



Control Number: 47457



Item Number: 46

Addendum StartPage: 0

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Public Utility Commission of Texas

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TO: Stephen Journey
Commission Counsel

All Parties of Record
FROM: Hunter Burkhalter
Administrative Law Judge
RE: Docket No. 47457 – *Complaint of Clay Morehead Against Corey Abel, Trustee to the Castlecomb Trust*
DATE: September 11, 2019

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this memo, the parties to this proceeding are being served with the PFD.

Please place this docket on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadline for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

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DOCKET NO. 47457

COMPLAINT OF CLAY MOREHEAD § PUBLIC UTILITY COMMISSION
AGAINST COREY ABEL, TRUSTEE TO §
THE CASTLECOMB TRUST § OF TEXAS

PROPOSAL FOR DECISION
ON MOTION FOR SUMMARY DECISION

In this matter, Clay Morehead complains about fees for water and other services assessed against him by Corey Abel, Trustee to the Castlecomb Trust (Castlecomb). On June 17, 2019, Commission Staff filed a motion for summary decision. In this proposal for decision (PFD), the administrative law judge (ALJ) finds that there is no genuine issue as to any material fact, that Mr. Morehead and Commission Staff are entitled to a decision in their favor as a matter of law, that Castlecomb constitutes a utility under applicable law, and that, unless and until Castlecomb obtains the required certificates of convenience and necessity (CCNs) and files its tariffs with the Commission, the utility is barred from charging or collecting any past, present, or future compensation from Mr. Morehead for its provision of water and sewer service to him.

I. Procedural History

The procedural history of this case is long, convoluted, and requires discussion of a related enforcement action against Castlecomb.

A. Docket No. 47426: Commission Staff's Enforcement Proceeding Against Castlecomb

On July 20, 2017, Commission Staff instituted Docket No. 47426,¹ an enforcement action against Castlecomb alleging that the company illegally charges for water and sewer service without CCNs or associated tariffs.

Castlecomb responded to the complaint in Docket No. 47426 on August 18, 2017, disputing that it needed CCNs, but suggesting that it would institute the process to obtain them.

¹ *Notice of Violation by Castlecomb Water System of Texas of Texas Water Code § 13.242 and 16 Texas Administrative Code § 24 101 Related to Certificate Required*, Docket No. 47426.

On September 6, 2017, Commission Staff moved to have Docket No. 47426 abated, expressing its opinion that Castlecomb would be applying for CCNs, thereby resolving the violations alleged.

In Order No. 2 issued on September 7, 2017, the administrative law judge (ALJ) abated Docket No. 47426.

On December 6, 2017, Commission Staff advised that it no longer believed Castlecomb would be filing applications for CCNs and, accordingly, asked that the case be unabated and referred to the State Office of Administrative Hearings (SOAH) for a hearing on the merits.

In Order No. 3 issued on December 7, 2017, the ALJ unabated the case. The case was then referred to SOAH on February 26, 2018.

At the open meeting held on September 27, 2018, the Commission voted to request that SOAH return Docket No. 47426 to the Commission and to request the Office of the Attorney General (OAG) file suit against Castlecomb, or any other appropriate entity, to obtain compliance with the Commission's rules and the Texas Water Code. The SOAH ALJ then remanded the case back to the Commission on October 2, 2018.

No pleadings have been filed in Docket No. 47426 since the remand.

B. Docket No. 47457: Mr. Morehead's Complaint Against Castlecomb

In the present case, Mr. Morehead filed his complaint on July 31, 2017, complaining that he was being wrongfully charged for water and sewer service by Castlecomb.

Castlecomb responded to Mr. Morehead's complaint on August 18, 2017, denying that it had wrongfully charged Mr. Morehead.

On September 18, 2017, Commission Staff asked that Docket 47457 be abated so that Docket No. 47426 could first be resolved.

In Order No. 3 issued on September 19, 2017, the ALJ abated the case. Over many ensuing months, the period of abatement was repeatedly extended, all for the purpose of awaiting the outcome of Docket No. 47426.

On November 9, 2018, Commission Staff moved to have Docket No. 47457 dismissed, arguing that it was duplicative of an enforcement matter that the OAG had filed, or would soon be

filing, against Castlecomb. In Order No. 13 issued on January 24, 2019, the ALJ denied the motion to dismiss because it was unclear from the record whether the OAG proceeding had been instituted and because it was impossible to determine from the record whether the OAG proceeding would be duplicative of Mr. Morehead's complaint.²

On May 15, 2019, Commission Staff last requested that the period of abatement continue, so that Commission Staff could pursue opportunities to resolve the dispute with the OAG, Texas Commission on Environmental Quality, the Commission's Oversight and Enforcement Division, Mr. Morehead, and the City of Kerrville. The ALJ granted the abatement.

On June 17, 2019, Commission Staff filed its motion for summary decision.

In Order No. 18 issued July 3, 2019, the ALJ lifted the abatement and ordered that responses to the motion for summary decision were due by July 22, 2019.

On July 18, 2019, Mr. Morehead filed a letter in support for the motion for summary decision.

Castlecomb did not file a response to the motion for summary decision, and no hearing was held on the motion.

II. Applicable Law

Under Texas Water Code (TWC) § 13.242(a), a "utility" may not render "retail water or sewer utility service" to the public without first obtaining from the Commission a CCN. "Utility" is defined by TWC § 13.002(23) to include any person "owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public . . . or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public." "Retail water or sewer utility service" is defined by TWC § 13.002(20) to mean "potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for consumption." A "retail public utility" is defined by TWC § 13.002(19) to mean "any person . . . operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation."

² As recently as July 3, 2019, the OAG had still not filed its enforcement action against Castlecomb. *See*, Commission Staff's Motion for Summary Decision at 1.

Under TWC § 13.135, a utility may not charge any rate for utility service other than as provided by TWC chapter 13. Under TWC § 13.136, each utility must file with the Commission tariffs showing all rates it charges that are within the Commission's jurisdiction to regulate.

Under 16 Texas Administrative Code (TAC) § 22.182(a), the ALJ may grant a motion for summary decision on any or all issues if the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion. Under 16 TAC § 22.182(d), a hearing on the motion is not required. Under 16 TAC § 22.182(f), if all issues will be resolved by granting a motion for summary decision, the ALJ must issue a PFD.

III. Discussion and Analysis

Mr. Morehead is a homeowner in Castlecomb Estates, a subdivision located outside the city limits of Kerrville, Texas. In his complaint, Mr. Morehead alleges that he has, for years, been charged by Castlecomb for retail water service and sewer service, but that those charges are described by Castlecomb as "maintenance fees." According to the complaint, Castlecomb does not possess a CCN to provide water or sewer service. Rather, Castlecomb claims that its authority to provide water and sewer service in exchange for compensation comes from deed restrictions applicable to homeowners within Castlecomb Estates.

In its initial response to the complaint filed on August 18, 2017, Castlecomb concedes that it is charging Mr. Morehead for water and sewer service, and that it lacks CCNs authorizing it to do so. It asserts, however, that the Commission lacks jurisdiction to consider Mr. Morehead's complaint because the fees at issue are "deed restriction fees," over which the Commission has no authority. According to Castlecomb, the fees "are not utility tariffs but fees called for in the Castlecomb Deed Restrictions, and include (until 2013) trash service, and to the present, grounds maintenance, upkeep and repairs, in addition to water and septic."³ Castlecomb denies that it is a utility and asserts, rather, that it is a "maintenance operation, which in turn is a creature of the Castlecomb Deed Restrictions."⁴

³ Castlecomb Response at 2 (Aug. 18, 2017).

⁴ Castlecomb Response at 3.

Castlecomb provided copies of the deed restrictions applicable to Castlecomb Estates. They have been amended many times over the years. The initial version of the deed restrictions, which were recorded in the Kerr County property records in 1988, included the following relevant provisions:

9) PRIVATE UTILITIES

The builder/developer has provided public streets, *sewers, water and utilities.*

No private septic systems, water systems, or any other utility system (excluding satellite T.V. reception) will be permitted within this subdivision.

...

12 MAINTENANCE FEES

The builder/developer will maintain all streets (until such time that they are taken over by the county maintenance), *sewer system, water system,* handle trash collection, and generally maintain all subdivision grounds and common areas, until such time that these functions may or may not be taken over by a Homeowner's Association. *For these services, a small monthly maintenance fee will be assessed each homeowner.*⁵

Over the ensuing years, the deed restrictions were amended multiple times and each round of amendments was recorded in the Kerr County property records. Each reiteration of the restrictions includes provisions identical to, or substantially similar to, the verbiage quoted above.

Commission Staff's motion for summary decision includes undisputed evidence confirming that Castlecomb provides the water and sewer service to more than 15 connections, and Castlecomb has never applied for CCNs and has never filed tariffs with the Commission.

Castlecomb's contention that it is not subject to regulation by the Commission is unpersuasive. Because Castlecomb owns and operates, for compensation, facilities for providing retail potable water and sewer service to the residents of Castlecomb Estates, it is a utility. As such, it is violating TWC §§ 13.135-.136 and 13.242 law by providing water and sewer service for compensation without holding CCNs and without filing any tariff with the Commission. Castlecomb identifies no legal authority to support its premise that it is exempt from Commission regulation because its charges for water and sewer service are merely "maintenance fees" charged

⁵ Castlecomb Response at Exhibit E (emphasis added).

pursuant to deed restrictions, and no such legal authority exists. Therefore, the ALJ concludes that summary decision is appropriate in this case.

IV. Findings of Fact

The ALJ makes the following findings of fact.

Mr. Morehead and Castlecomb

1. Clay Morehead is a homeowner in Castlecomb Estates, a subdivision located outside of the city limits of Kerrville, Texas, and not within the city limits of any municipality.
2. Corey Abel, Trustee to the Castlecomb Trust (Castlecomb) owns and operates for compensation equipment and facilities for the provision of potable water and sewer service to the residents of Castlecomb Estates, including Mr. Morehead.

Mr. Morehead's Formal Complaint

3. On July 31, 2017, Mr. Morehead filed the formal complaint at issue in this proceeding, alleging that Castlecomb was wrongfully charging him for water and sewer service.
4. On September 16, 2016, prior to filing his formal complaint, Mr. Morehead filed an informal complaint with the Commission, informal complaint number CP2016090540, which was not resolved and was closed by Commission Staff on October 14, 2016.
5. From September 17, 2017 to July 3, 2019, this case was repeatedly abated, in the hope that a separate enforcement action initiated by Commission Staff—*Notice of Violation by Castlecomb Water System of Texas of Texas Water Code § 13.242 and 16 Texas Administrative Code § 24.101 Related to Certificate Filed*, Docket No. 47426—would lead to a resolution of the issues in this case.
6. Docket No. 47426 remains unresolved.

The Motion for Summary Decision

7. On June 17, 2019, Commission Staff moved for summary decision.
8. In Order No. 18 issued July 3, 2019, the ALJ lifted the abatement and ordered that responses to the motion for summary decision were due by July 22, 2019.

9. On July 18, 2019, Mr. Morehead filed a letter in support of the motion for summary decision.
10. Castlecomb did not file a response to the motion for summary decision.
11. No hearing was held on the motion for summary decision.

Evidentiary Record

12. In Order No. 19 issued on September 10, 2019, the ALJ admitted the following documents as evidence in the record of this proceeding: (a) Mr. Morehead's formal complaint and the documents attached thereto filed on July 31, 2017; (b) Castlecomb's response to the complaint and the documents attached thereto filed on August 18, 2017; and (c) Patricia Garcia's memorandum dated June 17, 2019, and affidavit dated June 13, 2019, attached to Commission Staff's motion for summary decision.

Grounds for Summary Decision

13. Castlecomb provides water and sewer service to more than 15 connections in Castlecomb Estates, including Mr. Morehead.
14. Castlecomb charges Mr. Morehead a monthly "maintenance fee" for, among other expenses, the provision of water and sewer service.
15. Castlecomb does not possess CCNs for its provision of water and sewer service.
16. Castlecomb has never filed with the Commission tariffs of its water and sewer rates.
17. Castlecomb claims that its authority to provide water and sewer service in exchange for compensation derives from deed restrictions applicable to homeowners within Castlecomb Estates.
18. The applicable deed restrictions expressly acknowledge that Castlecomb is the exclusively-authorized provider of water and sewer service within Castlecomb Estates and that the residents will be charged a monthly fee for those services.

V. Conclusions of Law

The ALJ makes the following conclusions of law.

1. The Commission has jurisdiction in this matter under TWC §§ 13.041, 13.135-136, 13.242.
2. Castlecomb is a utility as defined by TWC § 13.002(23), and a retail public utility as defined by TWC § 13.002(19).
3. Castlecomb provides retail water and sewer utility service, as defined by TWC § 13.002(20), to more than 15 connections in Castlecomb Estates, including Mr. Morehead.
4. Castlecomb provides retail water and sewer service to Mr. Morehead without having obtained CCNs, in violation of TWC § 13.242(a).
5. Castlecomb charges rates for utility service in a manner other than as provided by TWC chapter 13, in violation of TWC § 13.135.
6. Castlecomb has not filed with the Commission tariffs itemizing the water and sewer rates it charges, in violation of TWC § 13.136(a).
7. Before filing his formal complaint that is at issue in this docket, Mr. Morehead complied with the informal resolution requirements specified in 16 TAC § 22.242(c).
8. Summary decision on all issues in a proceeding may be granted if the pleadings and evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law. 16 TAC § 22.182(a).
9. A hearing on a motion for summary decision is not required. 16 TAC § 22.182(d).
10. If all issues will be resolved by granting a motion for summary decision, the ALJ must issue a PFD. 16 TAC § 22.182(f).
11. A PFD was issued in accordance with Texas Government Code § 2001.062 and 16 TAC § 22.182(f).
12. Commission Staff proved, by summary decision, that Castlecomb lacks the legal authority to charge, collect, or receive compensation for its provision of water and sewer service to Mr. Morehead.

VI. Ordering Provisions

In accordance with these findings of fact and conclusions of law, the ALJ proposes the following ordering paragraphs.

1. The Commission grants Commission Staff's motion for summary decision.
2. Unless and until it obtains the required CCNs and files its tariffs, Castlecomb is barred from charging or collecting any past, present, or future compensation from Mr. Morehead for its provision of water and sewer service to him.
3. The Commission is not constrained in any manner from requiring additional action or penalties for violations discussed herein.
4. The Commission denies all other motions, and any other requests for general or special relief if not expressly granted.

Signed at Austin, Texas the _____ day of September 2019.

PUBLIC UTILITY COMMISSION OF TEXAS

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE