

Control Number: 46782



Item Number: 28

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DOCKET NO. 46782
SOAH DOCKET NO. 473-17-4909.WS

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APPLICATION OF KAMIRA	§	STATE OFFICE
PROPERTY OWNERS	§	
ASSOCIATION, INC. DBA KAMIRA	§	OF
WATER SYSTEM TO AMEND A	§	
CERTIFICATE OF CONVENIENCE	§	ADMINISTRATIVE HEARINGS
AND NECESSITY IN KERR	§	
COUNTY	§	

COMMISSION STAFF'S BRIEF ON THRESHOLD ISSUES

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Commission Staff's Brief on Threshold Issues. In support thereof, Staff shows the following:

I. BACKGROUND

On January 19, 2017, Kamira Property Owners Association, Inc. dba Kamira Water System (Kamira) filed an application to amend and decertify a portion of its water certificate of convenience and necessity (CCN) No. 12176 in Kerr County. On June 26, 2017, this matter was referred to the State Office of Administrative Hearings (SOAH). All parties filed lists of issues to be addressed.

On July 17, 2017, Commission Advising and Docket Management issued an Order Requesting Briefing on Threshold Legal/Policy Issues, which allowed any interested party to file briefs addressing the identified threshold legal/policy issues by August 17, 2017. Therefore, this brief is timely filed.

II. ARGUMENT

- 1. Does Kamira's proposed transaction implicate the requirements of subchapter H, of the Texas Code, regarding a sale, acquisition, lease or rental of a water system owned by an entity that is required to hold a CCN?**

Subchapter H. of the Texas Water Code (TWC) governs the sale of property and mergers. Within subchapter H., the only section applicable to Kamira's proposed transaction is TWC §

13.301(a),¹ which requires that an application be made to the Commission for the sale, acquisition, lease, or rental of a water or sewer system owned by an entity that is required by law to possess a CCN. Kamira is a utility as defined by the Commission's substantive rules, and is therefore required to hold a CCN.² Because Kamira is required to hold a CCN, TWC § 13.301 applies to its proposed transaction regardless of whether the proposed transferee is a CCN holder.

Kamira's proposed transaction involves the transfer of service area, a well, and existing customers (the Kamira subdivision), to Bracero Water Supply Corporation (Bracero WSC), a proposed exempt utility.³ Because Kamira is transferring existing facilities and customers, not just unserved area, this transfer is appropriately accomplished through the filing of an Application for a Sale, Transfer, or Merger of a Retail Public Utility. As part of such an application, the Commission may require that the person purchasing or acquiring the water system demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area.⁴ Staff urges that such an analysis is not only appropriate, but crucial, in this instance to ensure that the existing customers in the Kamira subdivision will not be harmed by the decertification. As discussed further below, Bracero WSC and its ability to provide service should be fully evaluated before the customers it proposes to serve are removed from Kamira's CCN service area.

For the reasons discussed above, Staff recommends that Kamira's proposed transaction does implicate the requirements of TWC § 13.301, and that the proposed transaction should be processed as a Sale, Transfer, or Merger of a Retail Public Utility.

¹ The other sections that make up subchapter H are related to the purchase of voting stock (TWC § 13.302), loans to stockholders (TWC § 13.303), and foreclosure reports (TWC § 13.304), none of which are applicable in this proceeding.

² See 16 TAC § 24.3(75)-(76) (defining utility); TWC § 13.242(a) (stating that a utility may not render water utility service without obtaining a CCN).

³ See Application at 20, Appendix 1.

⁴ See TWC § 13.301(b).

2. Does Kamira's proposed transaction implicate TWC § 13.250, regarding the provision of continuous and adequate service, as well as discontinuance, reduction, or impairment of service?

Pursuant to TWC § 13.250(a), a retail public utility that possesses a CCN or is required to possess a CCN, "shall serve every consumer within its certified area, and shall render continuous and adequate service within the area or areas."⁵ Under TWC § 13.250(b), the CCN holder or person who possesses facilities used to provide utility service "shall not discontinue, reduce, or impair service" to its certificated area, except for cases where the limited exceptions provided by the statute apply.⁶ Kamira is a CCN holder, therefore TWC § 13.250(d), which applies to a retail public utility that has not been granted a CCN, is not applicable here. Kamira has not filed bankruptcy, so TWC § 13.250(e) is also not applicable.

The applicable subsections described above⁷ provide that a CCN holder (or person operating facilities) cannot stop, reduce, or impair the service that is being provided to its certificated area. These subsections refer to a CCN holder's obligation to provide service to the area certificated to it. Kamira's goal in the proposed transaction is to remove a portion of its CCN service area, which would result in a termination of Kamira's obligation to serve that area, and render TWC § 13.250 no longer applicable to Kamira with regard to the decertified area. There is an additional requirement in TWC § 13.250(b) that a "person who possesses facilities used to provide utility service" is required to continue the provision of continuous and adequate service, even if that "person" is not a CCN holder. Kamira's transaction, as proposed, would transfer the facilities used to serve the decertified area to Bracero WSC, which would result in Bracero WSC being subject to this subsection as the possessor of the facilities, and a non-CCN holder. Applying TWC § 13.250(a) and (b) to Kamira's proposed transaction would result in Kamira being obligated to provide continuous and adequate service to its remaining certificated area (the Box S subdivision), and Bracero WSC being required to provide such service to the transferred Kamira subdivision. Kamira does not purport to alter the service that is being provided to either the customers contained in the area that Kamira proposes to decertify (the Kamira subdivision), or to

⁵ TWC § 13.250(a).

⁶ See TWC § 13.250(b)-(c).

⁷ TWC § 13.250(a)-(b).

the customers in its remaining CCN area (the Box S subdivision).⁸ Kamira asserts in its application that the customers it proposes to decertify would continue to be served using the same facilities as before, but operated by Bracero WSC.⁹

However, TWC §13.250(a) and (b) could be implicated, if after the subject area is removed from Kamira's CCN, there is no entity available to provide service to those customers in the Kamira subdivision. As its transaction is proposed, Kamira intends to transfer a portion of its existing CCN area and facilities to Bracero WSC, which would operate as an exempt utility. As filed, this transaction would be accomplished through a two-step process of decertification of the service area by Kamira, and then exempt utility registration for the same area by Bracero WSC. However, Bracero WSC has not yet filed for exempt utility registration status, so it is unknown whether Bracero could meet the requisite criteria for such registration. While Staff has not evaluated the merits of an application by Bracero WSC for exempt utility registration status, Staff has initial concerns that Bracero WSC will not be independent of Kamira,¹⁰ and thus may not satisfy the requirements of 16 TAC § 24.103(e)(1)(B).¹¹ Bracero WSC could alternatively apply for a CCN if it was found to be ineligible for exempt utility registration; however, it seems such an application would be inconsistent with the spirit of Kamira's proposed transaction, which is to remove this area from being regulated within a CCN.¹² If Bracero WSC is unable to serve the Kamira subdivision, TWC § 13.250 could be implicated because Kamira's former customers within the Kamira subdivision could experience a discontinuance, impairment, or reduction in service.

⁸ See Application at 20, Appendix 1 (stating "the economic need for service is best described as a continuation of current service, but by two separate water supply corporations, the Kamira Property Owners Association, Inc., dba the Kamira Water System (for the Box S Subdivision) and the Bracero Water Supply Corporation (for the Kamira Subdivision)").

⁹ *Id.* at 22, Appendix 2.

¹⁰ See Applicant's Proposed List of Issues (Jul. 17, 2017) (Issue No. 2 states in part that "When this amendment is approved, ~~we~~ will operate the Bracero Water Supply Corporation to serve the residents of the Kamira Subdivision, while the KPOA, dba Kamira Water System continue to serve the Box S customers and solve the NOV.") (emphasis added).

¹¹ 16 TAC § 24.103(e)(1)(B) requires that a utility eligible to be exempt from holding a CCN "is not owned or affiliated with a retail public water utility, or any other entity, that provides potable water service."

¹² Application at 20, Appendix 1 ("The ultimate goal is to make each side self-supporting and independent of TCEQ/PUC/EPA regulatory requirements.").

However, any concern that the customers removed from Kamira's CCN service area as a result of the proposed transaction would not receive continuous and adequate service would be addressed by finding that TWC § 13.301 applies to this transaction. Under a TWC § 13.301 review, the Commission could require Bracero WSC to demonstrate adequate financial, managerial, and technical capability to provide continuous and adequate service to the transferred area before approving the transaction.¹³ Accordingly, TWC § 13.250 would not be implicated by Kamira's proposed transaction if the Commission determines that the transaction should be treated as a Sale, Transfer, Merger, but may be implicated if the Commission determines that the transaction is appropriately treated as filed, as a CCN decertification.

3. Does Kamira's proposed transaction implicate TWC § 13.253, regarding actions the Commission may take to address the provision of continuous and adequate service?

Pursuant to TWC § 13.253(a), the Commission may take certain actions to ensure the provision of continuous and adequate service by a retail public utility that possesses a CCN or is required by law to possess a CCN. These actions include (1) ordering the retail public utility to provide specified improvements if the service in a defined area is inadequate or is substantially inferior to service in a comparable area; (2) developing and implementing financial, managerial, and technical practices to ensure the provision of continuous and adequate service where such service has not been provided; (3) ordering interconnection; (4) ordering the retail public utility that has not provided continuous and adequate service to obtain wholesale service from another provider; and (5) issuing an emergency order.¹⁴ Each of these actions is responsive to a failure of the subject retail public utility to provide continuous and adequate service within its certificated area, and is designed to ensure that the CCN holder cures any impediments to providing such service.

Kamira's proposed transaction could implicate this section only if the Commission determines that Kamira has failed to provide continuous and adequate service. At this time, there are no indications in the record of this proceeding that Kamira has failed to provide continuous water service to the customers within its CCN area, or has failed to comply with 16 TAC § 24.93

¹³ See TWC § 13.301(b); 16 TAC § 24.109.

¹⁴ See TWC § 13.253(a)(1)-(4).

(regarding Adequacy of Water Utility Service). An area of potential concern may be Kamira's outstanding notice of violation (NOV) related to excess combined radium and Gross Alpha in the well that supplies the Box S subdivision.¹⁵ However, Staff notes that Kamira's proposed transaction would leave the Box S subdivision and the well that supplies it within Kamira's existing CCN area. Therefore, approval of this transaction would not interfere with the Commission's jurisdiction over that system, or its ability to ensure that Kamira provides continuous and adequate service to the customers within the Box S subdivision.

TWC § 13.253(b) applies to a retail public utility that has provided financial assurance, which Kamira has not. Therefore, that section is not addressed here.

4. If the answer to any of these issues is yes, must Kamira supplement its application?

Kamira's proposed transaction implicates the requirements of the Texas Water Code subchapter H., relating to the sale, acquisition, lease, or rental of a water system owned by an entity that is required to hold a CCN. Therefore, Staff recommends that Kamira must supplement its application to include any additional information as required by the Commission's form Application for Sale, Transfer, or Merger of a Retail Public Utility, and 16 TAC § 24.109. Additionally, if Kamira proposes to sell or transfer facilities to Bracero WSC, Kamira must also supplement its application to include the necessary information for either Bracero WSC's application for exempt utility registration status¹⁶ or application for a CCN¹⁷ to ensure that the entity proposing to take over the facilities and service area would be capable of providing continuous and adequate water service.

III. CONCLUSION

For the above stated reasons, Staff recommends that the Commission adopt a preliminary order that includes rulings on these threshold issues consistent with the above discussion.

¹⁵ See Applicant's List of Issues (Issue No. 2).

¹⁶ See 16 TAC § 24.103(e).

¹⁷ See 16 TAC § 24.105.

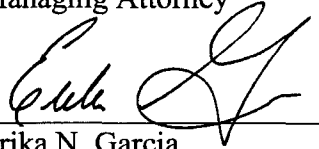
Dated: August 17, 2017

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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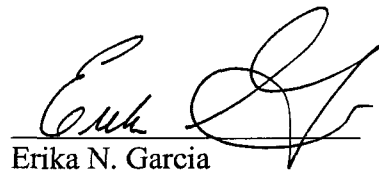


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CERTIFICATE OF SERVICE

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



Erika N. Garcia