



Control Number: 45870



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SOAH DOCKET NO. 473-16-4619.WS
P.U.C. DOCKET NO. 45870

COMPLAINT OF KER-SEVA LTD.
AGAINST THE CITY OF FRISCO

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ADMINISTRATIVE HEARINGS

COMMISSION STAFF'S RESPONSE TO
THE CITY OF FRISCO'S MOTION FOR SUMMARY DECISION

Commission Staff (Staff) of the Public Utility Commission of Texas (Commission) files its Response to the City of Frisco's Motion for Summary Decision. In support of its Response, Staff states the following:

I. Summary

The City of Frisco asserts that it is entitled to summary decision on legal grounds because the Commission does not have jurisdiction over this proceeding.¹ Although the City of Frisco acknowledges that the Commission has jurisdiction under the Texas Water Code to require a retail public utility² such as itself to "serve every consumer within its certified area,"³ the City of Frisco asserts that this jurisdiction applies only to the current provision of service. The City of Frisco interprets "consumers" in the Texas Water Code as being limited to individuals and entities that currently receive service.⁴ Under the City of Frisco's interpretation of the Texas Water Code, ADC West Ridge, L.P. and the Center for Housing Resources, Inc. (collectively, the Complainants) are not "consumers" because they are not currently receiving service.⁵ Thus, according to the City of Frisco's reasoning, the Commission has no jurisdiction over this

¹ See *Complaint of Ker-Seva Ltd. against the City of Frisco*, Docket No. 45870, City of Frisco's Motion for Summary Decision at 2-6 (Oct. 31, 2016).

² A "retail public utility" is defined as "any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation." Tex. Water Code § 13.002(19).

³ Tex. Water Code § 13.250(a).

⁴ See City of Frisco's Motion for Summary Decision at 4.

⁵ *Id.* at 5.

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proceeding. Relatedly, the City of Frisco asserts that the remaining issues do not need to be addressed once the jurisdictional inquiry is answered in its favor.

The City of Frisco's request for summary decision should be denied because the City of Frisco is incorrect in its view of the Commission's jurisdiction over this proceeding and in its interpretation of the Texas Water Code. Under the Texas Water Code, the Commission has jurisdiction to enforce a retail public utility's statutory obligations,⁶ which includes the obligation to provide continuous and adequate service.⁷ "The Commission may enforce these statutory obligations through administrative action or civil suits, including suits for injunctive relief."⁸ The City of Frisco is also incorrect in asserting that it has no obligation to serve the Complainants because they are not "consumers" – i.e. because they do not currently receive service. The Commission should reject such a narrow interpretation of the Texas Water Code. The Texas Construction of Laws Act, applicable to the interpretation of all Texas civil statutes,⁹ states that "[w]ords in the present or past tense include the future tense."¹⁰ As entities that seek service to be future consumers, the Complainants are "consumers" under the Texas Water Code. Thus, the City of Frisco does not have exclusive jurisdiction over the proceeding because it is the Commission that has original jurisdiction over this proceeding and the authority to enforce the City of Frisco's statutory obligations under the Texas Water Code.

II. Staff's Response

- a. The Commission has original jurisdiction over this proceeding because it is authorized by the Texas Water Code to enforce a certificate holder's statutory obligation to provide continuous and adequate service**

"An agency may exercise only those specific powers that the law confers upon it in clear

⁶ See generally Tex. Water Code § 13.411.

⁷ See generally Tex. Water Code § 13.250(a).

⁸ *Bexar Metropolitan Water District v. Texas Comm'n on Environmental Quality*, 185 S.W.3d 546, 553 (Tex. App.—Austin 2006, pet. denied).

⁹ See Tex. Gov't Code § 312.001 ("This subchapter applies to the construction of all civil statutes.").

¹⁰ Tex. Gov't Code § 312.003(a).

and express language.”¹¹ “[T]he legislature impliedly intends that an agency should have whatever power is reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed in the agency.”¹² “The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.”¹³

Nothing in the Texas Water Code confers “exclusive jurisdiction” to the City of Frisco regarding service issues. Under the Texas Water Code, the Commission has jurisdiction to enforce a retail public utility’s statutory obligations.¹⁴ “The Commission may enforce these statutory obligations through administrative action or civil suits, including suits for injunctive relief.”¹⁵ With regard to jurisdiction over a municipally-owned utility, a municipality has original, as opposed to exclusive, jurisdiction only over service in the municipality’s corporate limits.¹⁶ This original jurisdiction, however, is subject to the Commission’s appellate jurisdiction.¹⁷

The City of Frisco is a retail public utility under the Texas Water Code because it is a “municipality . . . operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.”¹⁸ The City of Frisco provides water service under Certificate of Convenience and Necessity No. 11772 and sewer service under

¹¹ *Public Utility Comm’n of Texas v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995) (internal quotations omitted).

¹² *Id.* (internal quotations omitted).

¹³ *Id.* (internal quotations omitted).

¹⁴ *See generally* Tex. Water Code § 13.411.

¹⁵ *Bexar Metropolitan Water District*, 185 S.W.3d at 553.

¹⁶ *See* Tex. Water Code § 13.042(f) (“This subchapter does not give the utility commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned corporation, within its corporate limits or to affect or limit the power, jurisdiction, or duties of a municipality that regulates land and supervises water and sewer utilities within its corporate limits, except as provided by this code.”).

¹⁷ *See generally* Tex. Water Code § 13.042(d).

¹⁸ Tex. Water Code § 13.002(19).

Certificate of Convenience and Necessity No. 20591.¹⁹ As a retail public utility that is the holder of a certificate of convenience and necessity, the City of Frisco has certain statutory obligations under the Texas Water Code. Among these statutory obligations is the obligation to serve every consumer in its certificated service area. The Texas Water Code States:

[A]ny 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 render continuous and adequate service within the area or areas.²⁰

This obligation to serve arises from the fact that a retail public utility such as the City of Frisco is a monopoly in its certificated service area²¹ and not subject to “the normal forces of competition that operate to regulate prices”²² Thus, the City of Frisco is required to serve all consumers in its certificated service area.

The Complainants’ property is located within the City of Frisco’s certificated service area,²³ and thus the City of Frisco must provide service to the Complainants. Additionally, the Commission has jurisdiction to require the City of Frisco to provide such service. This is because the City of Frisco is a certificate holder and because the Complainant’s property is outside of the City of Frisco’s corporate limits.²⁴ Had the Complainant’s property been located in the City of Frisco’s corporate limits, it would be the City of Frisco’s governing body that would have original jurisdiction over this proceeding. The Complainants acted appropriately by filing a complaint with the Commission, per the Commission’s substantive rules.²⁵ Thus, the City of Frisco’s request for summary decision should be denied.

¹⁹ See City of Frisco’s Motion for Summary Decision at Exhibit 4 (Affidavit of John Lettelleir).

²⁰ Tex. Water Code § 13.250(a).

²¹ See Tex. Water Code § 13.001(b)(1).

²² Tex. Water Code § 13.001(b)(2).

²³ See City of Frisco’s Motion for Summary Decision at Exhibit 4 (Affidavit of John Lettelleir).

²⁴ *Id.*

²⁵ See 16 Tex. Admin. Code § 24.83(b).

b. The City of Frisco's interpretation of the Texas Water Code is incorrect because "consumers" includes individuals and entities that prospectively seek service

Although the City of Frisco acknowledges that the Commission has jurisdiction under the Texas Water Code to require a retail public utility such as itself to serve every consumer in its certificated service area, the City of Frisco asserts that this jurisdiction applies only to the current provision of service. The City of Frisco interprets "consumer" narrowly to include only individuals and entities that currently receive service.²⁶ Under the City of Frisco's interpretation of the Texas Water Code, it has no statutory obligation to provide service to the Complainants because they are not "consumers" – i.e. the Complainants do not currently receive service from the City of Frisco.²⁷

The Commission should reject the City of Frisco's narrow interpretation of the Texas Water Code because it contradicts the mandatory canons of construction that are imposed by the Texas Construction of Laws Act.²⁸ The Texas Construction of Laws Act "applies to the construction of all civil statutes."²⁹ Additionally, such statutes "shall be liberally construed to achieve their purpose and to promote justice."³⁰ As it relates to the verb tense of words in a statute, the Texas Construction of Laws Act states: "Words in the present or past tense include the future tense."³¹ With these canons of construction in mind, the City of Frisco's narrow interpretation of the Texas Water Code should be rejected. As entities that seek service in order to be future consumers, the Complainants are "consumers" under the Texas Water Code. A narrow interpretation of the Texas Water Code would leave future consumers without protection. This is a tenuous and unsupportable result. Thus, the Commission has original jurisdiction over this proceeding.

²⁶ See *id.* at 4.

²⁷ See *id.* at Exhibit 4 (Affidavit of John Lettelier).

²⁸ See generally Tex. Gov't Code §§ 312.001 - 312.016.

²⁹ Tex. Gov't Code § 312.001.

³⁰ Tex. Gov't Code § 312.006(a).

³¹ Tex. Gov't Code § 312.003(a).

- c. **The Commission has appellate jurisdiction over this proceeding because the Texas Water Code authorizes the Commission to review the City of Frisco's ordinances regarding the provision of service**

While the City of Frisco's main assertion in support of its request for summary decision is the narrow interpretation of "consumer" in the Texas Water Code, it also asserts that it has authority to enact ordinances that address requests for service.³² Staff does not dispute that the City of Frisco has authority to enact such ordinances. To the extent that such ordinances were relied upon by the City of Frisco to refuse service to the Complainants' property, then the Commission has appellate jurisdiction over this proceeding. The Texas Water Code states that the Commission "shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in this chapter."³³ Thus, this is another basis to deny the City of Frisco's request for summary decision.

III. Conclusion

This proceeding involves the alleged refusal of service by the City of Frisco, a retail public utility under the Texas Water Code. Under the Texas Water Code, the Commission has original jurisdiction to enforce a retail public utility's obligation to provide service to consumers in its certificated service area. Thus, the Commission has original jurisdiction over this proceeding, and the City of Frisco's request for summary decision should be denied.

³² See City of Frisco's Motion for Summary Decision at 3, 8.

³³ Tex. Water Code § 13.042(d).

Date: November 30, 2016

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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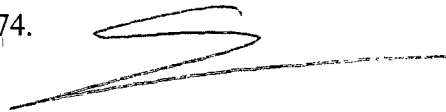


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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on November 30, 2016, in accordance with 16 TAC § 22.74.



Sam Chang