



Control Number: 51166



Item Number: 37

Addendum StartPage: 0



**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 Streamlined Expedited Re-
lease**

**PUBLIC UTILITY COMMISSION
OF TEXAS**

**COLORADO RIVER PROJECT, LLC'S REPLY TO HORNSBY BEND UTILITY
COMPANY, INC'S SUPPLEMENTAL RESPONSE**

Colorado River Project is seeking to release a tract of land that it owns from Hornsby Bend's certificate of convenience and necessity, and it has petitioned for streamlined expedited release under section 13.2541 of the Texas Water Code. Under section 13.2541, the Commission must grant Colorado River Project's petition if:

1. The tract of land is at least 25 acres;
2. The tract of land is located in a county described in section 13.2541(b), and
3. The tract of land "is not receiving water or sewer service."

Tex. Water Code § 13.2541(b). Hornsby Bend does not deny that the first two requirements are satisfied. But it insists the relevant tract of land is "receiving" water and sewer service from Hornsby Bend, and is therefore ineligible for streamlined expedited release under section 13.2541. Hornsby Bend's arguments are meritless.

Hornsby Bend admits that the tract is not actually receiving water from Hornsby Bend or its facilities. And Hornsby Bend admits that it is not actually collecting wastewater from the tract. One would think that should be the end of the case. It is hard to fathom how a tract of land can be "receiving water service" when it is not receiving water, or how a tract can be "receiving sewer service" when no one is collecting its wastewater. But Hornsby Bend invokes the Third Court of Appeals' decision in *Texas General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex.

App.—Austin 2014, pet. denied), which holds that a tract of land may be “receiving water service” under section 13.2541(b) even if it is not actually receiving water from the utility. *See id.* at 140. According to the Third Court’s opinion in *Crystal Clear*, a tract of land is “receiving water service” under section 13.2541(b) if:

(1) “the retail public utility has facilities or lines committed to providing water to the particular tract”; or

(2) “the retail public utility . . . has performed acts or supplied anything to the particular tract in furtherance of its obligation to provide water to that tract pursuant to its CCN.”

Id. at 140 (emphasis in original). Under this test, it is not necessary for a tract of land to actually receive water—or to have its wastewater collected—in order to be “receiving” water or sewer service under section 13.2541(b). Instead, a tract of land will be “receiving” water service if (and only if): (1) There are facilities or lines “committed to providing water to the particular tract”;¹ or (2) There are facilities or lines “used to provide water to that tract.”²

At the same time, the Third Court of Appeals made clear that a tract of land does not “receive” water service within the meaning of section 13.2541(b) merely because there are facilities or water lines on or near the tract:

A tract of land is not necessarily “receiving” water service simply because there are facilities or water lines near, or even on that tract if, for example, such facilities are used to provide water only to other tracts. Rather, it is important to consider whether the facilities and lines are “committed” to the tract seeking expedited release or “used” to provide water to that tract.

Id. Any such facilities or lines must be either: (1) “committed” to that tract, or (2) “used” to provide water to that tract; the mere existence of nearby facilities or lines

1. *Texas General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014, pet. denied) (emphasis added and removed).

2. *Id.* at 140 (emphasis added) (internal quotation marks omitted).

does not establish that a tract of land is “receiving” water or sewer service under section 13.2541(b).

I. Hornsby Bend’s Nearby Water Line And Facilities Are Not “Committed” To Providing Water To The Tract

Nothing in Hornsby Bend’s supplemental brief or supporting affidavit comes close to demonstrating that its facilities or lines are “committed” to providing water or sewer service to the tract, as the Commission staff found in its recommendation of December 14, 2020.

Hornsby Bend claims that it has a water line and facilities “adjacent” to the tract, and it contends that this adjacent water line is “capable of providing water to the tract.” Supp. Br. at 3. Hornsby Bend also claims that it has “acquired water rights” that will enable it to provide adequate water to the tract. *Id.* That falls short of demonstrating that the adjacent water line and facilities are *committed* to providing water to the tract, as required by *Crystal Clear*. The mere fact that nearby facilities or lines are *capable* of providing water to the tract does not establish that those facilities or lines are *committed* to that end, and it clear from the Williford affidavit that these nearby facilities and lines can be used for other purposes.

A facility or line is not “committed” to serve a property unless it *must* be used to provide service to that particular property, and cannot function properly if were unable to serve that property or if it were required to serve other properties instead. The word “committed” means *bound or obligated* to a person or thing; it does not refer to situations in which a person or entity is merely capable of serving another. See “committed.” *dictionary.com*. 2020. <https://www.dictionary.com/browse/committed?s=t> (defining “committed” as “bound or obligated to a person or thing, as by pledge or assurance; devoted.”). Imagine a prospective job applicant who is “capable” of performing needed work for a company that is looking to hire new employees. No one would say that this individual is *committed* to performing that work merely because

he is *capable* of performing it and lives nearby. A “commitment” would not occur until the individual enters into an employment contract that obligates him to perform the needed work, and that prevents from refusing that work and diverting his labor or human capital toward other ends. The same analysis applies to Hornsby Bend’s water line and facilities. They are not “committed” to serve the Colorado River Project’s tract of land merely because they are “capable” of providing water service to that property. Hornsby Bend must instead show that its nearby water line and facilities are *bound or obligated* to serve that property, and that they are unable or unsuitable to be used for other purposes.

It is clear from Hornsby Bend’s brief—and from Mr. Williford’s supporting affidavit—that the nearby water line and facilities are not “committed” to serve the Colorado River Project’s property in any sense of the word. Mr. Williford claims that Hornsby Bend’s 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.” Williford Affidavit ¶ 3 (emphasis added). This statement acknowledges that the facilities serve other properties besides the Colorado River Project’s land tract, and they were intended to serve those other properties from the get-go. Neither Mr. Williford nor Hornsby Bend ever asserts that the nearby water line and facilities will be unusable unless they provide service to the Colorado River Project’s property, and they never claim that these facilities are in any way dedicated to serving that particular land tract as opposed to other nearby properties. All we have is an assertion that Hornsby Bend’s water line and facilities are capable of serving the relevant land tract, and it is not enough to establish that the water line and facilities are “committed” to serving that particular property.

II. Whether And To What Extent Hornsby Bend Is Entitled To Compensation Is To Be Determined By An Independent Appraiser Rather Than The Commission

Hornsby Bend also claims that it is entitled to compensation if the Commission grants the petition. See Supp. Br. at 5–6. The lack of any direct expenditures to provide services to the land in question by Hornsby Bend, as well as the continued usefulness of existing infrastructure to service future development within Hornsby Bend’s CCNs will, in all probability, result in no compensation being determined by the appraiser. But that is a determination for an independent appraiser to make rather than the Commission. *See* Tex. Water Code § 13.2541(g) (“The monetary amount of compensation, if any, shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the certificate holder and the petitioner. The determination of compensation by the independent appraiser shall be binding on the utility commission.”) The Commission should not weigh in on these questions, and the petitioner will address Hornsby Bend’s compensation arguments before the independent appraiser.

CONCLUSION

The Commission should accept the staff’s recommendation and grant the petition for streamlined expedited release.

Respectfully submitted.

/s/ John B. Scott

John B. Scott
State Bar No. 17901500
Scott PLLC
508 West 14th Street
Austin, Texas 78701
(512) 690-6976 (phone)
(512) 808-0838 (fax)
john.scott@scottpllc.net

Counsel for Petitioner
Colorado River Project, LLC

Dated: December 21, 2020

CERTIFICATE OF SERVICE

I hereby 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 December 21, 2020, in accordance with the Order Suspending Rules.

In addition, I served this document upon:

William A. Faulk III
Lambeth Townsend
Reid Barnes
Lloyd, Gosselink, Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5830 (phone)
(512) 472-0532 (fax)
cfaulk@lglawfirm.com
ltownsend@lglawfirm.com
rbarnes@lglawfirm.com

*Counsel for SWWC Utilities, Inc.
d/b/a Hornsby Bend Utility Company, Inc.*

/s/ John B. Scott
John B. Scott
*Counsel for Petitioner
Colorado River Project, LLC*