



Control Number: 45870



Item Number: 107

Addendum StartPage: 0

**SOAH DOCKET NO. 473-16-4619.WS
PUC DOCKET NO. 45870**

RECEIVED

2016 DEC 15 AM 9:58
PUBLIC UTILITY COMMISSION
FILING CLERK

FORMAL COMPLAINT OF ADC WEST RIDGE, L.P. AND CENTER FOR HOUSING RESOURCES, INC. AGAINST THE CITY OF FRISCO	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
---	-----------------------	---

**SOAH ORDER NO. 8
GRANTING IN PART AND DENYING IN PART MOTION BY
CITY OF FRISCO FOR SUMMARY DECISION**

On October 31, 2016, the City of Frisco (Frisco) filed a Motion for Summary Decision (the Motion) on the issues the Public Utility Commission of Texas (Commission) referred to the State Office of Administrative Hearings. The Administrative Law Judges (ALJs) set November 30, 2016, as the deadline for responses.

ADC West Ridge, L.P. and Center for Housing Resources, Inc. (collectively, "Complainants") and the staff (Staff) of the Commission timely responded to the Motion. They contend that some issues are ripe for summary decision, but contrary to Frisco's position on those issues. The Complainants oppose the Motion as to some of the issues, contending summary decision is not appropriate because there are genuine issues of fact.

As set out below, the Motion granted in part and denied in part.

Summary Decision Rule

The ALJs may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the Motion.¹

¹ 16 Tex. Admin. Code § 22.2(34), .182(a).

Undisputed Issues

Many facts relevant to ruling on the Motion are not disputed and are set out in an exhibit to Frisco's motion.² Frisco is a municipality and holds certificate of convenience and necessity (CCNs) Nos. 11772 for water service and 20591 for sewer service. The property where Complainants seek water and sewer service (Property) is within the area for which Frisco holds CCNs (CCN area). The Property is not within Frisco's city limits, but it is within Frisco's extra territorial jurisdiction.

The Commission asked if the Property is not within the incorporated limits of a municipality exercising exclusive jurisdiction over service.³ As indicated above, it is undisputed that the Property is not within Frisco's city limits. As to that issue, the motion is granted.

The Commission also asked if Frisco is a retail public utility as defined by Texas Water Code § 13.002(19).⁴ Because it is a municipality operating, maintaining, and controlling in this state facilities for providing potable water and sewer service for compensation, Frisco is a "retail public utility."⁵ As to that issue, the Motion is granted.

Jurisdiction

The Commission asked if it has original or appellate jurisdiction to consider the complaint.⁶ Frisco contends that the Commission does not have original or appellate jurisdiction over the complaint, so it must be denied.

² Frisco's Motion for Summary Decision, Ex. 4.

³ Preliminary Order, Issue No. 1, in part.

⁴ Preliminary Order, Issue No. 3.

⁵ Tex. Water Code § 13.002(19).

⁶ Preliminary Order, Issue No. 1, in part, and Issue No. 2.

The ALJs do not agree with Frisco. Instead, they agree with Complainants and Staff that, under Texas Water Code §§ 13.042(e) and 13.250(a), the Commission has original jurisdiction over the complaint. Thus, the Motion is denied to the extent Frisco seeks a decision that the Commission has no original jurisdiction.

Because the Commission has original jurisdiction, the ALJs conclude that the Commission need not decide if it has appellate jurisdiction. To the extent Frisco seeks a decision that the Commission has no appellate jurisdiction, the Motion is denied.

Texas Water Code § 13.042(e) gives the Commission original jurisdiction over services, etc. provided by a municipality outside its city limits:

The utility commission shall have exclusive original jurisdiction over water and sewer utility rates, operations, and services not within the incorporated limits of a municipality exercising exclusive original jurisdiction over those rates, operations, and services as provided in this chapter.

With exceptions that no party claims are applicable, Texas Water Code § 13.250(a) requires a "retail public utility" that possesses a CCN to provide continuous and adequate service to "every customer" in its CCN area:

Except as provided by this section or Section 13.2501 of this code, any retail public utility that possesses or is required to possess a certificate of public convenience and necessity shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas.

Frisco asserts that § 13.250(a) contemplates service to existing consumers, not prospective ones. The ALJs do not agree with Frisco's narrow interpretation.

Words and phrases in the Texas Water Code must be read in context and construed according to the rules of grammar and common usage unless they have acquired a technical or

particular meaning by legislative definition or otherwise.⁷ The Texas Water Code does not define “customer” for purposes of § 13.250(a). There is no evidence that “customer” has a technical or particular meaning in this context. Commonly, a “customer” is one that purchases a commodity or service.⁸

Frisco extensively cites its rights and duties under chapter 552 of the Texas Local Government Code in running its municipally owned utility. It also notes that municipally owned utilities are treated different from other utilities under chapter 13 of the Texas Water Code. However, chapter 552 of the Texas Local Government Code never mentions certificates of convenience and necessity, much less does it require a municipal utility to have one. For whatever reason, Frisco chose to obtain CCNs, which subjected it to the Commission’s jurisdiction. Frisco points to nothing in the Texas Local Government Code that limits its obligations under Texas Water Code § 13.250(a) as a retail public utility with a CCN to serve every consumer within its certified area.

From the context of Texas Water Code § 13.250(a), the ALJs conclude that the Legislature, by specifying that a retail public utility “shall serve every consumer within its certified area,” imposed an obligation to serve everyone who is receiving or seeks to receive service within the retail public utility’s CCN area. Nothing in chapter 13 specifically supports Frisco’s claims that “customer” means only existing customers. Section 13.250(a) imposes two obligations on a retail public utility holding a CCN, specifying that it: (1) “shall serve every consumer within its certified area” and (2) “shall render continuous and adequate service.” If “customer” meant only existing customers, as Frisco claims, the two obligations would be nearly redundantly identical. The retail public utility would be required to adequately and continuously serve existing customer within its certificated area. There is no indication in chapter 13 that the legislature intended such a narrow and redundant result. The more reasonable and logical interpretation is that a retail public utility shall (1) serve everyone who seeks service, and (2) serve them thereafter continuously and adequately.

⁷ Tex. Gov’t Code §§ 311.002(1), .011.

⁸ “Customer.” Merriam-Webster.com. Merriam-Webster, n.d. Web. 12 Dec. 2016.

Applicable Rules

The Commission asked if 16 Texas Administrative Code § 24.85 is applicable to Frisco.⁹ Also, it asked whether Frisco had complied with that 16 Texas Administrative Code § 24.83,¹⁰ implicitly asking if it is applicable. Frisco contends that 16 Texas Administrative Code §§ 24.83 and 24.85 do not apply to it.

As to § 24.85, Frisco argues it is not applicable because the Commission has no jurisdiction over the complaint under Texas Water Code § 13.250. As set out above, however, the ALJs conclude that the Commission has jurisdiction under § 13.250(a) over the complaint. Accordingly, § 24.85 is applicable because it governs responses to requests for service by a retail public utility within its certificated area, Frisco is a retail public utility with a CCN, and Complaints claim they have requested service at the Property within Frisco's CCN area. To the extent Frisco seeks a decision that § 24.85 is not applicable to it, the Motion is denied.

As to § 24.83, Frisco is correct, as Complainants concede. Section 24.83 governs refusal of service, governs actions by a "utility," and does not mention "retail public utility." A municipality is a "retail public utility" if operates, maintains, or controls in this state facilities for providing potable water service or sewer service, or both, for compensation.¹¹ However, municipal corporations and political subdivisions are excluded from the definitions of "utility," "public utility," and "water and sewer utility."¹² To the extent Frisco seeks a decision that § 24.83 is not applicable to it, the Motion is granted.

Nevertheless, as the Complainants argue, § 24.83 may be instructive as a template for analyzing Frisco's alleged refusal to serve the complainants, especially if no Commission rule

⁹ Preliminary Order, Issue No. 4.

¹⁰ Preliminary Order, Issue No. 5, in part.

¹¹ 16 Tex. Admin. Code § 24.3(58). *Accord* Tex. Water Code § 13.002(19).

¹² 16 Tex. Admin. Code § 24.3(51), (72), (73). *Accord* Tex. Water Code § 13.002(23).

addresses alleged refusal to serve by a retail public utility. By determining that § 24.83 is not applicable, the ALJs are not deciding that § 24.83 may not be cited as instructive.

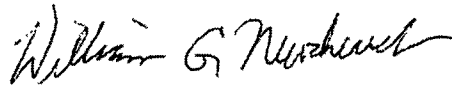
Remaining Issues

The Commission referred several other issues on which Frisco seeks summary decision.¹³ The ALJs conclude that each of these presents genuine issues of fact; hence, as to them, Frisco's motion for summary decision is denied.

SIGNED December 14, 2016.



MEITRA FARHADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹³ Preliminary Order, Issue Nos. 5-13.