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PUC DOCKET NO. 51166

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PETITION OF COLORADO RIVER PROJECT, LLC TO AMEND SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN TRAVIS COUNTY BY EXPEDITED RELEASE

PUBLIC UTILITY COMMISSION OF TEXAS

PUBLIC UTILITY COMMISSION FILING CLERK

SWWC UTILITIES, INC., D.B.A. HORNSBY BEND UTILITY COMPANY, INC.'S SUPPLEMENTAL RESPONSE TO COLORADO RIVER PROJECT, LLC'S PETITION

SWWC Utilities, Inc. d/b/a Hornsby Bend Utility Company, Inc. (HBUC), files this Supplemental Response to Colorado River Project, LLC's (CRP) Petition in response to Order No. 6, issued on November 5, 2020.¹ In support, HBUC shows as follows.

I. PROCEDURAL BACKGROUND

On August 13, 2020, Colorado River Project, LLC filed a petition to amend HBUC's certificates of convenience and necessity (CCNs) in Travis County by streamlined expedited release (SER). CRP seeks the expedited release of the portion of the properties owned by CRP that lie within the boundaries of HBUC's water CCN No. 11978 and sewer CCN No. 20650. CRP filed supplemental information on August 31, 2020, and September 9, 17, and 29, 2020.

In Order No. 4, filed September 30, 2020,² CRP was directed to file an amended application or confirm its intent to stand by its current application and provide explanatory briefing. CRP filed an amended petition on October 9, 2020 and a supplement to the amended petition on October 29, 2020 (Petition). Order No. 4 also directed Public Utility Commission (Commission) Staff to provide a supplemental recommendation on the completeness of the application and, if applicable, respond to any briefing by CRP. The presiding Commission Administrative Law Judge (ALJ) deemed the Petition administratively complete on November 5, 2020 and set a deadline of

¹ Order No. 6 Finding Petition Administratively Complete and Notice Sufficient, and Establishing Procedural Schedule (Nov. 5, 2020).

² Order No. 4 Finding Application Administratively Incomplete and Providing an Opportunity to Cure (Sept. 30, 2020).

November 19, 2020 for HBUC to file its response to the administratively complete Petition. Therefore, this pleading is timely filed.

The Commission must deny the Petition because HBUC serves the Property.

II. ARGUMENTS AND AUTHORITIES

The Commission should deny the Petition because the SER requested cannot lawfully be granted under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245. The Property is receiving service from HBUC and not eligible for SER. Alternatively, if the Commission releases the Property despite this fact, HBUC is entitled to just and adequate compensation, prior to CRP receiving service from any other utility.

A. The Property Receives Service from HBUC

The Property receives water and sewer service from HBUC under any interpretation or application of the term “service” as the TWC defines it and the Property cannot be released from HBUC’s CCNs under TWC § 13.2541.³ The Water Code broadly defines “service” as:

any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties . . . to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.⁴

The embedded term “facilities” is defined as:

[a]ll the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.⁵

³ TWC § 13.2541(b) (allowing streamlined expedited release of a tract of land that “is not receiving water or sewer service.”); *see also* 16 TAC § 24.245(h)(1)(B).

⁴ TWC § 13.002(21); *see also* 16 TAC § 24.3(33) (same definition).

⁵ TWC § 13.002(9); *see also* 16 TAC § 24.3(15) (same definition).

Actually delivering water to or collecting wastewater from a property is obviously “service,” but a property can also receive water or sewer service under the statute without a utility delivering “actual water” onto or collecting wastewater from a property.⁶ In the *Crystal Clear* Austin Third Court of Appeals decision, the court held that facilities or lines “used” or “committed” to providing such service may cause a property to “receive service” under the statutory and regulatory definition.⁷ But where water lines or wastewater lines are actually present within a tract and “committed” to the property in that manner, the tract is unquestionably “receiving service” and the Commission recently determined that a streamlined expedited release petition may not be granted under *Crystal Clear* and TWC § 13.2541 when such facts are present.⁸

Here, the Petition claims, “The property in question is not receiving water or sewer service from Hornsby or any other water or sewer service provider.”⁹ The Petition supports that statement with a self-serving affidavit from Mr. Rohan Patel, Development Manager for the Petitioner.¹⁰ But HBUC has a water line adjacent to the Property that is capable of providing water to the tract and has acquired water rights to provide adequate water resources to the tract and future development of the Property.¹¹

As shown by the attached affidavit of Timothy Williford, Vice President of Operations of Texas Utilities for HBUC, HBUC submits that: (1) HBUC’s water and wastewater facilities were originally built with the intent of serving the Property and the planned Austin Green Municipal Utility District (MUD); (2) HBUC acquired water rights in the Blue Water pipeline, and allocated 6,000 living unit equivalents of water capacity in that line to servicing the Property and the planned

⁶ See *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014, pet. denied).

⁷ *Id.*

⁸ *Petition of Clay Road 628 Development, LP to Amend T&W Water Service Company’s Certificate of Convenience and Necessity in Montgomery County by Expedited Release*, Docket No. 50261, Order Denying Streamlined Expedited Release at 2-4 (Apr. 29, 2020).

⁹ Petition at 6.

¹⁰ *Id.* at 6-7.

¹¹ Affidavit of Timothy Williford (attached as Exhibit A).

MUD; and (3) HBUC has other facilities immediately adjacent to the Property, and has performed various acts and supplied funds in furtherance of service to the Property and HBUC's CCN area that includes the Property, as detailed in Mr. Williford's affidavit.¹² Mr. Williford's affidavit includes a map showing the location of facilities which serve the Property and nearby areas, marked as Attachment TW-1, as well as a copy of the wholesale purchased water agreement, marked as Confidential Attachment TW-2, evidencing the acquired water rights necessary to serve the Property.¹³

Additionally, HBUC has entered into various agreements with neighboring utilities relating to the protection of HBUC's certificated service area and to ensure continuous and adequate service to both current and future customers, including to the Property.

Here, these facilities—and the acts planning, creating, and maintaining them—are all plainly “committed” or “used” by HBUC in the performance of its duties to supply water and sewer service to the targeted CCN area. At a minimum, the water main line located adjacent to the Property provide water service to the Property, but the Property also receives water and sewer service from HBUC through its commitments to, and its existing facilities and capacity adjacent to the Property. Mr. Williford's affidavit describes all the different ways HBUC has served the Property through its various service acts and funds supplied, but there should be no question that the Property receives water and sewer service from HBUC today through facilities located adjacent to the Property.¹⁴ Under these facts, the Commission should deny the Petitioner's request to release the Property from HBUC's CCNs because that would violate TWC § 13.2541.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

B. HBUC Must Be Compensated If the Property Is Removed from HBUC's CCN Area

In the alternative, HBUC is entitled to a determination of just and adequate compensation if its CCN areas are reduced.¹⁵ The value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain, and compensation for personal property is to be based on several factors, including the following:

the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors.¹⁶

If the Property is removed from HBUC's CCNs, HBUC would be entitled to compensation under several of these factors, including but not necessarily limited to the costs of obtaining permits, planning, design, and construction of facilities, and the necessary and reasonable legal expenses and professional fees that are incurred as a result of the decertification Petition.¹⁷ HBUC would also be compelled to spend time and resources to make the filing required by TWC § 13.257(r)-(s). But regardless, HBUC would need full compensation for its lines located adjacent to the Property, along with corresponding real property interests, line relocation and installation costs, and costs associated with purchased water allocated to serve the Property. Further, decertification of Property may impede HBUC's ability to serve areas of the CCN adjacent to the Property using the water and wastewater lines located adjacent to the Property, potentially

¹⁵ TWC §§ 13.254(g) and 13.2541(f)-(h).

¹⁶ TWC §§ 13.254(g) and 13.2541(h).

¹⁷ See Exhibit A.

increasing expense to all HBUC customers.¹⁸ HBUC would be entitled to receive compensation for those increased costs as well. If required, the monetary amount shall be determined by an appraiser—either one agreed upon by the retail public utilities involved, or one hired by each retail public utility, and a third appointed by the Commission.¹⁹

III. CONCLUSION AND PRAYER

HBUC respectfully requests that the Commission deny the Petition because it cannot lawfully be granted under TWC § 13.2541. Alternatively, if the Commission approves the Petition, HBUC seeks just and adequate compensation for the decertification of portions of its water CCN No. 11978 and sewer CCN No. 20650. HBUC also seeks all and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,

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Austin, Texas 78701
Telephone: (512) 322-5830
Facsimile: (512) 472-0532

/s/ William A. Faulk, III

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¹⁸ See Exhibit A.

¹⁹ TWC § 13.2541(g), (i).

**ATTORNEYS FOR SWWC UTILITIES,
INC. D.B.A. HORNSBY BEND UTILITY
COMPANY, INC.**

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on November 25, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ William A. Faulk, III

WILLIAM A. FAULK, III

PUC DOCKET NO. 51166

PETITION OF COLORADO RIVER PROJECT, LLC TO AMEND SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN TRAVIS COUNTY BY EXPEDITED RELEASE § PUBLIC UTILITY COMMISSION OF TEXAS §

AFFIDAVIT OF TIMOTHY WILLIFORD IN OPPOSITION OF THE PETITION OF COLORADO RIVER PROJECT, LLC TO AMEND SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN TRAVIS COUNTY BY EXPEDITED RELEASE

STATE OF TEXAS § COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary, personally appeared Timothy Williford, the affiant, a person who is known to me. After administering an oath, the affiant testified that:

1. My name is Timothy J. Williford. I am over the age of eighteen years, of sound mind, and am capable of making this affidavit. The facts stated in the affidavit are within my personal knowledge and are true and correct.

2. I am the authorized representative, Vice President of Operations of Texas Utilities for SWWC Utilities, Inc. d/b/a Hornsby Bend Utility ("HBUC"), the Protestant, in the above-captioned matter. HBUC is the holder of water Certificate of Convenience and Necessity ("CCN") Nos. 11978 and sewer CCN No. 20650.

3. The attached map, Attachment TW-1, shows the property tract ("Property") that the Petition filed by Colorado River Project, LLC ("Petitioner") in Docket No. 51166 seeks to remove through streamlined expedited release ("SER") from areas for which HBUC holds water and sewer certificates of convenience and necessity CCN Nos. 11978 and 20650. I am familiar with HBUC's facilities in the vicinity of the Property and their location in relation to same. Attachment TW-1 shows the Property and the location of HBUC's water and wastewater facilities adjacent to the Property. Those facilities are part of HBUC's Austin's Colony water system (PWS ID No. TX2270255) and Austin's Colony sewer system (TPDES Permit No. WQ0013138001) which serves the Property and nearby areas. The HBUC water and wastewater facilities were originally built with

the intent of serving the Property, and the approved Austin Green Municipal Utility District (“MUD”) and the growth areas next to the Property.

4. Specifically, the Austin’s Colony water system and the Austin’s Colony sewer system facilities include: three wells that produce a combined 1,210 gallons per minute (“gpm”), two elevated storage tanks that hold a combined 800,000 gallons, two ground storage tanks that hold a combined 279,300 gallons, two pump stations with a combined pumping capacity of 1,800 gpm, (3,313) 5/8” meter water customers, (9) 3/4”, (7) 1”, (3) 1 1/2”, (4) 2”, (1) 3” and (2) 6” meter water customers with corresponding service lines, and over 30 miles of water mains adjacent to the property. Austin’s Colony sewer system facilities include: a 900,000 gallon per day wastewater treatment plant, 10 lift stations with estimated pumping capacity of 3,500 gpm, chlorine disinfection system, 6 blower units, over 1,300 manholes, 3,587 sewer customers, with corresponding sewer lateral collection lines, and over 22 miles of sewer gravity and force main lines adjacent to the property.

5. HBUC has provided water service to the Property in several ways: (1) performing acts and supplying funds to permit, plan, design, construct, own, and operate the Austin’s Colony water system facilities located adjacent to the Property; (2) performing acts and supplying funds necessary to obtain, transfer, and maintain the water CCN No. 11978 service area covering the Property under prevailing regulations; (3) performing acts and supplying funds necessary to obtain, transfer, renew, and maintain permits for the Austin’s Colony water system so that it may be used to serve the Property; (4) maintaining a regional office in Pflugerville, Texas with personnel specifically dedicated to operations within HBUC’s geographic West Texas Region water CCN No. 11978 service areas, including the Property and CCN No. 11978 area that includes the Property; and (5) analyzing and responding to past service inquiries and service requests for the Property.

6. HBUC has provided sewer service to the Property in several ways: (1) performing acts and supplying funds to permit, plan, design, construct, own, and operate the Austin’s Colony sewer system facilities located adjacent to the Property; (2) performing acts and supplying funds necessary to obtain, transfer, and maintain the sewer CCN No. 20650 service area covering the Property under prevailing regulations; (3) performing acts and supplying funds necessary to obtain, transfer, renew, and maintain permits for the Austin’s Colony sewer system so that it may be used to serve the Property; (4) maintaining a regional office in Pflugerville, Texas with personnel specifically dedicated to operations within HBUC’s geographic West Texas Region sewer CCN No. 20650

service areas, including the Property and CCN No. 20650 area that includes the Property; and (5) analyzing and responding to past service inquiries and service requests for the Property.

7. CCNs, groundwater, and wastewater permits have value that purchasers of utilities will pay for when acquiring a utility because of the rights to serve the public that they accord and because the time and expense to acquire the CCNs and permits has already been spent. Decertification of the Property will prevent HBUC from using these rights within the Property.

8. HBUC has acquired water rights necessary to provide its Austin's Colony water system and the Austin's Colony sewer system facilities with capacity that exceeds immediate need in order to respond quickly to anticipated new development within the Property. HBUC's dedicated purchased water has the capacity to provide water to approximately 6,000 living unit equivalent (LUE) connections. Attached to this affidavit as Confidential Attachment TW-2 is a copy of the Wholesale Potable Water Supply Agreement between HBUC and Blue Water 130 Project LP ("Blue Water") that was entered for the purposes of acquiring sufficient raw water to be provided to the Property and adjacent service areas.

9. Decertification of the property as requested by Petitioner would result in removal of HBUC's ability to serve planned future commercial and residential development in the area, which would result in substantial financial and operational harm.

10. Decertification of the property as requested by Petitioner denies HBUC's ability to use that existing infrastructure to serve some or all of the acreage sought to be decertified, with the further financial and operational harm to HBUC.

11. HBUC has performed numerous acts, supplied funds, and committed facilities to the Property. HBUC has also performed acts, supplied funds, and committed facilities to areas adjacent to the Property in CCN Nos. 11978 and 20650. HBUC is incurring legal expenses and is likely to incur other professional expenses as a result of the decertification and Petition. If the decertification is approved, HBUC will be compelled to spend time and resources to make the filing required by TWC § 13.257(r)-(s). HBUC is actively supplying water and sewer services to the Property and nearby properties. The Property receives water and sewer service from HBUC through these acts, supplied funds, and facilities. HBUC stands ready to perform additional acts of service and commit additional facilities to the Property as necessary.

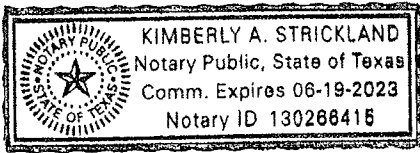
12. HBUC is opposed to Colorado River Project, LLC's request for expedited release of the property in question.

FURTHER AFFIANT SAYETH NOT.

SIGNED this 25th day of November 2020.

Timothy J. Williford

SWORN TO AND SUBSCRIBED BEFORE ME the undersigned authority on this 25TH day of NOVEMBER 2020.

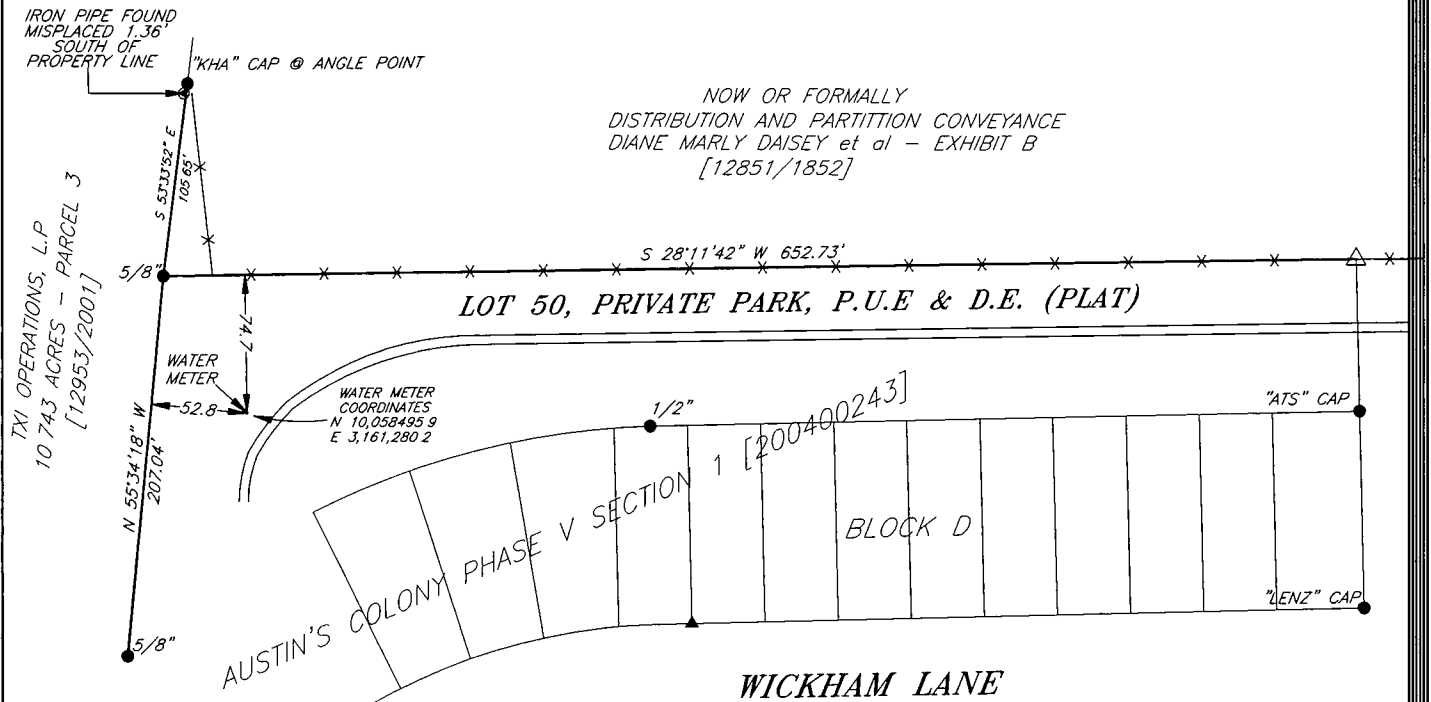


Kim Strickland
Notary Public, State of Texas

SAMFORD & ASSOCIATES
LAND SURVEYING
TEL: 441-5601 FAX: 441-5603

EXHIBIT "B"

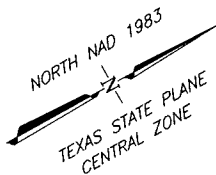
1400 HILLSIDE TERRACE
BUDA, TEXAS 78610



SCALE: 1"=100'

LEGEND

- = IRON ROD FOUND
- ⊙ = IRON PIPE FOUND
- ▲ = MAG NAIL FOUND
- △ = CALCULATED POINT
- x— = WIRE FENCE
- () = FROM PLAT RECORDS
- [] = FROM DEED RECORDS



SKETCH SHOWING WATER METER AND SURROUNDING VICINITY ON LOT 50, (PARK PUE & D.E.) AUSTIN'S COLONY PHASE V, SECTION ONE IN TRAVIS COUNTY TEXAS OF RECORD IN DOC. 200400243 OPRTCT

PLAN No.: 200085P

DATE: 08/20/20

**Attachment TW-2 is
CONFIDENTIAL and being
provided under seal.**