

Control Number: 46359



Item Number: 9

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APPLICATION OF CITY OF FAIR
OAKS RANCH TO AMEND A
WATER CERTIFICATE OF
CONVENIENCE AND NECESSITY
IN KENDALL COUNTY

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PUBLIC UTILITY COMMISSION

OF TEXAS

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MOTION TO DISMISS

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Motion to Dismiss in response to Order No. 3 and would show the following:

I. BACKGROUND

On September 14, 2016, the City of Fair Oaks Ranch (City) filed an application with the Commission to amend its water certificate of convenience and necessity (CCN) No. 11246 in Kendall County. On November 22, 2016, Order No. 3 was issued, establishing a deadline of January 17, 2017 for Staff to file a recommendation on the administrative completeness of the application and a deadline of January 31, 2017 for the parties to propose a procedural schedule for continued processing of the application. This pleading is therefore timely filed.

II. DISMISSAL

A. Background

On November 21, 2013, City entered into a development agreement with R.W. Pfeiffer Properties, LLC (Pfeiffer) to develop a 345-acre tract of land abutting the City limits (Pfeiffer Tract).¹ In 2014, the City filed an application in Docket No. 43666 to amend its water and sewer CCNs to include the development.² After receiving notice of the application in Docket No. 43666, Pfeiffer filed a request to opt the Pfeiffer Tract out of the City's proposed CCN area.³ The City

¹ See Application at 19 (Sept. 14, 2016).

² See Application at 19 (Sept. 14, 2016).

³ See Application at 19 (Sept. 14, 2016); see also *Application of City of Fair Oaks Ranch to Amend Certificates of Convenience and Necessity in Kendall, Bexar, and Comal Counties*, Docket No. 43666, Letter from R.W. Pfeiffer Properties, LLC at 1 (Sept. 14, 2015).

removed the Pfeiffer Tract from its sewer CCN without protest and from its water CCN under protest.⁴

Subsequently, on March 29, 2016, the City filed a suit against Pfeiffer seeking to enforce the development agreement.⁵ The City asked for declaratory judgment that Pfeiffer failed to comply with the development agreement by opting out of the CCN amendment.⁶ The City also asked for a temporary and permanent injunction to enjoin Pfeiffer from opting out of the City's application to amend its water CCN.⁷

On September 14, 2016, the City filed the present application seeking to add the Pfeiffer Tract to its water CCN.⁸ Staff has conferred with the City in an attempt to resolve the issues raised in this pleading, but Staff and the City have been unable to reach an agreement. Therefore, for the reasons discussed below, Staff recommends that the application be dismissed for *res judicata*, unnecessary duplication of proceedings, or other good cause shown under 16 Texas Administrative Code (TAC) § 22.181(d)(3), (d)(5), (d)(11).

B. *Res Judicata*

Recognizing the “usefulness of *res judicata* in administrative proceedings,” Texas courts have “expressed a strong preference that ‘[c]ontinued litigation of issues or piecemeal litigation should be discouraged’ in state regulatory agencies.”⁹ The Commission has held 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.¹⁰

With respect to the first element, the Commission has held that a Commission order can be a final judgment on the merits for purposes of *res judicata*.¹¹ Texas courts have also noted that

⁴ See Application at 19 (Sept. 14, 2016); see also Docket No. 43666, The City of Fair Oaks Ranch's Response to Order No. 8 at 1-4 (Nov. 16, 2015).

⁵ See Application at 19-20 (Sept. 14, 2016).

⁶ See Application at 19-20 (Sept. 14, 2016).

⁷ See Application at 19-20 (Sept. 14, 2016).

⁸ See Application at 19-20 (Sept. 14, 2016).

⁹ See generally *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Texas*, 798 S.W.2d 560, 563 (Tex. 1990) (citing *Westheimer Indep. School Dist. v. Brockett*, 567 S.W.2d 780, 787 (Tex. 1978)).

¹⁰ See *Complaint of City of Houston Against Southwestern Bell Telephone D/B/A AT&T Texas*, Docket No. 45501, Conclusion of Law No. 5 (Nov. 3, 2016).

¹¹ Docket No. 45501, Order, Conclusion of Law No. 11 (Nov. 3, 2016).

“an administrative order bars subsequent agency adjudication of the same subject matter by the same party *unless allowed by statute*, or perhaps unless circumstances have changed.”¹² Here, the Commission issued a notice of approval in Docket No. 43666, approving the water and sewer CCNs and excluding the Pfeiffer Tract from those CCNs.¹³ No statute allows the Commission to adjudicate the same subject matter by the same party in these circumstances. Moreover, the facts of this case remain the same as the facts in Docket No. 43666.¹⁴ Thus, the order in Docket No. 43666 constitutes a final judgement on the merits and satisfies the first element of *res judicata*.

Additionally, the City and Commission Staff were both parties to Docket No. 43666 and are both parties to the present application. Therefore, the parties are the same in both dockets, and the second element of *res judicata* is satisfied.

Finally, in Docket No. 43666, the City sought to add the Pfeiffer Tract to its water CCN because of a provision in a development agreement between it and Pfeiffer.¹⁵ The City makes the exact same argument in this case, raising the exact same claims.¹⁶ Therefore, the claims raised in this case have already been raised in Docket No. 43666, satisfying the third element of *res judicata*. For these reasons, the City’s application should be dismissed under *res judicata*.

C. Unnecessary Duplication of Proceedings

Alternatively, Staff recommends that the application be dismissed to avoid unnecessary duplication of proceedings. In Docket No. 43666, Pfeiffer exercised its statutory right under TWC § 13.246(h) to opt the Pfeiffer Tract out of the City’s proposed CCN expansion.¹⁷ In the present application, the City again seeks to add the Pfeiffer Tract to its water CCN.¹⁸ However, no indication has been filed that Pfeiffer would not simply once again opt the Pfeiffer Tract out of the City’s proposed CCN area. In fact, given the ongoing district court litigation between the City and Pfeiffer and the lack of any indication that the temporary restraining order issued against Pfeiffer

¹² See *Friedrich Air Conditioning and Refrigeration Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763, 770 (Tex. App.—San Antonio 1988, no pet.) (citing *Al-Jazrawi v. Tex. Bd. of Land Surveying*, 719 S.W.2d 670 (Tex. App.—Austin 1986, no writ) (emphasis in the original)).

¹³ See Docket No. 43666, Corrected Notice of Approval at Findings of Fact Nos. 21, 29, and 42, and Ordering Paragraph No. 1 (Feb. 26, 2016).

¹⁴ See Application at 19-20 (Sept. 14, 2016).

¹⁵ See Application at 19 (Sept. 14, 2016); see also Docket No. 43666, The City of Fair Oaks Ranch’s Response to Order No. 8 at 1-2 (Nov. 16, 2015).

¹⁶ See Application at 19-20 (Sept. 14, 2016).

¹⁷ See Application at 19 (Sept. 14, 2016); see also Docket No. 43666, Letter from R.W. Pfeiffer Properties, LLC at 1 (Sept. 14, 2015).

¹⁸ See Application at 19-20 (Sept. 14, 2016).

has been converted to a temporary injunction, it seems likely that Pfeiffer would in fact opt the Pfeiffer Tract out of the City's requested CCN area again.¹⁹ In the absence of some indication that Pfeiffer has changed its mind and now desires to have the Pfeiffer Tract included in the City's water CCN, this proceeding unnecessarily duplicates Docket No. 43666.²⁰ Staff therefore recommends that this application be dismissed to avoid unnecessary duplication of proceedings.

D. Other Good Cause Shown

Finally, Staff recommends that the application be dismissed for other good cause shown. In Docket No. 43666, Pfeiffer properly exercised its right under TWC § 13.246(h) to opt-out of the City's proposed expansion of its water CCN.²¹ Exercising that right to opt-out should not preclude Pfeiffer from requesting to be added to the City's water CCN at some time in the future, but it should protect Pfeiffer from future unsolicited attempts to be added to that same CCN. In addition, since the City's purpose in this application appears to be the addition of the Pfeiffer Tract to the City's water CCN, this application will become moot if Pfeiffer opts out again, as seems plausible based on the information available in the record.²² Staff therefore recommends that the application be dismissed for good cause shown.

III. CONCLUSION

For the reasons discussed above, Staff respectfully moves that the application be dismissed on the grounds of *res judicata*, unnecessary duplication of proceedings, and other good cause shown, as authorized by 16 TAC § 22.181(d)(3), (d)(5), and (d)(11). Staff also recommends that the procedural schedule established in Order No. 3 be revised to allow the City 20 days from the date of receipt to file a response to this motion, as provided by 16 TAC § 22.181(e)(3).

¹⁹ See Application at 19-20 (Sept. 14, 2016).

²⁰ See Application at 19 (Sept. 14, 2016); see also Docket No. 43666, Letter from R.W. Pfeiffer Properties, LLC at 1 (Sept. 14, 2015).

²¹ See Application at 19 (Sept. 14, 2016); see also Docket No. 43666, Letter from R.W. Pfeiffer Properties, LLC at 1 (Sept. 14, 2015).

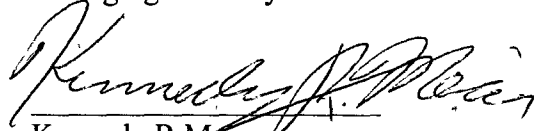
²² See Application at 19-20 (Sept. 14, 2016).

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF
TEXAS LEGAL DIVISION**

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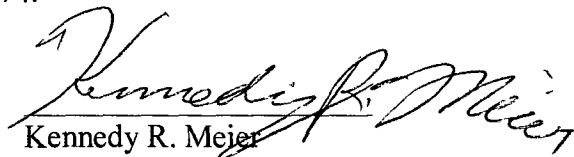


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DOCKET NO. 46359

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 17th of January, 2017 in accordance with 16 TAC § 22.74.



Kennedy R. Meier