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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**

PETITIONER'S BRIEF REGARDING COMPENSATION ISSUE

Section 13.2541(i) of the Texas Water Code required Hornsby Bend to submit its appraisal "within 70 calendar days after the date on which the utility commission approves the petition." Tex. Water Code § 13.2541(i); *see also* 16 Tex. Admin. Code § 24.245(i)(2)(B) (reiterating the 70-day deadline for submitting an appraisal). It is undisputed that Hornsby Bend missed the 70-day statutory deadline by filing its appraisal on March 26, 2021, rather than March 25, 2021. And the consequences for missing that deadline are set forth in the Texas Administrative Code:

> If the former CCN holder fails to . . . file an appraisal within the timeframes required by this subsection, the amount of compensation to be paid will be deemed to be zero.

16 Tex. Admin. Code § 24.245(i)(4). Rules mean what they say, and the text this rule is unambiguous: When a former CCN holder fails to file its appraisal "within" the 70-day window, the amount of compensation is "deemed be zero." *Id.*

There is no way for Hornsby Bend to escape the language of this rule. Its letter of March 26, 2021, acknowledges that it missed the 70-day deadline. But it claims that Colorado River Project also missed the 70-day deadline by filing its appraisal at 4:58 P.M. on March 25, 2021, rather than before 3:00 P.M. on that date. And it asks the commission to invoke a "good cause exception" to section 24.245(i)(4) that would allow its appraisal "to be considered so that justice may be done." Each of these arguments is meritless.

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I. Colorado River Project Timely Filed Its Appraisal

The PUC granted the petition for streamlined expedited release on January 14, 2021. Section 13.2541(i) of the Texas Water Code provides that:

> If the petitioner and the certificate holder cannot agree on an independent appraiser within 10 calendar days after the date on which the utility commission approves the petition, the petitioner and the certificate holder shall each engage its own appraiser at its own expense, and each appraisal shall be submitted to the utility commission within 70 calendar days after the date on which the utility commission approves the petition.

Tex. Water Code § 13.2541(i). Section 24.245(i)(2)(B) of Title 16 of the Texas Administrative Code similarly provides:

> If the former CCN holder and landowner have not agreed on an independent appraiser within ten days after the commission grants streamlined expedited release under subsection (h) of this section, the former CCN holder and landowner must each engage its own appraiser at its own expense. Each appraiser must file its appraisal with the commission within 70 calendar days after the commission grants streamlined expedited release.

16 Tex. Admin. Code § 24.245(i)(2)(B). The 70th calendar day after January 14, 2021, is March 25, 2021. And Colorado River Project complied with this deadline by filing its appraisal on March 25, 2021—the last day of the 70-day window. Nothing in section 13.2541(i) or section 24.245(i)(2)(B) required the appraisal to be filed by 3:00 P.M.

Hornby Bend tries to concoct a 3:00 P.M. deadline from 16 Tex. Admin. Code § 22.71(h), which says that "[a]ll documents shall be filed by 3:00 P.M. on the date due, unless otherwise ordered by the presiding officer." But that rule was suspended by the commission's order of March 16, 2020, which provides:

> In light of the ongoing health crisis created by the coronavirus, and under the authority found in 16 Texas Administrative Code (TAC) § 22.5(a), the Commission finds that there exists a public emergency and imperative public necessity for suspending the following rules: . . .

> (3) Any provision in chapters 22, 24, 25, and 26 of title 16 of the Texas Administrative Code requiring that filings be made in a certain amount of time or that the presiding office act by a certain date, unless that requirement is also found in statute.

Order Suspending Rules (March 16, 2020) (attached as Exhibit A). The 3:00 P.M. filing deadline in section 22.71(h) is not "found in [a] statute," so it has been suspended by the commission's order of March 16, 2020, and is no longer in effect. By contrast, the 70-day deadline in section 24.245(i)(2)(B) can be "found" in section 13.2541(i) of the Texas Water Code,[1] so the 70-day rule remains in effect and survives the commission's order of March 16, 2020.

The commission's order of March 16, 2020, also suspends:

> (1) Any provision in chapters 22, 24, 25, and 26 of title 16 of the Texas Administrative Code requiring that pleadings and documents in any Commission proceeding be physically filed with the Commission, and any rule that specifies the form or manner of such physical filings or requires that pleadings or documents be served on any party by a method other than email.

Order Suspending Rules (March 16, 2020). Section 22.71 requires documents to be physically filed with the Commission,[2] and subjection (h) "specifies the form and manner of such physical filings" by imposing a 3:00 P.M. filing deadline. So section 22.71(h) has been doubly suspended by the commission's order of March 16, 2020.

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1. *See* Tex. Water Code § 13.2541(i) ("If the petitioner and the certificate holder cannot agree on an independent appraiser within 10 calendar days after the date on which the utility commission approves the petition, the petitioner and the certificate holder shall each engage its own appraiser at its own expense, and ***each appraisal shall be submitted to the utility commission within 70 calendar days after the date on which the utility commission approves the petition.***" (emphasis added)).
2. 16 Tex. Admin. Code § 22.71(b) ("Except as provided in §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission), all pleadings and documents required to be filed with the commission ***shall be filed with the commission filing clerk***, and shall state the control number on the heading, if known." (emphasis added)).

II. Section 24.245(i)(4) Requires Compensation To Be Set At Zero

Hornsby Bend's attack on the timeliness of our appraisal does nothing to absolve Hornsby Bend of its admitted non-compliance with the 70-day statutory deadline—and it does not in any way alter the consequences of Hornsby Bend's failure to file its appraisal within the timelines set forth in Tex. Water Code 13.2541(i) and 16 Tex. Admin. Code § 24.245(i)(4).

Section 24.245(i)(4) provides:

> If the former CCN holder [Hornsby Bend] fails to . . . file an appraisal within the timeframes required by this subsection, the amount of compensation to be paid will be deemed to be zero. If the landowner fails to . . . file an appraisal within the timeframes required by this subsection, the commission will base the amount of compensation to be paid on the appraisal provided by the CCN holder.

16 Tex. Admin. Code § 24.245(i)(4). The first sentence specifies the consequence of Hornsby Bend's failure to file its appraisal "within the timeframes required by" section 24.245(i)(2)(B): compensation will set at zero. That consequence is not in any way contingent on the landowner's compliance with the 70-day deadline.

If a landowner fails to file its appraisal within the 70-day window, then compensation will be based on "the appraisal provided by the CCN holder." *Id.* But that happens only if the CNN holder has filed a timely appraisal; if the CNN holder misses the deadline, then compensation "will be deemed to be zero" as required by the first sentence of section 24.245(i)(4). Hornsby Bend does not even try to contend that the second sentence of 24.245(i)(4) applies when *both* parties miss the 70-day deadline, which would require compensation be determined exclusively by the untimely appraisal submitted by Hornsby Bend. Instead, Hornsby Bend claims that mutual untimely filings should lead the commission to recognize a "good cause *exception*" to the requirements of section 24.245(i)(4) and allow "*both* parties' reports to be considered."

III. The Commission Has No Authority To Defy The Language Of Section 24.245(i)(4) Or The Text Of Section 13.2541(i) Of The Texas Water Code

Hornsby Bend's request for a "good cause exception" is foreclosed by the language of section 24.245(i)(4), which clearly and unambiguously states that compensation is "deemed to be zero" when the CCN holder fails to file a timely appraisal. *See* 16 Tex. Admin. Code § 24.245(i)(4). It is also foreclosed by the state supreme court's ruling in *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248 (Tex. 1999), which forbids state agencies to create "exceptions" to their rules without using the rulemaking process of the Administrative Procedure Act. *See id.* at 254–56.

The petitioner in *Rodriguez* had filed a workers' compensation claim before the Texas Workforce Commission. Her treating chiropractor had certified that she had reached maximum medical improvement and assigned her a 4% impairment rating. *See id.* at 251–52. This 4% impairment rating became final under the Workforce Commission's "90-day rule," which said: "The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." *Id.* at 251 (quoting 28 Tex. Admin. Code § 130.5(e)). Ms. Rodriguez did not dispute the initial 4% impairment rating within that 90-day window.

Ms. Rodriguez later sought to change her 4% impairment rating after consulting with other medical professionals who recommended back surgery. *See id.* at 252. She asked the Commission to recognize "exceptions" to its 90-day rule for "substantial change of condition." *Id.* at 254. The state supreme court would have none of it, and held that the Commission must enforce its 90-day rule according to its terms:

> [T]he 90–day Rule does not include exceptions. . . .
>
> We construe administrative rules, which have the same force as statutes, in the same manner as statutes. Unless the rule is ambiguous, we follow the rule's clear language.

> The plain language of the 90–day Rule does not contain exceptions. . . . [B]ased on the Commission's intent and the Rule's clear language, we conclude that Rule 130.5(e) has no exceptions and that an impairment rating is final if not disputed within ninety days.

Id. at 254. The state supreme court also rebuked the Workforce Commission's appeals panels for creating and recognizing "exceptions" to the 90-day rule despite the rule's unambiguous language:

> In interpreting this rule, however, the Commission appeals panels have created exceptions. One exception allows the Commission to recalculate an impairment rating after the ninety-day period has expired if the claimant shows a "substantial change of condition." Other exceptions include "significant error" and "clear misdiagnosis." While we defer to the Commission's interpretation of its own regulation, we cannot defer to an administrative interpretation that is "plainly erroneous or inconsistent with the regulation." *Public Util. Comm'n of Tex. v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991). If the Commission does not follow the clear, unambiguous language of its own regulation, we reverse its action as arbitrary and capricious. *See Public Util. Comm'n of Tex. v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991). Consequently, given the language and intent of the 90-day Rule, we cannot recognize the exceptions to the 90-day Rule that Rodriguez pleads, including substantial change of condition.

Id. at 254–55.

If an agency wishes to create or recognize exceptions to its rules, it must amend its rules through rulemaking processes in APA; it cannot concoct ad hoc or willy-nilly exceptions to its rules through unilateral decree. *See id.* at 255 ("Allowing an agency to create broad amendments to its rules through administrative adjudication rather than through its rulemaking authority undercuts the Administrative Procedure Act (APA)."); *see also In re Alcatel USA, Inc.*, 11 S.W.3d 173, 181 (Tex. 2000) ("[T]he proper place to amend . . . a rule is through rulemaking"). Hornsby Bend's request for a "good-cause exception" is an invitation to defy not only the text of section 24.245(i)(4) but also the state supreme court's ruling in *Rodriguez*.

Hornsby Bend's argument is also incompatible with section 13.2541(i) of the Texas Water Code, which says:

> If the petitioner and the certificate holder cannot agree on an independent appraiser within 10 calendar days after the date on which the utility commission approves the petition, the petitioner and the certificate holder shall each engage its own appraiser at its own expense, and each appraisal *shall* be submitted to the utility commission within 70 calendar days after the date on which the utility commission approves the petition.

Tex. Water Code § 13.2541(i) (emphasis added). Although this statute does not specify the consequences of submitting an untimely appraisal, its use of the word "shall"—along with the absence of any statutory exceptions—is incompatible with a regime that allows the commission to overlook a party's non-compliance with the statutory deadline. The statute says that an appraisal "*shall* be submitted . . . within 70 calendar days." It does not say that an appraisal "may be submitted" within 70 calendar days; it does not say that an appraisal "shall be submitted . . . within 70 calendar days or as soon as possible thereafter"; and it does not say that a party "shall endeavor to submit its appraisal . . . within 70 calendar days." When a statute uses the word "shall," it is normally interpreted to impose a mandatory obligation that courts and agencies have no discretion to ignore. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty, so the verb phrase 'shall be applied' tells us that the district court has some nondiscretionary duty to perform."); *see also Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). Yet Hornsby Bend would convert section 13.2541(i)'s command into a mere exhortation.

Hornsby Bend's argument is incompatible with the text of section 13.2541(i) in another respect. It would require to Commission to invent rules for determining *which* late filings to accept—yet there is nothing in section 13.2541(i) that empowers

the Commission to make these determinations, and there is no intelligible principle to guide the agency's discretion in this regard. *See Edgewood Independent School District v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) ("The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes 'reasonable standards to guide the entity to which the powers are delegated.'" (quoting *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992)). Hornsby Bend does not claim that *every* untimely appraisal should be accepted; it suggests only that the Commission should consider untimely appraisals when "good cause" exists for missing the deadline (whatever that means). But how is the Commission supposed to define "good cause"—and where does it have the statutory authority to do so? And if the Commission decides to accept a filing that is one day late, then how it can justify rejecting filings that are two days late, seven days late, or even seven months late? As the Supreme Court of the United States has explained:

> Deadlines are inherently arbitrary, while fixed dates are often essential to accomplish necessary results. Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by the statute. . . .
>
> The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. . . . A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.

United States v. Locke, 471 U.S. 84, 94, 100–01 (1985) (citations and internal quotation marks omitted); *see also BankDirect Capital Finance, LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 82–83 (Tex. 2017) ("Noncompliance with a statutorily fixed time

limit cannot be excused under the banner of substantial compliance. The 'essential requirement' of a deadline is the deadline, and, as with a missed statute of limitations, the *degree* of delay matters not: 'A miss is as good as a mile.' " (citations and footnote omitted)). There is simply no way for the Commission to accept late filings under section 13.2541(i) without engaging itself in lawmaking prerogatives.

IV. Even If The Commission Were Willing To Recognize The "Good Cause Exception" Proposed By Hornsby Bend, There Is No "Good Cause" To Excuse Hornsby Bend's Untimely Filing

The final problem with Hornby Bend's plea for a "good cause exception" is that it does not have "good cause" for missing the statutory deadline. Hornby Bend has not offered any explanation for its late filing apart from counsel's inadvertence. But late filings caused by counsel's inadvertence do not qualify as "good cause" in any area of the law. As the state supreme court has explained:

> We have repeatedly addressed what factors, standing alone, are *not* in themselves good cause. Included among these are inadvertence of counsel, *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 672 (Tex. 1990) (per curiam); *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987) (per curiam). . . . If inadvertence of counsel, by itself, were good cause, the exception would swallow up the rule, for there would be few cases in which counsel would admit to making a deliberate decision not to comply with the discovery rules.

Alvarado v. Farah Manufacturing Co., 830 S.W.2d 911, 915 (Tex. 1992). Late filings caused by counsel's inadvertence also do not satisfy the "cause and prejudice" standard that allows habeas petitioners to excuse a procedural default—even in capital cases. *See Coleman v. Thompson*, 501 U.S. 722 (1991) ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' "). And late filings caused by counsel's inadvertence do not qualify for "equitable tolling" of limitations periods. *See Lawrence v. Florida*, 549 U.S. 327, 336–37

(2007) ("Lawrence argues that his counsel's mistake in miscalculating the limitations period entitles him to equitable tolling. If credited, this argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling . . .").

CONCLUSION

Hornsby Bend's appraisal is untimely under Tex. Water Code § 13.2541(i) and 16 Tex. Admin. Code § 24.245(i)(2)(B), and compensation must be set at zero as required by 16 Tex. Admin. Code § 24.245(i)(4).

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on April 5, 2021, I served this document by e-mail upon:

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