion is based, the information and materials which demonstrate those facts, and the laws or legal theories that entitled the movant to summary decision."<sup>14</sup>

As demonstrated below, Heath's argument relies on an erroneous interpretation of TWC § 13.255, does not specifically describe the facts upon which the motion is based, and does not show that no issue of material fact remains. Accordingly, Heath has not met the standard for requesting a summary decision and is not entitled to a decision in its favor as a matter of law. Heath's motion should be denied.

## **2. Heath's motion relies on an erroneous reading of TWC § 13.255.**

Heath contends that any property Forney Lake possesses in the affected area would not be rendered valueless and useless because Heath only seeks to serve new customers in the affected area, suggesting that Forney Lake would be able to serve existing customers, if any, in the area.<sup>15</sup> The type of dual certification Heath proposes is not consistent with the relief available pursuant to TWC § 13.255(b)<sup>16</sup> or with Heath's own application.<sup>17</sup> Accordingly, Heath's argument relying on Heath's interpretation of TWC § 13.255(b) cannot be used to demonstrate that Heath is entitled to summary decision as a matter of law.

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<sup>12</sup> 16 TAC § 22.182(a).

<sup>13</sup> 16 TAC § 22.182(b) ("The party filing the motion shall demonstrate that the issue or issues may be resolved by summary decision in accordance with the standard set forth in [16 TAC § 22.182(a)].").

<sup>14</sup> *Id*

<sup>15</sup> Motion at 2.

<sup>16</sup> While TWC § 13.255(b) does not provide for the form dual certification proposed by Heath, Staff notes that, with the consent of Forney Lake, such dual certification would be available either by using TWC § 13.255(a) or by filing an agreement pursuant to TWC § 13.248 and requesting that the agreement be incorporated into the retail public utilities' certificates using the provisions of TWC §§ 13.246 and 13.254.

<sup>17</sup> In response to the first question of the Commission's application form, Heath filled in a checkbox indicating that it was seeking to "[o]btain single certification to a service area." Application at 1.

TWC § 13.255(b) may only be used to achieve single certification of an area to a municipal applicant. TWC § 13.255 generally describes the procedures by which a municipality is entitled to amendment of its CCN with respect to areas incorporated or annexed by the municipality. TWC § 13.255(a) states that a municipality may enter into an agreement with a retail public utility serving within the municipality's city limits and that such "agreement may provide for single or dual certification."<sup>18</sup> When such an agreement cannot be reached, TWC § 13.255(b) allows the municipality to apply for certification to serve the area, even over the objection of any other retail public utility. However, TWC § 13.255(b) consistently refers to such an application as an "application . . . to grant single certification" and "an application for single certification." Because TWC § 13.255(a) refers to single or dual certification while TWC § 13.255(b) refers only to single certification, one must conclude that dual certification is not available to Heath using an application filed pursuant to TWC § 13.255(b).<sup>19</sup>

Heath also states that certification to serve only an area's new customers is available using TWC § 13.242(c) and 30 TAC § 24.103(c).<sup>20</sup> However, these two provisions do not provide for certification of a municipality at all, let alone the form of certification proposed by Heath. Rather, these provisions allow a municipality to begin providing service *without a certificate* to new customers during the pendency of an application for single certification filed

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<sup>18</sup> The Commission shall incorporate the terms of such an agreement into the relevant retail public utilities' certificates. TWC § 13.255(a).

<sup>19</sup> The Supreme Court of Texas has stated: "When the Legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded." *Railroad Comm'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011).

<sup>20</sup> Motion at 1.

pursuant to TWC § 13.255(b).<sup>21</sup> At the conclusion of this proceeding, absent an agreement from Forney Lake, the affected area will be singly certificated to Heath, and Heath must serve under the terms of its certificate. As such, any provisions relating to Heath's ability to serve *without a certificate* during the pendency of this proceeding are irrelevant to a determination of the relief available pursuant to TWC § 13.255(b).

For the reasons stated above, Heath's argument relies on a clear misreading of TWC § 13.255 and therefore cannot sustain Heath's burden to show that it is entitled to summary decision as a matter of law.

**3. Heath's motion does not specifically describe the facts upon which the motion is based and does not show that no issue of material fact exists.**

Heath's motion does not specifically describe the facts upon which its motion is based and does not show that no issue of material fact exists, both of which are required before Heath may be entitled to summary decision.<sup>22</sup> Although Heath's application indicated that Forney Lake possesses "water lines crossing some of these tracts,"<sup>23</sup> Heath's motion does not state with specificity the location, nature, or quantity of Forney Lake's water lines in the area and does not state where any other property belonging to Forney Lake exists in the area. Heath does not specify whether these water lines are used in the provision of service inside or outside the

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<sup>21</sup> TWC § 13.242 and 30 TAC § 24.103 clearly relate to a municipality's ability to serve an area certificated to another retail public utility when the municipality *does not have a certificate* to serve the area. Generally, a municipality may not serve "within an area certificated to another retail public utility" without first having obtained from the Commission a certificate to serve that area, "[e]xcept as provided by [TWC § 13.255]." TWC § 13.247(a). However, the Commission "may by rule allow a municipality . . . to render retail service *without a certificate of public convenience and necessity* if the municipality has given notice under [TWC § 13.255] that it intends to provide retail water service to an area . . . ." TWC § 13.242(c) (emphasis added). Under this authority, the Commission adopted 16 TAC § 24.103(c) (which is titled "Certificates Not Required"), which states that a municipality that "intends to provide retail water service to an area or customers not currently being served" is not required to obtain a certificate prior to providing service if the municipality provides "a copy of the notice required pursuant to [TWC § 13.255]" and additional mapping information. The notice that these provisions refer to corresponds to the provisions of TWC § 13.255(b), which requires that a "municipality notif[y] the retail public utility of its intent to provide service" and that "the municipality, *prior to providing service in the area*, shall file an application . . . to grant single certification" to the municipality. TWC § 13.255(b) (emphasis added). Accordingly, the provisions relied on by Heath allow it, *without a certificate*, to serve new customers in the affected area after it has provided the notice and during the pendency of an application described by TWC § 13.255(b). However, at the conclusion of this proceeding, Heath will have obtained single certification as to the area and will be required to serve under the terms of its certificate rather than rely on provisions that relate to the absence of a certificate.

<sup>22</sup> 16 TAC § 22.182(b).

<sup>23</sup> Application at 2.

affected area or whether they are in use at all. Further, Heath's motion is not supported by affidavit or by reference to where to find information needed to verify necessary facts.

Even assuming for the sake of argument that Heath may seek certification as to only new customers using the authority in TWC § 13.255(b), it does not necessarily follow that Forney Lake's water lines or other property in the affected area is spared from being rendered useless or valueless. For example, if Forney Lake's facilities in the area had been constructed solely for the purpose of serving the same potential customers that Heath seeks to serve, it is possible that the form of certification requested by Heath may still result in property being rendered valueless or useless.

Heath has not described with specificity the facts on which it relies. Because significant factual considerations are not resolved at this time, Heath cannot show that no issue of material fact exists. As such, Heath's motion for summary decision cannot be granted.

**4. Referral to SOAH is premature at this time because the application has not been accepted for filing.**

Heath requests, as alternative to an order granting its motion, that this matter be referred to the State Office of Administrative Hearings ("SOAH").<sup>24</sup> Heath's motion for referral to SOAH is premature. Staff recommends that referral to SOAH is not appropriate at this time because Heath's application has not been deemed administratively complete by the Administrative Law Judge ("ALJ") and therefore is not considered filed.<sup>25</sup> Staff recommends that Heath be required to provide an administratively complete application before this matter is set for a hearing either at SOAH or before the Commission.

### **III. CONCLUSION**

For the reasons discussed above, Heath's motion should be denied. Further, Heath should be required to provide an administratively complete application before this matter is set for a hearing either at SOAH or before the Commission.

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<sup>24</sup> Motion at 2.

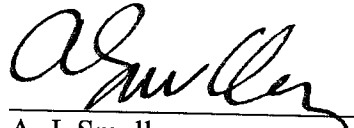
<sup>25</sup> 16 TAC § 24.8(a) ("[A]pplications for certificates of convenience and necessity are not considered filed until . . . a determination of administrative completeness is made."). Staff previously stated the grounds for which Heath's application should be determined not to be administrative complete at this time. Commission Staff's Response to Order No. 1 (Apr. 8, 2015).

Date: April 14, 2015

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on April 14, 2015 in accordance with P.U.C. PROC. R. 22.74.



A. J. Smullen