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DOCKET NO. 50927

PETITION OF THE CITY OF MESQUITE AND TALTY SPECIAL UTILITY DISTRICT FOR APPROVAL OF A SERVICE AREA CONTRACT UNDER TEXAS WATER CODE § 13.248 AND TO AMEND CERTIFICATES OF CONVENIENCE AND NECESSITY IN KAUFMAN COUNTY	§ § § § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER NO. 3
REQUIRING NEW RECOMMENDATION ON ADMINISTRATIVE COMPLETENESS AND SUFFICIENCY OF NOTICE

In this matter, the City of Mesquite and Talty Special Utility District seek approval of a service-area contract under Texas Water Code (TWC) § 13.248 and to amend their respective certificates of convenience and necessity (CCNs) accordingly. In the underlying agreement for which Commission approval is sought, Talty SUD agreed to decertify a portion of the service area under its water CCN number 10850 (the transfer area) and transfer it to Mesquite's service area under water CCN number 10060. Upon approval of the agreement, the following will transfer from Talty SUD to Mesquite:

- responsibility for providing water service to the 23 customers within the transfer area;
- possession of customer deposits from the customers in the transfer area; and
- ownership of 2,700 feet of a 6-inch water line, 670 feet of a 6-inch water line, and 2,810 feet of a 6-inch water line.

On July 15, 2020, Commission Staff recommended that the application be found administratively incomplete. Commission Staff contends that, because the agreement in question involves not only the transfer of areas and customers to be served under CCNs, but also the transfer of assets and facilities, the petition is not appropriately filed under TWC § 13.248 and the accompanying Commission rule, 16 Texas Administrative Code (TAC) § 24.253. Commission Staff argues that Mesquite and Talty SUD must, instead, file a sale, transfer, or merger (STM) application under TWC § 13.301 and 16 TAC § 24.239.

Mesquite and Talty SUD disagree with Commission Staff. They contend that the requirements of TWC § 13.301 and 16 TAC § 24.239 do not apply to the circumstance of this case. They filed a response on July 17, 2020, and a pleading re-urging their position on October 30, 2020.

On November 19, 2020, responsibility for this matter was transferred to the undersigned administrative law judge (ALJ).

While acknowledging that the relevant law on this issue is not terribly clear, the ALJ concludes that Mesquite and Talty SUD have the better argument. The relevant analysis turns, in large part, on the definitions of "retail public utility" and "utility."

Under TWC § 13.002(23), 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."[1] Mesquite is a municipality and Talty SUD is a political subdivision. Both operate and maintain facilities for providing potable water service for compensation. Accordingly, all parties agree that Mesquite and Talty SUD are retail public utilities.

Under TWC § 13.002(23), "utility" is defined as follows:

> [A]ny person, corporation, cooperative corporation, affected county, . . . *other than a municipal corporation, . . . or a political subdivision of the state*, . . . 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 resale of potable water to the public for any use . . . *other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state* . . .."[2]

Because Mesquite is a municipality and Talty SUD is a political subdivision, all parties agree that neither meets the definition of utility.

The statute and rule applicable to service-area contracts, TWC § 13.248 and 16 TAC § 24.253, apply to retail public utilities. Under that statute, a contract between two retail public utilities that designates "areas to be served and customers to be served by those retail public

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[1] Emphasis added.

[2] Emphasis added.

utilities" are "valid and enforceable and are incorporated into" the applicable CCN service areas when approved by the Commission. The rule goes on to specify, however, that "[n]othing in this provision negates the requirements of TWC § 13.301 to obtain a new CCN and document the transfer of assets and facilities between retail public utilities." It is primarily this verbiage upon which Commission Staff relies for its assertion that, because assets and facilities are being transferred in the agreement between Mesquite and Talty SUD, they must submit an STM application under TWC § 13.301.

The statute applicable to STM applications, TWC § 13.301, reads, in relevant part, as follows:

> A *utility or a water supply . . . corporation*, on or before the 120th day before the effective date of a sale, acquisition, lease, or rental of a *water or sewer system owned by an entity that is required by law to possess a certificate of public convenience and necessity* or the effective date of a sale or acquisition of or merger or consolidation with such an entity, shall . . . file a written application with the utility commission . . ..[3]

As already established, Mesquite, the acquiring entity in the transaction at issue in this docket, is not a utility, nor is it a water supply corporation.

Similarly, Talty SUD, the selling entity in the transaction at issue in this docket, is not an entity that is required by law to possess a CCN. The relevant statute, TWC § 13.242(a), sets out two scenarios in which an entity is required to possess a CCN. First, "a utility, a utility operated by an affected county, or a water supply . . . corporation" generally may not render water service without first having obtained from the Commission a CCN. This provision does not apply because Talty SUD is not a utility, a utility operated by an affected county, or a water supply corporation. Second, "a retail public utility" generally may not render or extend water service to any area in which water service is already being provided by another retail public utility without first having obtained a CCN for the area. Although Talty SUD is a retail public utility, it is not seeking to extend its service into an area already being served by another retail public utility. Thus, the requirement to file an STM application under TWC § 13.301 applies to neither Mesquite nor Talty SUD.

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[3] Emphasis added.

In support of its argument, Commission Staff stresses the fact that TWC § 13.248 and 16 TAC § 24.253 address the approval of transfers of "areas to be served and customers to be served," but do not address the transfer of assets and facilities. Commission Staff also points to the last sentence of 16 TAC § 24.253(a) which states: "Nothing in this provision negates the requirements of TWC § 13.301 to obtain a new CCN and document the transfer of assets and facilities between retail public utilities."[4] According to Commission Staff, this sentence indicates that, because Mesquite and Talty SUD are transferring assets and facilities, they must submit an STM application under TWC § 13.301.

The last sentence of 16 TAC § 24.253(a) cannot expand the meaning or scope of TWC § 13.301. Thus, if two retail public utilities wish to transfer assets and facilities between themselves but do not fall within the types of entities for which an STM application is required, then they are not obligated by TWC § 13.301 to seek approval of the transfer of assets and facilities between them.

This conclusion is buttressed by the wording of 16 TAC § 24.239, the Commission rule that implements TWC § 13.301. Subsection (a) of the rule states:

> Any water supply or sewer service corporation, or water and sewer utility, owned by an entity required to possess a certificate of convenience and necessity (CCN) *must*, and a retail public utility that possesses a CCN *may*, file a written application with the commission and give public notice of any sale, transfer, merger, consolidation, acquisition, lease, or rental at least 120 days before the effective date of the transaction.[5]

The use of the words "must" and "may" indicates that utilities and water supply and sewer service corporations are legally obligated to submit an STM application when transferring assets and facilities, but retail public utilities are not. In the present case, the applicants have chosen, as is their right, to not submit an STM application.

Commission Staff concedes that the "plain language of TWC § 13.301 does not explicitly require Applicants to submit an STM application," but argues that requiring them to do so would be in the public's best interest because it would allow additional oversight and a more robust

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[4] Emphasis added.

[5] Emphasis added.

Commission review of the transaction at issue. While it is true that an STM application allows for a higher level of oversight by the Commission, the ALJ cannot order Mesquite and Talty SUD to do what the law does not require.

Accordingly, Commission Staff's recommendation that Mesquite and Talty SUD be ordered to file an STM application is denied. By December 14, 2020, Commission Staff must file a new recommendation as to the administrative completeness of the application and the sufficiency of notice, and propose a procedural schedule. In conducting its administrative completeness review, Commission Staff must analyze solely whether the application is administratively complete as an application for approval of a service-area contract.

Signed at Austin, Texas the 30th day of November 2020.

PUBLIC UTILITY COMMISSION OF TEXAS

HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE