



Control Number: 46359



Item Number: 14

Addendum StartPage: 0

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Commissioner

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Executive Director



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PUBLIC UTILITY COMMISSION
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Public Utility Commission of Texas

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

All Parties of Record

FROM: Susan E. Goodson *SEP*
Administrative Law Judge

RE: **Open Meeting of March 30, 2017**
Docket No. 46359 – *Application of City of Fair Oaks Ranch to Amend a Waiver Certificate of Convenience and Necessity in Kendall County*

DATE: March 7, 2017

Enclosed is a copy of the Proposed Order in the above-referenced docket. The Commission is currently scheduled to consider this docket at an open meeting to begin at 9:30 a.m. on Thursday, March 30, 2017, at the Commission's offices, 1701 North Congress Avenue, Austin, Texas. The parties shall file corrections or exceptions to the Proposed Order on or before Wednesday, March 22, 2017.

If there are no corrections or exceptions, no response is necessary.

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DOCKET NO. 46359

APPLICATION OF CITY OF FAIR	§	PUBLIC UTILITY COMMISSION
OAKS RANCH TO AMEND A WATER	§	
CERTIFICATE OF CONVENIENCE	§	OF TEXAS
AND NECESSITY IN KENDALL	§	
COUNTY	§	

PROPOSED ORDER

This Order addresses the application of the City of Fair Oaks Ranch to amend its water certificate of convenience and necessity (CCN) in Kendall County. Commission Staff recommended dismissal, without prejudice. This application is dismissed, without prejudice.

I. Background

Fair Oaks entered into a development agreement with R.W. Pfeiffer Properties, LLC to develop a 345-acre tract of land that abuts the Fair Oaks city limit. That agreement requires Fair Oaks to serve the Pfeiffer property. In Docket No. 43666,¹ Fair Oaks applied to amend its water and sewer CCN service areas to include the Pfeiffer property, but Pfeiffer opted out of Fair Oaks proposed CCN service area. Fair Oaks disputed the opt-out, but ultimately removed the Pfeiffer tract from its application in Docket No. 43666, and then filed suit to enforce the development agreement in district court.² This application to amend its water CCN No. 11246 is Fair Oaks' second attempt to add the Pfeiffer tract to Fair Oaks' water service area.

Fair Oaks filed this application on September 14, 2016. Commission Staff's recommendation on administrative completeness was due on January 17, 2017, and Commission Staff recommended dismissal.

¹ *Application of Fair Oaks Ranch to Amend Certificates of Convenience and Necessity in Kendall, Bexar and Comal Counties*, Docket No. 43666 (October 29, 2014).

² *City of Fair Oaks Ranch, Texas v. R.W. Pfeiffer Properties, LLC*, No. 2016-CI-05444 (57th Dist. Ct., Bexar County, Tex., Mar. 29, 2016).

II. Commission Staff's Recommendation

Commission Staff recommended that the application be dismissed for three reasons; *res judicata*, unnecessary duplication of proceedings, or other good cause shown.³

Commission Staff stated that three elements must be proved to establish *res judicata*: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action.⁴ Commission Staff stated that this case involves the same parties and claims as Docket No. 43666 and the notice of approval in Docket No. 43666 constitutes a final judgment; therefore that the requirements for *res judicata* are satisfied.⁵

Commission Staff also recommends dismissal to avoid unnecessary duplication of proceedings. Commission Staff stated that there is no indication in this application that Pfeiffer will not simply opt-out again, and that given the ongoing district court litigation between Fair Oaks and Pfeiffer and the lack of any indication that the temporary restraining order (TRO) issued against Pfeiffer, that precludes Pfeiffer from electing to exclude its property from Fair Oaks water CCN, has been converted to a temporary injunction (TI), it seems likely Pfeiffer would in fact opt-out of Fair Oaks requested CCN again.⁶ Therefore, in the absence of some indication in this docket that Pfeiffer desires to have the Pfeiffer tract included in Fair Oaks' CCN, this proceeding is unnecessarily duplicative.

Finally, Commission Staff stated that although Pfeiffer was not precluded from requesting to be added to Fair Oaks CCN at some time in the future, Pfeiffer should not be subject to unsolicited attempts by Fair Oaks to add the Pfeiffer tract to its CCN.⁷ Therefore, Commission Staff recommended that there is other good cause to dismiss this application.

³ Commission Staff's Motion to Dismiss at 1 (Jan. 17, 2017) (Staff Motion).

⁴ *Id.*

⁵ *Id.* at 2.

⁶ *Id.* at 2-3.

⁷ *Id.* at 3.

III. Fair Oaks' Response

Fair Oaks stated that the trial on the merits in its law suit against Pfeiffer is scheduled for March 8, 2017 in the 57th District Court of Bexar County.⁸ Fair Oaks stated that Commission Staff's concerns could be resolved with the forbearance of the Commission and delaying action on this application for a defined period of time.⁹

Fair Oaks stated that with respect to *res judicata*, the circumstances have changed since Docket No. 43666 because in 2014 Fair Oaks had not filed suit against Pfeiffer and obtained a trial date.¹⁰ In the law suit, Fair Oaks seeks to assert Pfeiffer's mandatory obligation under their development agreement and continues to seek a permanent injunction to prevent Pfeiffer from removing its property from this application.¹¹ Fair Oaks also stated that there has been no determination of the technical matters involved with inclusion of Pfeiffer's tract in its water CCN because it was removed in Docket No. 43666; therefore that there has been no prior adjudication.¹²

Fair Oaks explained the legal proceedings that involve the Pfeiffer property. A TRO was obtained, preventing Pfeiffer from opting out of this application. However, at a hearing conducted by a second trial judge, a TI was denied.¹³ Thus, the only remedy for Fair Oaks was to seek equitable relief against Pfeiffer, as opposed to monetary damages that are specifically disallowed by their agreement.¹⁴ In order to invoke the remedies set forth in their agreement, Fair Oaks must re-apply for a CCN extension and seek injunctive relief to prevent Pfeiffer from opting out again.¹⁵ Fair Oaks stated that the requirement of an actual legal controversy is the only way it can fulfill its obligations under and compel Pfeiffer's compliance with their agreement.¹⁶

⁸ City of Fair Oaks Ranch's Response to Motion to Dismiss at 2 (Feb. 6, 2017) (City Response).

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 3-4.

¹⁴ City Response at 4.

¹⁵ *Id.*

¹⁶ *Id.*

Fair Oaks argues that as to duplicate proceedings, there has not been an adjudication on the merits of their application and suggested that a duplication of proceedings can be avoided by simply abating this proceeding until after the Bexar County District Court has adjudicated Fair Oaks contractual claim and issued a permanent injunction against Pfeiffer from opting out.¹⁷ Fair Oaks argues that such a delay would not be any additional administrative burden.¹⁸ Finally, Fair Oaks states that based on its agreement with Pfeiffer, which obligates the city to serve Pfeiffer's property, there has not been an unsolicited attempt to include Pfeiffer's property in its CCN.¹⁹ Fair Oaks stated that if it is required to undertake another filing after the conclusion of the court case, it will incur avoidable expenses.²⁰ Fair Oaks closed by requesting a 180-day abatement, or until August 6, 2017, at which time Commission Staff's recommendation on administrative completeness would be issued and the application could proceed.²¹

IV. Pfeiffer Letter

On February 7, 2017, Pfeiffer filed a letter in support of Fair Oaks' request to abate this proceeding.²² Pfeiffer stated that abatement would allow Fair Oaks and Pfeiffer to resolve the underlying litigation through alternative dispute resolution instead of litigation.²³

V. Conclusion

The Commission agrees with Commission Staff. Pfeiffer had the right to opt-out in Docket No. 43666 and has the right to ask to be included in Fair Oaks CCN at a later time. However, and even though it is arguably not unsolicited, Fair Oaks should not have submitted the same application a second time without explicitly including Pfeiffer's consent; certainly not while a dispute still exists with Pfeiffer that requires injunctive relief to prevent Pfeiffer from opting-out a

¹⁷ *Id.*

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 5.

²⁰ City Response at 5.

²¹ *Id.*

²² Advisory Letter Regarding Docket at 1 (Feb. 7, 2017).

²³ *Id.*

second time. Fair Oaks' application, without Pfeiffer's consent, does not present a different circumstance to the Commission.

Additionally, a pending lawsuit on the underlying contract is not a changed circumstance for this application. This application is indeed the same parties and claim, and in the absence of Pfeiffer's consent, there has been a final adjudication on the matter. Therefore, this application is barred by *res judicata* and it is an unnecessary duplication of proceedings.

Additionally, there is other good cause. Commission Staff was unable to make a recommendation on the administrative completeness of Fair Oaks' application; but rather recommended dismissal for reasons that Fair Oaks can do nothing to address and resolve until the pending litigation between the parties to the contract that is basis for this application is concluded, and only then if the conclusion is in Fair Oaks' favor. Therefore, Fair Oaks' is requesting a lengthy abatement in an application that is not yet considered filed with the Commission.²⁴

Although Pfeiffer filed a letter in support of Fair Oaks' requested abatement, that letter did not indicate that these parties' legal issues have neared resolution. For this reason, and because Fair Oaks continues to need and has been unable to get permanent injunctive relief, there is no reason for this Commission to believe that the pending litigation between Fair Oaks and Pfeiffer will be resolved in Fair Oaks favor or that their dispute will be resolved expeditiously. Further, although a trial date has been set, there is nothing that obligates the trial court to complete that proceeding and all follow up matters by August 6, 2017, or at any given time.

The Commission concludes that abating this application under these circumstances is inappropriate. The Commission cannot predict when or how the litigation between Fair Oaks and Pfeiffer will be resolved. Without Pfeiffer's consent, a permanent injunction preventing Pfeiffer from opting-out of Fair Oaks' CCN service area, or a litigation resolution in its favor, Fair Oaks' application was premature; it is barred by *res judicata*, it is an unnecessary duplication of proceedings and there is other good cause for dismissal. For all these reasons, the Commission dismisses this application, without prejudice.

The Commission adopts the following findings of fact and conclusions of law:

²⁴ 16 Tex. Admin. Code § 24.8(a).

VI. Findings of Fact

Procedural history and background

1. On September 14, 2016, Fair Oaks filed an application to amend its water CCN No. 11246 in Kendall County.
2. Fair Oaks seeks to serve an approximately 345-acre proposed master-planned community, "The Reserve at Fair Oaks Ranch," that is owned and will be developed by Pfeiffer.
3. On September 19, 2016, Order No. 1 was issued, requiring comments on administrative completeness and notice.
4. On October 13, 2016, Fair Oaks and Commission Staff filed a joint motion for extension of time to respond to Order No. 1.
5. On October 14, 2016, Order No. 2 was issued granting that extension.
6. On November 18, 2016, Fair Oaks and Commission Staff jointly requested a deadline for Commission Staff's recommendation on administrative completeness.
7. On November 22, 2016, Order No. 3 was issued, establishing a January 17, 2017 deadline for Commission Staff to file a recommendation on administrative completeness of the application.
8. On January 17, 2017, Commission Staff filed a motion to dismiss.
9. On February 6, 2017, Fair Oaks responded to Commission Staff's motion to dismiss.
10. On February 7, 2017, Pfeiffer filed an advisory letter.
11. On March 2, 2017, Fair Oaks re-urged its request to abate this proceeding pending the outcome of the District Court proceeding.

Informal Disposition

12. Commission Staff and Fair Oaks are the only parties to this proceeding.
13. More than 15 days have passed since the completion of the notice provided in this docket.
14. No protests have been filed. No requests for hearing have been filed. No issues of fact or law are disputed by any party; therefore, no hearing is necessary.

VII. Conclusions of Law

1. The Commission has jurisdiction and authority over this docket under TWC §§ 13.041, 13.241, 13.244, 13.246, and 13.254 and 16 TAC §§ 24.101, 24.102, and 24.113.
2. In accordance with 16 TAC § 24.8(a), an application shall be reviewed for administrative completeness within 30 calendar days from the date the application is file stamped by the commission's Central Records office. If the applicant is required to issue notice, the applicant shall be notified upon determination that the notice or application is administratively complete.
3. Under 16 TAC §24.8(d), applications under subchapter G of chapter 24 are not considered filed until the commission makes a determination that the application is administratively complete.
4. Commission Staff has demonstrated that dismissal is appropriate under the doctrine of *res judicata*, because without dismissal there will be an unnecessary duplication of proceedings, and for other good cause.
5. The criteria for informal disposition under 16 TAC § 22.35 have been satisfied in this proceeding.

VIII. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders:

1. The application of Fair Oaks to amend its water CCN No. 11246 in Kendall County is dismissed, without prejudice.
2. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

Signed at Austin, Texas the _____ day of March 2017.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY MARTY MARQUEZ, COMMISSIONER

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