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PUBLIC UTILITY COMMISSION
OF TEXAS

**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 §**

**COMMISSION STAFF'S BRIEF IN RESPONSE TO ORDER NOS. 8 AND 9 AND
RENEWED REQUEST FOR EXTENSION**

On August 13, 2020, Colorado River Project, LLC (CRP) filed a petition to amend SWWC Utilities, Inc. dba Hornsby Bend Utility's (Hornsby Bend) certificates of convenience and necessity (CCNs) in Travis County by streamlined expedited release. CRP seeks the expedited release of the portion of the 2,122.27 acres owned by CRP that lies within the boundaries of Hornsby Bend's water CCN number 11978 and sewer CCN number 20650.

An Order was filed on January 14, 2021 granting CRP's petition for streamlined expedited release. Under Texas Water Code (TWC) § 13.2541(i), the former CCN holder and the landowner must both file appraisal reports within 70 days of the date a final order is issued in a streamlined expedited release docket should they be unable to agree upon a single appraiser or agree upon a monetary amount of compensation. 70 days from January 14, 2021 was March 25, 2021. CRP filed its appraisal report at 4:58 PM on March 21, 2021 and Hornsby Bend filed its appraisal report at 12:42 PM on March 26, 2021.

CRP raised a concern that Hornsby Bend's appraisal report was not timely filed¹ and briefing was requested in Order No. 8, which set a deadline of April 9, 2021 for the Staff of the Public Utility Commission of Texas (Staff) to file a brief on how compensation should be decided. Order No. 9 affirmed this deadline. On April 5, 2021, Hornsby Bend filed a request for exception and extension. Staff filed a response to this request on April 6, 2021 recommending that the extension be granted in light of the expenses both parties have incurred so far in the processing of this docket. The extension request was denied. Therefore, Staff now timely files this response to the briefing requested in Order Nos. 8 and 9.

¹ Colorado River Project's Letter Seeking Clarification (Mar. 26, 2021).

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I. GOVERNING LAW

The issue of compensation in this docket is governed by TWC § 13.2541(i) and 16 Texas Administrative Code (TAC) § 24.245(i). TWC § 13.2541(i) states:

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. After receiving the appraisals, the utility commission shall appoint a third appraiser who shall make a determination of the compensation within 100 days after the date on which the utility commission approves the petition. The determination may not be less than the lower appraisal or more than the higher appraisal. The petitioner and the certificate holder shall each pay half the cost of the third appraisal.

16 TAC § 24.245(i) states in part:

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. After receiving the appraisals, the commission will appoint a third appraiser who must make a determination of compensation within 100 days after the date the commission grants streamlined expedited release.²

If the former CCN holder fails to make a filing with the commission about the amount of agreed compensation or engage an appraiser or 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 make a filing with the commission about the amount of agreed compensation, or engage an appraiser, or 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.³

² 16 TAC § 24.245(i)(2)(B).

³ 16 TAC § 24.245(i)(4).

II. CRP'S ARGUMENT

On April 5, 2021, CRP filed a brief in response to Order Nos. 8 and 9. CRP's brief argues that under 16 TAC § 24.245(i)(4) the language is unambiguous and that when a former CCN holder fails to file its appraisal "within" the 70-day window, the amount of compensation is "deemed be zero."⁴ CRP contends that its brief filed at 4:58 PM on March 25, 2021 was not late because on March 16, 2020, the Commission suspended all filing deadlines unless they were found in statute.⁵ CRP notes that the 3:00 PM filing deadline is not contained in statute, and therefore, was suspended by the March 16, 2020 Order. CRP argues that the Commission lacks authority to grant a good cause exception to the deadlines and requirement to set compensation at zero within 16 TAC § 24.245(i)(4) because under the Texas Supreme Court's ruling in *Rodriguez v. Service Lloyds Insurance Co.*, 997 S.W.2d 248 (Tex. 1999), state agencies cannot create exceptions to their rules without using the rulemaking process of the Administrative Procedures Act.⁶ Finally, CRP notes that Hornsby Bend offers no explanation for its failure to timely meet the filing deadline other than the miscalculation of Hornsby Bend's counsel.⁷

In its conclusion, CRP states that Hornsby Bend's appraisal is untimely under TWC § 13.2541(i) and 16 TAC § 24.245(i)(2)(B), and that the compensation amount must be set at zero as required by 16 TAC § 24.245(i)(4).⁸

III. HORNSBY BEND'S ARGUMENT

On March 29, 2021⁹ and April 5, 2021,¹⁰ Hornsby Bend filed a request for a good cause exception or a one-day extension of the time for filing its appraisal report pursuant to 16 TAC §§ 22.4(b) and 22.5(b). Hornsby Bend states that its appraisal report was filed before 3:00 p.m. on

⁴ Colorado River Project's Brief Regarding Compensation Issue at 1 (Apr. 5, 2021) (CRP's Brief).

⁵ *Id.* at 2-3; *Issues Related to the State of Disaster for the Coronavirus Disease 2019*, Project No. 50664, Order Suspending Rules (Mar. 16, 2020).

⁶ CRP's Brief at 5.

⁷ *Id.* at 9.

⁸ *Id.* at 10.

⁹ SWWC Utilities, Inc. dba Hornsby Bend Utility Company Inc.'s Response to Colorado River Project's Letter Seeking Clarification (Mar. 29, 2021).

¹⁰ Motion for Exception or Extension of Time and Brief of SWWC Utilities, Inc. dba Hornsby Bend Utility Company Inc. (Apr. 5, 2021) (Hornsby Bend's Brief)

March 26, 2021, less than 24 hours after 3:00 p.m. on March 25, 2021, when report was due. Hornsby Bend further argues that the appraisal reports in this docket were due before 3:00 p.m. on March 25, 2021, and therefore, both Hornsby Bend and CRP's report were filed late.¹¹

In its April 5, 2021 brief Hornsby Bend cites a number of dockets in which an extension of the 70-day filing deadline under 16 TAC § 24.245(i) was granted.¹² Specifically, Hornsby Bend notes Docket Nos. 50109,¹³ 50495,¹⁴ and 50787.¹⁵ Hornsby Bend asserts that in these dockets, the Commission treated the 70-day and 100-day deadlines in TWC § 13.2541(i) of the Texas Water Code as directory and granted extensions to the deadlines.¹⁶

In its conclusion, Hornsby Bend requests that, pursuant to 16 TAC §§ 22.4(b), 22.5(b), and 24.5, the ALJ issue an order granting Hornsby Bend a one-day extension of time or a good cause exception for filing appraisals in 16 TAC § 24.245(i)(2)(B) and that the ALJ order the process to continue with the appointment of a third appraiser by the Commission to determine an amount of compensation.¹⁷

IV. STAFF'S RESPONSE TO THE BRIEFING ORDER

Having reviewed the briefs filed by CRP and Hornsby Bend, and the governing authorities, Staff respectfully requests that the compensation phase be allowed to proceed to completion. Staff believes that allowing the third, independent appraisal to proceed is the best means by which to fulfill the intent of TWC § 13.2541. The process contemplated by TWC § 13.2541 and 16 TAC § 24.245(i) is one that is designed to get the parties to engage with one another and to move forward

¹¹ *Id.* at 4-5.

¹² *Id.* at 11-12.

¹³ *Petition of Carol C Van Alstyne AKA Wanda Carol Calfee Van Alstyne to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Montgomery County by Expedited Release*, Docket No. 50109, Order No. 7 Ruling on Pending Motions and Adopting a New Procedural Schedule for the Compensation Phase (Jun. 16, 2020).

¹⁴ *Petition of the Sanctuary Texas LLC to Amend the City of Lakewood Village's Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 50495, Order No. 5 Granting Extension (Mar. 1, 2021).

¹⁵ *Petition of Tyler Oak Creek Development, LLC to Amend Liberty Utilities (Tall Timbers Sewer) Corp.'s Certificate of Convenience and Necessity in Smith County by Expedited Release*, Docket No. 50787, Order No. 7 Granting Extension (Mar. 23, 2021).

¹⁶ Hornsby Bend's Brief at 13.

¹⁷ *Id.* at 14.

with the compensation phase in a timely manner. In the Order adopting the current version of 16 TAC § 24.245, the Commission responded to a comment opposing 16 TAC § 24.245(i)(4) as follows:

The commission declines to modify the rule because TWC §13.2541 requires the former CCN holder to reach an agreement with the landowner or engage an appraiser. The proposed rule is intended to *provide an incentive* for the former CCN holder to comply with the statutory requirements so that the proceeding can be concluded within the required time periods.¹⁸

Based on this comment, Staff does not believe it is appropriate to apply 16 TAC § 24.245(i)(4) punitively in this proceeding because Hornsby Bend secured its own appraiser and filed a report in compliance with the statutory provisions that apply when the landowner and former CCN holder cannot agree on an appraiser. Moreover, the inadvertent late filing of Hornsby Bend's appraiser's will not significantly delay the Commission's ability to conclude the compensation phase within the time periods required by TWC § 13.2541(i).¹⁹

Further bolstering the interpretation of 16 TAC § 24.245(i)(4) as an inducement and not a punishment, the Commission has granted exceptions in the past to the deadlines established in TWC § 13.2541(i); therefore; it is appropriate to grant the extension requested by Hornsby Bend. This course of action also acknowledges that both parties have already gone to the time and expense of having an appraiser prepare a report. In addition, the compensation amounts recommended by CRP and Hornsby Bend range from \$10,000²⁰ to more than \$50 million,²¹ respectively. This means that there is a \$49.990 million difference between the two appraisal reports and that the opinion of a third, independent appraiser would help determine an amount of compensation that is just and reasonable.

Staff respectfully recommends that the third, independent appraisal be allowed to proceed as it is the best means by which to fulfill the intent of TWC § 13.2541 and 16 TAC § 24.245, which

¹⁸ *Revisions of Rules and Forms Relevant to Expedited Release*, Project No. 50028, Order Adopting Repeal of 16 TAC §24.245 and New Rule 16 TAC §24.245 as Approved at the June 12, 2020 Open Meeting at 9-10 (Jun. 12, 2020) (emphasis added).

¹⁹ Staff's appraiser is ready to move forward with the third appraisal once the issue raised by CRP is resolved.

²⁰ Engineering Valuation of SWWC Utilities dba Hornsby Bend Utility at 8 (Mar. 26, 2021).

²¹ Hornsby Bend's Brief at 8.

require the Commission to determine the amount of compensation, if any, due to a former CCN holder after a streamlined expedited release is granted.

V. STAFF'S RENEWED REQUEST FOR EXTENSION

Under 16 TAC § 22.4(b), Staff may request that the time allowed for filing any documents be extended for good cause. Staff has retained an appraiser to prepare the third appraisal report required by 16 TAC § 24.245(i)(2)(B); however, as a result of the timing issue raised by CRP, Staff's appraiser has yet to begin work on preparing the third appraisal report. Consequently, Staff's appraiser will require additional time to complete the appraisal report. Should the ALJ determine that moving forward with the third, independent appraisal is appropriate in this docket, Staff respectfully renews its requests for the entry of an order extending the deadline for Staff to file the third appraisal report to a date that is 30 days from the date the order addressing the briefing required by Order Nos. 8 and 9 is filed.

VI. CONCLUSION

For the reasons detailed above, Staff respectfully requests that Hornsby Bend's extension be granted and that Staff be permitted to proceed with the third appraisal.

Dated: April 9, 2021

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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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 April 9, 2021 in accordance with the Order Suspending Rules, filed in Project No. 50664.

/s/ John Harrison
John Harrison