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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	§	BEFORE THE
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	§	PUBLIC UTILITY COMMISSION
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	§	OF TEXAS
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COLORADO RIVER PROJECT, LLC'S APPEAL OF INTERIM ORDER NO. 10

Colorado River Project, LLC ("CRP") respectfully appeals Order No. 10 pursuant to 16 Tex. Admin. Code § 22.123.[1] Specifically, proceeding with the appraisal process pursuant to Section 13.2541 of the Texas Water Code is unjustified and immediately prejudices CRP's rights. For that reason and as explained in further detail below, CRP appeals Order No. 10.

I. THIS APPEAL IS TIMELY

The Commission's procedural rules provide that an "appeal to the commission from an interim order shall be filed within ten days of the issuance of the written order." 16 Tex. Admin. Code § 22.123(a)(2). Order No. 10 was entered on April 12, 2021, and the deadline for filing this appeal is therefore April 22, 2021. Hence this appeal is timely filed.

II. STANDARD FOR APPEAL

"Appeals are available for any order of the presiding officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings." 16 Tex. Admin. Code § 22.123(a)(1). In Order No. 10, the presiding officer

[1] Order No. 10 Addressing Pending Motions (Apr. 12, 2021).

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decided to retroactively extend Hornsby Bend's time to file its appraisal beyond the 70-day period specified in Tex. Water Code § 13.2541(i) and 16 Tex. Admin. Code § 24.245(i)(2)(B)—even though the statute and the rule make no allowance for extensions, and even though 16 Tex. Admin. Code § 24.245(i)(4) clearly sets forth the consequence for Hornsby Bend's failure to submit its appraisal within the 70-day timeframe:

> 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.*

Tex. Admin. Code § 24.245(i)(4) (emphasis added). Despite this unambiguous text, the presiding officer decided to unilaterally "make exceptions" to both "the 70-day deadline specified in 16 TAC § 24.245(i)(2)(B)" and "the consequence for [Hornby Bend's] failure to file its appraisal report within 70 days specified in 16 TAC § 24.245(i)(4)," and it denied CRP's request to set compensation at zero as required by 16 Tex. Admin. Code § 24.245(i)(4).

The presiding officer's ruling "immediately prejudices a substantial or material right" of CRP by thwarting its entitlement to pay zero compensation—an entitlement established in the unambiguous language of 16 Tex. Admin. Code § 24.245(i)(4). The presiding officer's ruling also "materially affects the course of the hearing" by further delaying the completion of the facility and substantially changing the amount of compensation potentially owed to Hornsby Bend. The Commission should reverse the presiding officer's ruling and hold that CRP owes no compensation to Hornsby Bend, as required by clear and unambiguous text of 16 Tex. Admin. Code § 24.245(i)(4).

III. BACKGROUND

On August 13, 2020, CRP filed its request for streamlined expedited release to release a portion of its property within the boundaries of water CCN No. 11978 and sewer CCN No. 20650 held by SWWC Utilities, Inc. d/b/a Hornby Bend Utility ("Hornsby Bend").

On January 14, 2021, the Commission released the water CCN release property under water CCN number 11978 and the sewer CCN release property under sewer CCN number 20650. Thus, the proceeding to determine the amount of compensation to be awarded to the CCN holder, if any, commenced with the filing of the Commission's Order on January 14, 2021.

CRP and Hornsby Bend began the appraisal process, but were unable to agree on an independent appraiser, so each party retained its own appraiser. Each of the parties' appraisals was required to be submitted to the Commission within 70 calendar days after the Commission granted CRP's streamlined expedited release. CRP complied with this deadline by filing its appraisal on March 25, 2021—the last day of the 70-day window. By Hornsby Bend's own admission, Hornsby Bend missed the 70-day statutory deadline by filing its appraisal on March 26, 2021.

IV. PROCEEDING WITH THE THIRD APPRAISAL IS UNJUSTIFIED AND IMMEDIATELY PREJUDICIAL

A. The 70-day Requirement To File Appraisals Under Section 13.2541(i) Is Statutory and Mandatory

Just three weeks ago, in a different proceeding before the PUC, a presiding officer held that the "70-day deadline [under Texas Water Code § 13.2541(i)] is ***statutory and mandatory***" and that the "***statute gives no indication that extension can be granted.***"[2] The presiding officer's order in that proceeding was correct and should be applied in this proceeding. To be sure, section 13.2541(i) of the Texas Water Code says:

[2] *Petition of FCS Lancaster, Ltd. To Amend Rockett Special Utility District's Certificate of Convenience and Necessity in Dallas County by Expedited Release*, Docket No. 51044, Order No. 8 Denying Motion for Extensions (March 25, 2021) (emphasis added).

> 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."). By refusing to recognize section 13.2541(i)'s mandatory deadline, the presiding officer has exposed the straightforward appraisal process to a host of unknowns that deeply undercuts the expeditious nature of a *streamlined expedited* release.

Hornsby Bend's argument is incompatible with the text of section 13.2541(i) in another respect. It would require the 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)). The presiding officer did not rule that *every* untimely appraisal should be accepted; it held only that it could consider untimely appraisals whenever "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.

B. There Is No Procedural Rule To Allow For Hornsby Bend's Post-Deadline Extension

Order No. 10 lacks the procedural basis to warrant an extension of Hornsby Bend's deadline to file its appraisal. Section 22.4(b) provides:

> Unless otherwise provided by statute, the time for filing any documents may be extended, upon the filing of a motion, ***prior to the expiration of the applicable period of time***, showing that there is good cause for such extension of time and that the need for the extension is not caused by the neglect, indifference, or lack of diligence of the party making the motion.

16 Tex. Admin. Code § 22.4(b) (emphasis added). In other words, the presiding officer may extend a deadline to file a document provided that the moving party file a motion for extension ***before*** the expiration of the deadline. The timing of the party's motion is a condition precedent to any showing of good cause by the moving party. So without a timely motion for extension, the presiding officer has no basis to grant an extension of a deadline.

Hornsby Bend asked the presiding officer for a good-cause exception to the deadline to file its appraisal on March 26, 2021, one day *after* its deadline expired. Therefore, the presiding officer had no procedural basis to grant an extension when Hornsby Bend failed to timely file its request for an extension.

C. There Is No Good-Cause Exception To Section 13.2541(i)

Neither the Commission nor the presiding officer have the power to make an exception to the statutory and mandatory 70-day deadline set forth in Tex. Water Code § 13.2541(i). Indeed, the presiding officer's Order No. 10 wholly omits reference to Tex. Water Code § 13.2541(i).

Instead, Order No. 10 rests solely on a "good cause" exception (16 Tex. Admin. Code § 24.2(b)) to 16 Tex. Admin. Code § 24.245(i). The presiding officer cites to no exception to Tex. Water Code § 13.2541(i) because there is none. Section 24.2(b) only allows a presiding officer to make exceptions to Chapter 24 of the PUC's rules; there is no exception to nor any principle that affords the presiding officer to make a good cause exception to Tex. Water Code § 13.2541(i)'s 70-day requirement.

D. Even If The Commission Were Willing To Recognize A "Good Cause Exception" To Section 24.245(i)(4), 16 TAC § 24.245(i)(2)(B), and 16 TAC § 24.245(i)(4), An Attorney's Miscalculation Of A Filing Deadline Does Not Qualify As "Good Cause"

The final problem with the presiding officer's decision to invoke a "good cause exception"[3] is that Hornsby Bend simply does not have "good cause" for missing the statutory deadline. Neither Hornsby Bend nor the presiding officer offered any explanation for the 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

[3] Order No. 10 Addressing Pending Motions (Apr. 12, 2021).

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 . . ."). No different result should obtain here.

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

By both Hornsby Bend's and the presiding officer's own admission, Hornsby Bend failed to file its appraisal by the 70-day statutory deadline. The PUC's rules make clear the effects of a former CCN holder's failure to timely file its appraisal:

> 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) (emphasis added). 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. After all, as the Commission observed in June 2020, the purpose of section 24.245(i)(4) is to incentivize CCN holders like Hornsby Bend to comply with the statutory requirements so that the SER proceeding can be concluded within the required time periods.[4]

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

[4] *Revision 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 (June 12, 2020).

§ 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 ("APA"). *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 the 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.*

CRP agrees with the presiding officer's findings that CRP's appraisal was filed on the 70th day of the deadline and that Hornsby Bend filed its appraisal on the 71st day. Hornsby Bend's failure to timely file its appraisal means that CRP owes Hornsby Bend compensation of zero dollars as required by the first sentence of section 24.245(i)(4). Thus, since CRP owes Hornsby Bend no compensation, this proceeding is finished, and CRP may obtain sewer and water services to its property.

To proceed with a third-party appraisal when Hornsby Bend's compensation has been deemed to be zero would materially prejudice CRP's rights to obtain water and sewer services on its property. In addition, proceeding with a third-party appraisal would expose CRP to a financial burden that the statute and PUC's rules have both deemed CRP to be sheltered from by operation of Hornsby Bend's failure to file its appraisal.

CONCLUSION AND PRAYER

For the reasons stated herein, CRP respectfully requests the Commission order that no compensation is owed to Hornsby Bend by CRP as a result of the release in the afore referenced case and that CRP may proceed with obtaining water and sewer service at the released location.

Respectfully submitted.

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Dated: April 14, 2021

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