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**DOCKET NO. 44541**

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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 §  
§**

**PUBLIC UTILITY COMMISSION  
FILE NO. CLERK  
OF TEXAS**

**COMMISSION STAFF'S RESPONSE TO THE CITY OF HEATH'S  
APPEAL OF ORDER NO. 4**

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 Appeal of Order No. 4 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> Pursuant to 16 Tex. Admin. Code § 24.120(g) and (m) ("TAC"), the criteria for determining the compensation to be paid to Forney Lake by Heath, including the criteria under which appraisers will be appointed. Further, 16 TAC § 24.120(h) requires that the Commission make this determination within 90 days of a finding that the application is administratively complete.

On May 20, 2015, the parties filed a joint proposed procedural schedule.<sup>2</sup> The parties' proposal includes a motion for a good cause exception to the 90-day deadline set out in 16 TAC § 24.120(h) and explains that such an exception would result in cost savings for the parties

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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> Joint Proposed Procedural Schedule (May 20, 2015).

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participating in this proceeding.<sup>3</sup> The parties' proposal also explains that, "while the Commission's rules do impose a 90-day deadline, there is no statutory requirement that this proceeding be processed in 90 days but only a statutory requirement that the Commission's rules state a 90-day deadline."<sup>4</sup> The parties' proposal further states that waiver of this 90-day deadline is within the Commission's authority pursuant to 16 TAC § 24.2(b).<sup>5</sup>

On the same day that the parties' joint proposed procedural schedule was filed, Staff filed a recommendation regarding the administrative completeness of the application.<sup>6</sup> Staff stated that, ordinarily, given a 90-day deadline for the Commission to determine both whether the certification requested would result in property of a retail public utility being rendered useless or valueless and the monetary amount that is adequate and just to compensate the retail public utility for such property,<sup>7</sup> Staff would recommend that an applicant submit the appraisals required by TWC § 13.255(l) prior to the filing being deemed administratively complete.<sup>8</sup> However, Staff recommended that, if the 90-day deadline is extended, Heath's recommendation could be deemed to be administratively complete because it would be reasonable to delay requiring the submission of the appraisals required by TWC § 13.255(l).<sup>9</sup>

On June 10, 2015, Order No. 4 was entered, declining to adopt the parties' joint proposed procedural schedule and deeming Heath's application not to be administratively complete.<sup>10</sup> Order No. 4 concludes that TWC § 13.255(g-1) imposes a 90-day deadline for determining the appropriate amount of compensation to be paid to Forney Lake, but Order No. 4 does not discuss the parties' recommendation that TWC § 13.255(g-1) merely requires the adoption of certain rules and does not impose any deadlines on this proceeding.<sup>11</sup>

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* (citing Tex. Water Code Ann. § 13.255(g-1) (West 2008 and Supp. 2014) ("TWC")).

<sup>5</sup> *Id.*

<sup>6</sup> Commission Staff's Response to Order No. 2 (May 20, 2015).

<sup>7</sup> 16 Tex. Admin. Code § 24.120(h).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> Order No. 4 (Jun. 10, 2015).

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

On June 19, 2015, Heath filed an appeal of Order No. 4.<sup>12</sup> Heath contends that the Commission has the authority to extend the 90-day deadline set out in 16 TAC § 24.120(h) because the language in TWC § 13.255(g-1) is a directory, rather than mandatory, provision.<sup>13</sup> Heath further contends that its application should be determined to be administratively complete regardless of whether the 90-day deadline is extended.<sup>14</sup>

Staff now timely responds to Heath's appeal of Order No. 4.<sup>15</sup> As discussed in further detail below, Staff supports Heath's view that the 90-day deadline set out in 16 TAC § 24.120(h) may be waived by the Commission pursuant to 16 TAC § 24.2(b). If the 90-day deadline is waived, Staff would not oppose a finding that Heath's application is administratively complete. Staff also notes that, pursuant to 16 TAC § 22.123(a)(8), the ALJ may treat Heath's appeal as a motion for reconsideration and modify Order No. 4 prior to a Commission decision on Heath's appeal.

## II DISCUSSION

### 1. The 90-day deadline may be extended by the Commission.

As discussed above, Order No. 4 does not discuss in detail the parties' recommendation that the 90-day deadline set out in 16 TAC § 24.120(h) may be waived by the Commission pursuant to 16 TAC § 24.2(b). Instead, Order No. 4 states the conclusion that "the 90-day compensation determination deadline [is] found in [TWC] § 13.255(g-1)." Staff supports Heath's contention that the Commission may waive this deadline.

TWC § 13.255(g-1) requires that the Commission "by rule shall adopt procedures to ensure that the total compensation be paid to a retail public utility under [TWC § 13.255(g)] is determined not later than the 90<sup>th</sup> calendar day after" this application is determined to be administratively complete. In other circumstances, the Legislature has shown that it is capable of imposing deadlines for the Commission to make certain determinations, after which an application will be

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<sup>12</sup> City of Heath's Appeal of Order No. 4 (Jun. 19, 2015) ("Appeal").

<sup>13</sup> *Id.* at 7-8.

<sup>14</sup> *Id.* at 4-7.

<sup>15</sup> Responses to an appeal of an interim order shall be filed within five working days of the filing of the appeal. 16 TAC § 22.123(a)(4). Accordingly, this response is timely filed on or before June 26, 2015.

approved by default.<sup>16</sup> In contrast to such a scenario, the Legislature has merely required the adoption of certain rules but does not impose a deadline by statute for reaching the required determination. The Legislature is aware that each chapter of the Commission's rules permit a good cause exception to the requirement of any Commission rule<sup>17</sup> but did not revise TWC § 13.255(g-1) when it adopted a comprehensive revision of the TWC in 2013.<sup>18</sup>

Further, good cause supports such a waiver in this proceeding. As discussed above, both parties that could potentially be prejudiced by such a waiver—Forney Lake and Heath—have jointly moved for a good cause exception to the 90-day deadline on the basis that it would result in cost savings for both parties. Accordingly, Staff supports Heath's contention that the Commission is authorized to waive the 90-day deadline.

**2. If the 90-day deadline is waived, Heath's application should be deemed to be administratively complete.**

**A. If the 90-day deadline is waived, it is not necessary to address whether the required appraisals should be filed.**

Consistent with Staff's Response to Order No. 2, Staff recommends that Heath's application be found to be administratively complete if the 90-day deadline is extended.<sup>19</sup> Such a finding is consistent with the proposed procedural schedule, which contemplates the Commission making a determination regarding whether any property of Forney Lake's will be rendered valueless or useless prior to requiring the submission of appraisals of the value of Forney Lake's property.<sup>20</sup> If no property of Forney Lake is rendered valueless or useless, it will not be necessary to appraise any of Forney Lake's property. To the extent that a finding of administrative completeness would require a good cause exception pursuant to 16 TAC § 22.5, Staff is not opposed to such an exception.

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<sup>16</sup> See, e.g., TWC § 13.301(e) and (f) (imposing a 120-day deadline for the review of the proposed sale of a sewer or water system, after which the transaction may proceed as proposed if the Commission fails set the matter for a hearing).

<sup>17</sup> 16 TAC §§ 21.11(b), 22.5(b), 24.2(b), 25.3(b), and 26.3.

<sup>18</sup> Act of May 13, 2013, 83<sup>rd</sup> Leg., R.S., ch. 170 (HB 1600), 2013 Tex. Gen. Laws 725, 730 (eff. Sept. 1, 2013).

<sup>19</sup> Commission Staff's Response to Order No. 2 (May 20, 2015).

<sup>20</sup> Joint Proposed Procedural Schedule at 2–3 (May 20, 2015).

**B. If the 90-day deadline is not extended, Staff opposes Heath's appeal on this issue.**

If the 90-day deadline is not extended, the Commission should require the submission of the required appraisals before Heath's application can be deemed to be administratively complete. As Staff explained previously, under a 90-day deadline, it may be burdensome to hold a hearing on whether property of an affected retail public utility is rendered useless or valueless, receive a decision on such a hearing, and then enter into a valuation under the procedures set out in TWC § 13.255(l). Moreover, an identification of property and the value assigned to it would be helpful in determining whether any property is rendered valueless or useless. Accordingly, in order to provide for the efficient processing of this proceeding, Staff recommends that the appraisals should be submitted prior to the triggering of the 90-day period.

Heath states two reasons why its application should be deemed administratively complete without requiring the submission of the required appraisals: First, Heath states that the Commission's form for applications filed pursuant to TWC § 13.255 does not require the filing of these appraisals.<sup>21</sup> Second, Heath states that requiring the appraisals at this stage of the proceeding is unreasonable.<sup>22</sup>

It is appropriate to require the filing of the required appraisals even if the Commission's form does not state this requirement. Heath relies on 16 TAC § 22.80 to support its claim that mere compliance with the Commission's form establishes that an application is administratively complete. Although 16 TAC § 22.80 does require that applications be submitted using the Commission's standard forms when such forms are available, 16 TAC § 22.80 *does not* state that compliance with the Commission's form establishes a *prima facie* case that an application is administratively complete. Further, 16 TAC § 24.8(a) states that an application may be rejected if *any* material deficiencies exist in an application and does not limit the Commission's consideration to only whether a form is filled out. As discussed in Staff's Response to Order No. 2, Staff recommends that it would be burdensome on the other parties, as well as on the Commission, for the 90-day period to commence despite Heath's failure to provide the required appraisals.

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<sup>21</sup> Appeal at 4–6.

<sup>22</sup> *Id.* at 6–7.

Accordingly, absent the submission of the appraisals, Staff recommends that material deficiencies exist in Heath's application, as contemplated by 16 TAC § 24.8(a).

Further, it is not unreasonable to require the appraisals at this stage of the proceeding. Heath notes that part of the appraisal process requires the participation of Forney Lake, which is not within Heath's control.<sup>23</sup> However, if any property of Forney Lake will be rendered valueless or useless, these appraisals must be performed at some point in the proceeding, when Forney Lake's participation is equally beyond Heath's control.<sup>24</sup> TWC § 13.255(l) must be reasonably interpreted, and it could not be the case that the Legislature intended for a retail public utility's refusal to participate to result in the Commission's inability to order the required single certification. Instead, Staff recommends that Heath should undertake diligent efforts to confer with Forney Lake regarding the selection of appraisers. If Forney Lake refuses to participate in this process, Staff recommends that Heath may request that the ALJ set a deadline for Forney Lake to participate in the proceeding, after which the Commission would be able to determine an appropriate procedure for processing the application regardless of Forney Lake's participation. Staff's recommendation is a reasonable outcome under TWC § 13.255 and would address Heath's concerns regarding the reasonableness of Staff's recommendation. Staff notes that Heath merely complains that it *may* be unable to secure Forney Lake's participation but does not state that Forney Lake has indicated that it will refuse to select an appraiser.

Heath argues that Forney Lake cannot be compelled to participate before the application is determined to be administratively complete because Forney Lake is a water supply corporation ("WSC").<sup>25</sup> However, the Commission has jurisdiction over a WSC's certificate of convenience and necessity, including the jurisdiction to remove territory from the WSC's certificate.<sup>26</sup> The Commission's jurisdiction on this issue does not depend on whether the application is administratively complete. Accordingly, Heath's concerns apply equally regardless of when the

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<sup>23</sup> Appeal at 6.

<sup>24</sup> TWC § 13.255(l).

<sup>25</sup> *Id.*

<sup>26</sup> TWC § 13.255(b).

appraisals are required, and Heath's arguments do not state a valid ground for rejecting Staff's recommendation.

For the reasons discussed above, Staff opposes Heath's appeal if the 90-day deadline is not extended.

#### **IV. CONCLUSION**

For the reasons discussed above, Staff supports Heath's view that the 90-day deadline set out in 16 TAC § 24.120(h) may be waived by the Commission pursuant to 16 TAC § 24.2(b). If the 90-day deadline is waived, Staff would not oppose a finding that Heath's application is administratively complete.



Date: June 26, 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 June 26, 2015 in accordance with P.U.C. PROC. R. 22.74.

*AJ Smullen w/permission*  
A. J. Smullen  
*Steph Mack*