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Item Number: 21

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OPEN MEETING COVER SHEET

MEETING DATE: July 20, 2016

DATE DELIVERED: July 13, 2016

AGENDA ITEM NO.: 2

CAPTION: Docket No. 45870; SOAH Docket No. 473-16-4619.WS
Formal Complaint of Ker-Seva, Ltd. against
the City of Frisco

ACTION REQUESTED: Discussion and possible action with respect
to Draft Preliminary Order

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Greg Abbott
Governor

Public Utility Commission of Texas

TO: Chairman Donna L. Nelson
Commissioner Kenneth W. Anderson, Jr.
Commissioner Brandy Marty Marquez

All Parties of Record

FROM: Lisa Carter, Commission Advising *LJC*

RE: July 20, 2016, Open Meeting Agenda Item No. 2
Draft Preliminary Order, PUC Docket No. 45870, SOAH Docket No. 473-16-4619.WS – *Formal Complaint of Ker-Seva, Ltd. Against the City of Frisco*

DATE: July 13, 2016

Please find enclosed the draft preliminary order filed by Commission Advising in the above-referenced docket. The Commission will consider this draft preliminary order at the July 20, 2016 open meeting. Parties shall not file responses or comments addressing this draft preliminary order.

Any modifications to the draft preliminary order that are proposed by one or more Commissioners will be filed simultaneously prior to the consideration of the matter at the July 20, 2016 open meeting.

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

FORMAL COMPLAINT OF KER-SEVA LTD. AGAINST THE CITY OF FRISCO	§ § §	PUBLIC UTILITY COMMISSION OF TEXAS
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DRAFT PRELIMINARY ORDER

On April 19, 2016, Ker-Seva Ltd. filed a formal complaint against the city of Frisco, Texas, alleging Ker-Seva had requested retail water and sewer service from the city of Frisco on numerous occasions, but was denied service. Ker-Seva requests that the Commission order the city of Frisco to provide water and sewer service to this property, and asserts that the city refuses to provide such service in violation of Texas Water Code (TWC) § 13.250(a).¹ TWC § 13.250(a) requires that a retail public utility that possesses or is required to possess a certificate of convenience and necessity serve every consumer within its certified area, and render continuous and adequate service with the area. TWC § 13.042(e) gives the Commission exclusive original jurisdiction over water and sewer utility services not within the incorporated limits of a municipality exercising exclusive jurisdiction over those operations.²

The city of Frisco provides water and sewer service under certificate of convenience and necessity numbers 11772 (water) and 20591 (sewer).³ The property that is the subject of Ker-Seva's complaint, is located at 9331 Westridge Boulevard, and is within Frisco's certified service area, but outside of the city limits of Frisco.⁴ Ker-Seva also owns the adjacent property, located at 9421 Westridge Boulevard, which is currently receiving water and sewer service from the city

¹ Complaint at 1-2 (Apr. 19, 2016), Tex. Water Code Ann. § 13.250 (West 2008 & Supp. 2013) (TWC).

² TWC § 13.042(e).

³ *Id.* at 3.

⁴ *Id.* at 1-2.

of McKinney.⁵ On November 6, 2015, Ker-Seva sought service for the property at 9331 Westridge, but asserts that Frisco refused to provide service and indicated that McKinney lacked capacity to allow Ker-Seva to set a meter at 9331 Westridge.⁶

Since filing the initial complaint, Ker-Seva, Ltd. sold the property to ADC West Ridge Villas, L.P., whose general partner is a wholly-owned subsidiary of Center for Housing Resources, Inc.⁷ Ker-Seva, ADC West Ridge Villas, and the Center for Housing Resources, Inc. (complainants) filed an amended complaint, adding ADC West Ridge Villa, L.P. and Center for Housing Resources Inc. to the complaint. ADC West Ridge Villa states that it made a request for water and sewer service on June 15, 2016, but that the request was denied by Frisco.⁸ ADC West Ridge states that its construction contractors obtained a temporary water meter from Frisco to connect to Frisco's existing facilities adjacent to the property at issue, but Frisco has since confiscated the temporary meter.⁹

The city of Frisco asserts that the Commission does not have jurisdiction over this proceeding, and also asserts that Ker-Seva has not complied with applicable ordinances regarding the procurement of water and sewer service.¹⁰ Specifically, the city asserts that Ker-Seva is not a qualified applicant for water and sewer service, because Ker-Seva has failed to follow all development procedures for the property.¹¹ The city of Frisco also argues that Ker-Seva erred in filing for relief under 16 Texas Administrative Code § 22.242, the Commission rule regarding

⁵ *Id.* 3-4.

⁶ *Id.* at 4.

⁷ Second Amended Formal Complaint Against the City of Frisco, Texas at 1 (Jul. 1, 2016).

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ City of Frisco's Motion to Dismiss at 1 (May 11, 2016).

¹¹ *Id.* at 2.

complaints, because that rule applies to complaints against electric and telecommunications utilities.¹²

On June 8, 2016, Commission Staff filed a statement of position, recommending that this docket be referred to the State Office of Administrative Hearings (SOAH) for adjudication of factual disputes. This docket was referred to SOAH on June 14, 2016. On July 1, Commission Staff, complainants, and the city of Frisco each timely filed a list of issues.

I. Issues to be Addressed

The Commission must provide to the administrative law judge (ALJ) a list of issues or areas to be addressed in any proceeding referred to the State Office of Administrative Hearings (SOAH).¹³ After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in this docket:

1. Is the property that is the subject of this complaint “not within the incorporated limits of a municipality exercising exclusive original jurisdiction over . . . services,” thereby giving the Commission exclusive, original jurisdiction over services, in accordance with TWC § 13.042(e)? If not, does the Commission otherwise have jurisdiction over this application?
2. If the Commission does not have original jurisdiction over this proceeding, does the city of Frisco’s governing body have original jurisdiction, subject to the appellate jurisdiction of the Commission? If so, have complainants exhausted their administrative remedies with the city of Frisco?
3. Is the city of Frisco a retail public utility as defined by TWC § 13.002(19)?¹⁴

¹² *Id.*

¹³ Tex. Gov’t Code Ann. § 2003.049(e) (West 2008 and Supp. 2015).

¹⁴ TWC § 13.002(19).

4. Does 16 TAC § 24.85 apply to the city of Frisco?
5. Has the city of Frisco failed to serve complainants or failed to provide continuous and adequate service in violation of TWC § 13.250 and 16 TAC §§ 24.83, 24.85, or 24.114?
 - a. Is complainant a “qualified service applicant,” as defined in 16 TAC § 24.85(a), meeting all of the city of Frisco’s requirements contained in its tariff, schedule of rates, or service policies and regulations for the extension of service?¹⁵ If not, what specific tariff provisions, service policies, or regulations must be satisfied and what rates or fees (if any) must be paid in order for complainant to become a qualified service applicant?
 - b. If complainant is a qualified service applicant, did complainant provide a completed application to the city of Frisco?
 - c. If so, did the city of Frisco’s response comply with 16 TAC § 25.85(a)(1)-(5)?
 - d. Did the city of Frisco fail to provide service within 180 days of the date the completed application was provided? 16 TAC § 24.85(b).
6. Do the city of Frisco’s subdivision regulations, or any other relevant city regulations or ordinances with regard to extensions of water or sewer service apply to 9331 Westridge, which is located outside the corporate limits of Frisco?
7. Are new facilities necessary so that the property can receive service from the city of Frisco? If so, what facilities are required so that the property can receive service from the city of Frisco?
8. Do the city of Frisco’s ordinances, regulations, rules, and policies prohibit complainant’s property from receiving service from the pre-existing infrastructure adjacent to the property?

¹⁵ 16 TAC § 24.85(a).

- a. If not, is there any constraint that precludes the complainant's property from receiving service from the pre-existing infrastructure adjacent to the property?
 - b. What are the city of Frisco's prior practices with regard to the use of pre-existing infrastructure to provide new service?
9. Is the city of McKinney willing and able to provide service to the complainants' property?
10. If the city of Frisco has violated TWC § 13.250 and 16 TAC §§ 24.83, 24.85, or 24.114, what is the appropriate remedy?
11. Is the city of Frisco's line extension policy consistent and nondiscriminatory in accordance with 16 TAC § 24.86(c), or is the city of Frisco acting in a discriminatory manner with respect to the type of development proposed by complainants?
12. What are the rights and responsibilities of complainants and the city of Frisco in accordance with any valid annexation agreements?
13. What are the rights and responsibilities of complainants and the city of Frisco in accordance with any valid development agreements?

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ, or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed, as permitted under Tex. Gov't Code Ann. § 2003.049(e).

II. Effect of Preliminary Order

This Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the SOAH ALJ at hearing. The SOAH ALJ, upon his or her own motion or upon the motion of any party, may deviate from this Order when circumstances dictate that it is reasonable to do so. Any ruling by the SOAH ALJ that deviates

from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the _____ day of July 2016.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY MARTY MARQUEZ, COMMISSIONER