



Control Number: 51166



Item Number: 83

Addendum StartPage: 0

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

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SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY COMPANY, INC.'S

MOTION FOR RECONSIDERATION

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MAY 14, 2021

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**SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY COMPANY, INC.'S
MOTION FOR RECONSIDERATION OF ORDER ON INTERIM APPEAL**

TO THE HONORABLE COMMISSIONERS:

SWWC Utilities, Inc. d/b/a Hornsby Bend Utility Company, Inc. (HBUC) files this Motion for Reconsideration in response to the Public Utility Commission of Texas' (Commission) Order on Interim Appeal, issued May 13, 2021 (Order). This Motion for Reconsideration of the Commission's Order is timely, filed within five days of the date of the Order, in compliance with 16 Texas Administrative Code (TAC) § 22.123(b). HBUC respectfully urges reconsideration based upon the following.

I. INTRODUCTION

The Commission should reconsider and deny the Appeal because the 70-day deadline in 16 TAC § 24.245(i)(2)(B) is not mandatory but discretionary. The Commission has authority to grant an extension or exception under its Rules for good cause. Furthermore, HBUC has shown there is good cause for the one-day extension that the administrative law judge (ALJ) granted.

Imposing the severe consequences contained in 16 TAC § 24.245(i) on HBUC under these circumstances would constitute impermissible death penalty sanctions. Both CRP and HBUC filed their appraisals late, yet CRP has suffered no sanction for its late filing while HBUC's sanction is denial of its claim for compensation, contrary to legislative intent. Additionally, the severe sanction upon HBUC that will result from the Commission's Order violates HBUC's due-process rights and results in an unconstitutional regulatory taking.

HBUC respectfully requests the Commission reconsider the Order and deny CRP's Appeal.

II. GROUNDS FOR RECONSIDERATION

A. The Commission has Authority to Grant Extensions or Exceptions to the Deadlines in TWC § 13.2541.

The Commission's Order says that it has "no authority to grant an exception to or extend" the statutory deadline found in 16 TAC § 24.245(i)(2)(B). In effect, the Commission has determined that the statutory deadline is mandatory rather than directory. But the statute itself, relevant case law, and the Commission's own precedent make clear that the deadline is directory and subject to exception or extension through application of the Commission's Rules. The ALJ correctly followed the statute and the Commission's Rules. The Commission should reconsider its Order and deny the Appeal.

1. The Deadlines in TWC § 13.2541 are Directory, Not Mandatory, and Subject to Extension or Exception.

Whether a statutory provision is mandatory or directory is a question of law.¹ A mandatory provision in a statute requires that an action be done within a specified time *and* states the consequences for failing to complete the action within that time. A directory provision in a statute is not the essence of the thing to be done, but instead, is included to promote the proper, orderly, and prompt completion of the action required. All statutory deadlines in Texas Water Code (TWC) § 13.2541, including the deadline for filing appraisals in this case, exist to facilitate landowner's streamlined expedited release of land from certificate holders and therefore are directory, not mandatory.

A timing provision that requires performing an act within a certain time but does not specify the consequences for noncompliance is construed as directory.²

The Texas Supreme Court has held that a timing provision that requires performing an act within a certain time but does not specify the consequences for noncompliance is construed as directory.³ In determining whether a statutory provision is mandatory or directory, "[t]he fundamental rule is to ascertain and give effect to the legislative intent."⁴ To determine whether

¹ *Tex Dep't of Pub Safety v Guerra*, 970 S.W.2d 645, 648 (Tex. App.—Austin 1998, pet. denied).

² *Id.*

³ *AC Interests, L.P v Tex Comm'n on Env'tl. Quality*, 543 S.W.3d 703, 709 (Tex. 2018).

⁴ *Chisholm v Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956).

the Legislature intended the particular provision to be mandatory or merely directory, the entire act should be considered.⁵ “Provisions which are not of the essence of the thing to be done, but which are included for the purpose of promoting the proper, orderly and prompt conduct of business, are not generally regarded as mandatory.”⁶ “[The issue] is not whether ‘shall’ [or ‘must’] is mandatory, but what consequences follow a failure to comply.”⁷ Whether the statute contains a noncompliance penalty is important in determining whether a timing provision is mandatory or directory.⁸

In *AC Interests, L.P. v. Tex. Comm’n on Env’tl. Quality*, for example, the plaintiff timely filed suit to review a Texas Commission on Environmental Quality (TCEQ) order but failed to serve citation within 30 days as the statute said “must” be done. Notwithstanding the statute’s use of the term “must,” the Supreme Court held that the statute was “directory” rather than “mandatory.”⁹ The Court reasoned that “because the Legislature expressed no particular consequence for failing to meet that deadline and none is logically necessary, the presumption is the Legislature intended the requirement to be directory rather than mandatory and that the Legislature did not intend for late service to result in the automatic dismissal of the plaintiff’s appeal.”¹⁰

The lack of a stated consequence cannot, of course, be interpreted to defeat the statute’s essential purpose.¹¹ But the Supreme Court in *AC Interests* stressed that a statutory deadline whose purpose is merely to expedite the process is generally not part of the statute’s essential purpose: “We should be careful not to confuse incrementally promoting a purpose with being fundamentally

⁵ *Id.*

⁶ *Id.*

⁷ *AC Interests, L.P. v. Tex. Comm’n on Env’tl. Quality*, 543 S.W.3d 703, 709 (Tex. 2018) (quoting *State v. \$435,000 00*, 842 S.W.2d 642, 644 (Tex. 1992)).

⁸ *Id.*

⁹ *Id.* at 714.

¹⁰ *Id.*

¹¹ *Id.*

required by it—i.e., just because ‘expediency’ is a purpose does not mean that being less-expedient requires dismissal.”¹²

As the Commission noted, the *statute* at issue here does not specify a consequence for failing to meet the 70-day deadline. Thus, under *AC Interests*’ reasoning, the Legislature intended the requirement to be directory rather than mandatory. Therefore, the Commission’s construction of that statute as mandatory exceeds the legislative intent and directive to the Commission that the retail public utility receive just and adequate compensation as determined through the appraisal process. The 70-day timeline is “for the purpose of promoting the proper, orderly, and prompt” process of determining the just and adequate compensation for the decertified retail public utility. It is not part of the statute’s “essential purpose.” By imposing such a harsh consequence, and interpreting that consequence as making the statute mandatory rather than directive, the Commission has exceeded the statutory intent.

2. The Commission’s Order Contravenes its Statutory Authority.

Not only does the Order contravene the statute setting for the 70-day deadline, it also violates other statutes, as an order from the Commission denying compensation violates TWC §§ 13.2541(i) and (j). Under the TWC, once appraisal reports are filed with the Commission, a number of mandatory provisions are triggered, including the hiring of a third appraiser and payment of compensation. The Commission’s May 13, 2021 Order violates TWC § 13.2541, as it has the effect of precluding the statutory requirement to retain a third appraiser and the determination of appropriate compensation. The Commission’s ultimate determination of compensation is critical as the statute precludes the property owner receiving service from another utility until such compensation is paid.¹³

Additionally, the determination of compensation under the statute is predicated on the issuance of a third appraisal, and not on the parties’ appraisals. Section § 13.2541(j) of TWC mandates that the Commission, “shall ensure that: (1) the monetary amount of compensation is determined not later than the 60th day after the date the utility commission receives the final

¹² *Id.* at 713.

¹³ *See* TWC § 13.2541(a) (incorporating TWC §§ 13.254(d) and (g)).

appraisal.” Determining compensation prior to the submission of a third appraisal would violate the Legislature’s mandate.

“[A]n agency can adopt only such rules as are authorized by and consistent with its statutory authority.”¹⁴ Imposing 16 TAC § 24.245(i)(4) in this case where both parties have filed appraisals, albeit negligibly late, would improperly bypass the procedures mandated by TWC § 13.2541, violating the Legislature’s intent and the statute itself.

Such a statutory violation not only ignores the Legislature’s mandated deadlines and predicates, but also prejudices the substantial rights of HBUC by depriving it of compensation under the statute. Accordingly, the Commission’s decision should be reconsidered and the case remanded to the ALJ for continuation of the compensation procedures outlined in the statute.

3. Commission Precedent Treats the Various Time Deadlines in TWC § 13.2541(i) and its Predecessor as Directory.

The Commission’s Order also stands in sharp contrast to the Commission’s established precedent of granting extensions for streamlined expedited release deadlines and treating them as directory (i.e., not mandatory). The actions of HBUC, the Commission Staff, the ALJ, and the Commissioners themselves have been consistent with that precedent.

The use of the word “shall” does not mean the deadlines in this matter are “mandatory,”¹⁵ and the Commission has not treated them as mandatory. All of the streamlined expedited release proceeding deadlines use the word “shall.” Section 13.2541 of the TWC includes “shall” in setting out the 60-day deadline for the Commission to grant the petition and the 70-day deadline for the appraisal to be submitted. Section 13.2541(c) of the TWC provides, “[t]he utility commission shall grant the petition not later than the 60th day after the date the landowner files the petition.” Section 13.2541(i) of the TWC provides, in part, “each appraisal shall be submitted . . . within 70 calendar days after . . . the [commission] approves the petition.”

Nevertheless, the Commission has treated all of the deadlines in the streamlined expedited release process, including the determination of just and adequate compensation, as subject to

¹⁴ *R.R. Comm’n of Tex. v. Lone Star Gas Co., a Div. of Enserch Corp.*, 844 S.W.2d 679, 685 (Tex.1992) (quoting *State Bd. of Ins v Deffebach*, 631 S.W.2d 794, 798 (Tex.App.—Austin 1982, writ ref’d n.r.e.)).

¹⁵ *AC Interests, L.P. v. Tex. Comm’n on Envtl. Quality*, 543 S.W.3d 703, 709 (Tex. 2018).

exception and extension since the TWC was amended in 2013 to transfer jurisdiction over retail water and sewer utilities to the Commission. In fact, in Docket No. 45679,¹⁶ when considering how best to complete the compensation determination process and faced with the tension between the deadlines and ensuring an orderly process to complete all things required of the Commission in a streamlined expedited release proceeding, former Chairman Nelson sent a memorandum to the two other commissioners stating her opinion “that the 90-day *directory* deadline [to complete the process] should not control our decision to the point of improper application of the rest of the statute.”¹⁷

Although certainly the Commission strives to follow all of the deadlines in streamlined expedited release proceedings, the deadlines have been treated as directory, and the Commission has routinely acted after the deadlines have expired. For example, the 60-day deadline¹⁸ for the Commission to grant the petition in a streamlined expedited release proceeding is regularly missed, as happened in this very proceeding. Attached as Exhibit B to this Response are examples of the Commission acting on petitions beyond the 60-day deadline identified in the statute.

The Commission has also treated the 70-day and 100-day deadlines in Section 13.2541(i) of the TWC as directory and granted extensions:

- In Docket No. 50109, the petitioner requested a final order declaring it owed \$0 to Aqua Texas after petitioner was the only party to file an appraisal report within the 70-day deadline.¹⁹ Aqua Texas had not intervened in the proceeding at that point.²⁰

¹⁶ *Zipp Road Utility Company LLC's Notice of Intent to Provide Sewer Service to Area Decertified from Guadalupe-Blanco River Authority in Guadalupe County*, Docket No. 45679 (Feb. 21, 2017).

¹⁷ Public Utility Commission of Texas Open Meeting, June 29, 2016, Agenda Item No. 26, Memorandum from Chairman Nelson (Jun. 28, 2016) (emphasis added).

¹⁸ TWC § 13.2541(c).

¹⁹ *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, Motion for Proposed Final Order Deeming Compensation to be Zero (May 15, 2020).

²⁰ Docket No. 50109, Aqua Texas, Inc.'s Motion to Intervene, Response to Staff's Request for Extension, Reply to Petitioner's Response and Objection to Staff's Request, and Request for New Compensation Phase Deadlines (Jun. 5, 2020).

The Commission granted Aqua Texas’s motion to intervene and restarted the entire compensation phase of the proceeding.²¹

- In Docket No. 50495,²² the 70-day deadline was February 25, 2021. The petitioner filed a motion to extend time for filing the appraisal on February 26. Order No. 5 gave petitioner an additional week to submit its appraisal for good cause due to power outages, etc. from the week of February 15–19, 2021.
- In Docket No. 50787, Order No. 7 granted the Commission Staff a good cause extension of the time to file the Commission-appointed third appraiser’s report.²³ In that docket, the certificate of convenience and necessity (CCN) holder alleged that the valuation report filed by the landowner was not an appraisal as required by the statute because it was not prepared by an accredited appraiser.²⁴ Based on its position, the CCN holder would not sign the Commission Staff’s engagement letter for the third appraiser acknowledging that the CCN holder agreed to pay half of the cost of the third appraiser.²⁵

There is only one instance in which an extension of time to file an appraisal was not allowed, and CRP relies on it in its Appeal.²⁶ That ruling is easily distinguished, because the movant made no attempt whatsoever to show good cause, despite the rules’ requirement that it do

²¹ Docket No. 50109, Order No. 7 Ruling on Pending Motions and Adopting a New Procedural Schedule for the Compensation Phase (Jun. 16, 2020).

²² *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 (Mar. 23, 2021).

²³ *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).

²⁴ Docket No. 50787, Liberty Tall Timbers’ Objections to and Motion to Strike Compensation Determination Filed by Tyler Oak Creek Development, LLC (Mar. 3, 2021).

²⁵ Docket No. 50787, Commission Staff’s Motion for Extension and to Require Payment for Third Appraiser’s Report (Mar. 18, 2021).

²⁶ See CRP’s Appeal at 3 (citing to *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 (Mar. 25, 2021)).

so.²⁷ Here, HBUC has shown good cause as to why its filing was delayed.²⁸ Furthermore, because both parties already have filed their reports, the Commission Staff is ready to proceed with the compensation process without delay.

B. HBUC Established Good Cause.

The Commission’s Order concluded that it “disagrees that good cause was shown here to allow an exception to the Commission’s rule.”²⁹ While the Commission’s Order finds that no “good cause” was shown, the record evidence and the case law establish that there is.

As set forth in the Affidavit of William A. Faulk, III, attached as Exhibit A, HBUC miscalculated the deadline because of a mistake in calculating the time period described in 16 TAC § 22.4(a). The Rule directs that “the period shall begin on the day after the act, event, or default in question.” Because the “day after” the Order was January 15, counsel put that day into a date-calculation program, which then identified March 26 as the due date. The mistake was not brought to light until the afternoon of March 26, after HBUC’s Appraisal Report was filed.

As described in the Affidavit, HBUC learned of the mistake after CRP’s counsel sent a letter to the ALJ seeking clarification of the due date. CRP’s letter was sent after counsel for HBUC had a phone conversation with counsel for CRP where the timeliness of HBUC’s filing was not questioned. CRP’s engineering valuation report was also filed after the March 25, 3:00 p.m. deadline.

Immediately after determining that its filing was late, HBUC made a request for a good-cause exception to the filing deadline for both parties.³⁰ HBUC’s intent was always to timely file the Appraisal Report—there was no bad faith or intent to ignore or disregard the rules.³¹

The ALJ correctly found that HBUC had good cause for the extension. In other circumstances where parties have sought extensions of deadlines for good cause, the Texas

²⁷ See *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 (pending) (The special utility district filed an unopposed motion for extension for time to file the appraisal without giving any reason for needing the extension).

²⁸ See Exhibit A.

²⁹ Order on Interim Appeal at 4.

³⁰ SWWC Utilities, Inc. DBA Hornsby Bend Utility Company, Inc.’s Response to Colorado River Project’s Letter Seeking Clarification (Mar. 29, 2021).

³¹ See Exhibit A.

Supreme Court has held that “[g]ood cause is established by showing the failure involved was an *accident or mistake, not intentional or the result of conscious indifference.*”³² Furthermore, where a party “faces the very real prospect of summary disposition without regard to the underlying merits,” an extension of time should be granted on “a showing of (1) good cause, and (2) no undue prejudice.”³³

HBUC has shown good cause and that the need for the extension is not caused by neglect, indifference, or lack of diligence. The Commission ALJ in Order No. 10 firmly agreed, stating the failure to file timely “was due to an error made in good faith, and was not intentional or due to neglect or conscious indifference.” This is neither a case where HBUC’s attorney was aware of a deadline and intentionally ignored it, nor does it reflect a pattern of repeatedly ignoring deadlines or communications, as has been the case in every other case where an attorney’s inaction reached the level of conscious indifference.³⁴ The 19-hour delay in filing HBUC’s Appraisal Report was the result of an accident or mistake; it was not intentional or the result of conscious indifference. There was no flagrant bad faith or callous disregard for the rules.

An exception or extension was necessary to prevent this matter from being disposed of on harmless procedural defects rather than its merits. Without the good-faith extension, HBUC would receive no compensation for the release granted by the Commission, despite an Appraisal Report indicating it should receive more than \$52 million.³⁵

Moreover, the one-day delay in filing the Appraisal Report caused no harm—both CRP and HBUC have hired experts and filed reports, showing an intent to follow through with the streamlined expedited release process. Furthermore, Commission Staff’s Response supported

³² *Wheeler v Green*, 157 S.W.3d 439, 442 (Tex. 2005) (failure to file response to summary judgment motion) (emphasis added).

³³ *Carpenter v Cimarron Hydrocarbons Corp*, 98 S.W.3d 682, 687-88 (Tex. 2002) (failure to file response to summary judgment motion).

³⁴ See *Cervantes v. Cervantes*, No. 03-07-00381-CV, 2009 WL 3682637, at *8–9 (Tex. App.—Austin Nov. 5, 2009, no pet.) (collecting cases where attorney’s acts causing default judgment reached the level of conscious indifference).

³⁵ See 16 TAC § 24.245(i).

HBUC's request for relief not only because HBUC had shown good cause, but also because it serves the "public interest," which Commission Staff oversees.³⁶

The Commission's Order acknowledges that "good cause" is a necessary element to any extension under the Commission's Rules. The circumstances here present the paradigm of a situation where a good cause exception is called for. The record and case law make clear that there was good cause to extend HBUC's deadline to file its appraisal report, and accordingly, the Appeal should have been denied.

C. CRP Failed to File Timely.

While the Commissioner's Order is singularly focused on HBUC's timeliness, no mention was made of CRP's failure to meet the same deadline.

At 4:58 p.m. on March 25, 2021,³⁷ CRP electronically filed its engineering valuation report. That report was prepared by a person who is not accredited by any appraiser association and who did not prepare the engineering valuation report in compliance with the Uniform Standards of Professional Appraisal Practice (USPAP). The hard copy of CRP's engineering valuation report to the Commission was sent either by mail or courier.

Although CRP's report was filed electronically on March 25, it was done so almost two hours after the Commission's 3:00 p.m. deadline contained in 16 TAC § 22.71(h).³⁸ CRP contends that the 3:00 p.m. deadline was suspended by the Commission's March 16, 2020 order in Project No. 50664.³⁹ While the 3:00 p.m. deadline was arguably suspended for a time as a result of that order, CRP fails to recognize that the suspension was revoked on July 16, 2020.⁴⁰ CRP was

³⁶ See Staff's Response at 2-3 ("allowing the third, independent appraisal to proceed is the best means by which to fulfill the intent of TWC § 13.2541").

³⁷ See attached Exhibit A for email received from CRP's counsel. In its corrected letter of March 28, CRP argues that 16 TAC § 22.71 does not apply to an appraisal required to be filed by 16 TAC § 24.245(i)(2)(B) because the appraisal is not a pleading as defined under 16 TAC § 22.2. HBUC disagrees. Because the appraiser report is a document to be considered by the Commission under chapter 24, it is subject to chapter 22. 16 TAC § 24.5. Therefore, CRP's report was due to be filed by 3:00 p.m. as required by 16 TAC § 22.71(h).

³⁸ 16 TAC § 22.71(h) provides: "[a]ll documents shall be filed by 3:00 p.m. on the date due, unless otherwise ordered by the presiding officer."

³⁹ CRP's Brief at 2.

⁴⁰ *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Project No. 50644, Second Order Suspending Rules (Jul. 16, 2020).

required to file by 3:00 p.m., and it filed after that deadline. A filing received after 3:00 p.m. is deemed filed the next day. Thus, under the Commission's rules, CRP's report was also untimely filed on March 26.

CRP's tardiness was not only raised by HBUC, but also highlighted by Commission Staff in its response to CRP's Appeal. As addressed in their briefing to the Commission, Commission Staff pointed out⁴¹ that the 3:00 p.m. deadline was no longer suspended for COVID-19 beginning in July 2020:

The Commission modified filing deadlines to operate under the limitations resulting under the state of disaster issued by Governor Abbott on March 13, 2020. In its July 16, 2020 order, the Commission determined that "[t]he abilities of the Commission and regulated entities to operate under the limitations resulting under this state of disaster and to meet the filing deadlines has improved and suspension of filing deadlines [was] no longer required."

As supported by the second order, the Commission reinstated the 3:00 p.m. filing deadline before either appraisal report was filed. Consequently, both CRP's and Hornsby Bend's appraisal reports were filed on the 71st day after the Commission's order granting CRP's petition for streamlined expedited release.

Despite CRP's untimely filing, HBUC supported an extension or exception for CRP's report as well. In its Appeal, CRP saw no reason to confess to its own late filing or provide "good cause" for an extension of time. Instead, CRP focused its arguments to the Commission purely on implementing a procedural "gotcha" on HBUC and ignoring the fact that 16 TAC § 24.245(i) is silent regarding a situation in which both parties failed to file within 70 days.

More importantly, the Commission should recognize that while the facts in this case establish that both parties were untimely, both parties intended to meet the deadlines outlined in the TWC and the Commission's Rules and move this proceeding into the next stage of hiring a third appraiser to determine the final compensation amount. The untimely filing of both CRP's report and HBUC's appraisal did not affect the path this proceeding was on. Rather, the only

⁴¹ See Commission Staff's Corrected Response to Colorado River Project, LLC's Appeal of Order No. 10 (Apr. 22, 2021).

disruption thus far has come from CRP and its demand to impose the severe consequences contained in 16 TAC § 24.245(i).

D. The Commission’s Order Amounts to Impermissible Death Penalty Sanctions, Which Denies HBUC Due Process.

The effect of the Commission’s Order granting the Appeal is that HBUC’s appraisal is excluded from the evidentiary record and the amount of compensation to be paid is deemed by the Commission to be zero. Such a result is tantamount to a “death penalty” sanction for missing a directory deadline by one day, as the Commission’s decision effectively adjudicates the dispute over the amount of compensation owed to HBUC under TWC § 13.2541(i).⁴²

Death penalty sanctions are reserved only for exceptional cases wherein it is apparent that no lesser sanction would promote compliance with the rules. Texas courts look at the following factors when determining whether death penalty sanctions, such as the Commission’s order, are appropriate:⁴³

- 1) There must be a direct relationship between the conduct and the sanction;
- 2) The sanction may only be as severe as necessary to promote compliance;
- 3) To uphold death penalty sanctions, there must be a showing that a lesser sanction was previously imposed and did not resolve the issue; and
- 4) In egregious cases of misconduct, a court is not required to attempt lesser sanctions before imposing death penalty sanctions, “as long as the record reflects that the court considered lesser sanctions and found the party’s conduct would not be deterred by lesser sanctions.”

This death penalty sanction is the only sanction ever imposed against HBUC in this proceeding. Death penalty sanctions are only appropriate when a “party’s conduct justify[es] a presumption that its claims or defenses lack merit.”⁴⁴ HBUC’s filing of its appraiser report less than 24 hours after the deadline, with no prior history of late filings, does not create any inference

⁴² See Tex. R. Civ. P. 215.2(b)(4) (death penalty sanctions include an “order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.”).

⁴³ See *Cire v Cummings*, 134 S.W.3d 835, 839–41 (Tex. 2004).

⁴⁴ See *TransAmerician Nat Gas Corp. v Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991).

that the appraisal report lacks merit or that HBUC's claim for compensation under the statute is meritless, nor did CRP or the Commission itself identify such an inference.

Accordingly, the Commission's Order precluding the consideration of HBUC's appraisal report and adjudicating the issue of compensation is an improper death penalty sanction, which should be reversed by the Commission.

E. The Commission's Order Violates HBUC's Due Process Rights.

The Commission's Order granting the Appeal violates HBUC's rights under the due course of law provision of the Texas Constitution. Under TWC § 13.2541(i), HBUC had a constitutionally-protected property right to compensation valued somewhere between \$10,000 and \$52,757,216.

To have a constitutionally-protected property interest under the Texas Constitution's due-course clause, a person must have a "legitimate claim of entitlement rather than a mere unilateral expectation."⁴⁵ The text of TWC § 13.2541(i) creates an entitlement to compensation, as the text states:

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.

The statutory language requires the Commission to hire a third appraiser who must then make a determination of compensation within 100 days. The statute further creates a specific entitlement to compensation valued between \$10,000 and \$52,757,216.

Moreover, due process bars merits-preclusive sanctions, such as those imposed by the Commission's Order, "[a]bsent flagrant bad faith or callous disregard for the rules."⁴⁶ HBUC's 19-hour delay in submission of its appraisal report, which its attorney has acknowledged was an

⁴⁵ *Tex. Dep't of Motor Vehicles v Fry Auto Servs*, 584 S.W.3d 138 (Tex. App.—Austin 2018, no pet.).

⁴⁶ See *Wheeler v Green*, 157 S.W.3d 439, 443 (Tex. 2005) (recognizing that the prohibition on merit-preclusive sanctions under the due process clause have been applied to depositions, interrogatories, requests for production and requests for disclosure.).

unintentional mistake, cannot be said to have been done in “flagrant bad faith” or with “callous disregard.” The Texas Supreme Court has expressed that “[c]onstitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults.”⁴⁷ The Commission’s Order, unless reversed, has the effect of disposing of the case on procedural grounds, rather than determining the issue of compensation on its merits as is required by the statute. This merits-preclusive result violates HBUC’s due process rights.

F. The Commission’s Order Constitutes an Impermissible Regulatory Taking.

The Commission’s Order constitutes a regulatory taking of property in violation of the Texas Constitution and U.S. Constitution.

A regulatory taking occurs when: 1) the plaintiff has a vested property right; 2) the government intentionally performed certain acts; and 3) the acts proximately caused the regulatory taking, and the regulation either results in physical invasion, denies all economic benefit to the property, is a land-use exaction, or unreasonably interferes with plaintiff’s use and employment.⁴⁸

HBUC had a vested property right in compensation under TWC § 13.2541(i) at the time of the alleged taking, and the Commission’s Order was an intentional act. Both Chairman Lake and Commissioner McAdams acknowledged that their ruling on the one-day extension would have significant consequences for HBUC and its ability to recover under TWC § 13.2541(i) before ultimately granting the Appeal and reversing such extension. Finally, the Commission’s May 6, 2021 ruling proximately caused the regulatory taking of the compensation owed to HBUC under TWC § 13.2541(i). The Commission’s Order precluded HBUC’s reasonable investment-backed expectations under the TWC.

III. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, HBUC respectfully requests that the Commission grant Reconsideration on CRP’s Appeal of Order No. 10 described herein, and upon such reconsideration adopt an Order that sustains and approves of Order No. 10. HBUC further requests any and all other relief to which it is justly entitled.

⁴⁷ See *Marino v King*, 355 S.W.3d 629, 634 (Tex. 2011).

⁴⁸ See *Hearts Bluff Game Ranch, Inc v State*, 381 S.W.3d 468, 477–78 & no. 20 (Tex. 2012).

Respectfully submitted,

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**ATTORNEYS FOR SWWC UTILITIES, INC.
DBA 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 May 14, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Lambeth Townsend

LAMBETH TOWNSEND

EXHIBIT A

DOCKET NO. 51166

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

AFFIDAVIT OF WILLIAM A. FAULK, III
IN SUPPORT OF MOTION FOR EXCEPTION OR EXTENSION OF TIME

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

On this date, William A. Faulk, III, personally appeared before me, the undersigned Notary Public, and after being duly sworn stated the following under oath:

1. My name is William A. Faulk, III. I am an attorney at Lloyd Gosselink Rochelle & Townsend, P.C. in Austin, Texas. I am one of the attorneys at the firm representing SWWC Utilities, Inc. DBA Hornsby Bend Utility Company, Inc. (HBUC) in the above-entitled matter.
2. In this case, the Administrative Law Judge (ALJ) issued Order Nos. 6 and 7, which placed the deadline for the parties to file their appraiser reports “Within 70 days after the Commission approves expedited release.” It was, therefore, left to the parties to calculate the due date.
3. I was responsible for calculating and calendaring the 70-day deadline for HBUC to file its appraiser report with the Commission. I looked at Section 22.4(a), the Commission’s rule governing counting days for the computation of time. The Rule directs that “the period shall begin on the day after the act, event, or default in question.” Because the “day after” the Order was January 15, I put that day into a date-calculation program as the starting date. The

program identified March 26 as the due date. HBUC filed its appraiser report with the Commission before 3:00 pm on March 26, 2021.

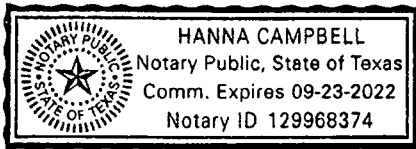
4. On the morning of March 26, I saw an email from counsel for Petitioner to Lambeth Townsend, sent at 7:06 pm on March 25, 2021, notifying us that Petitioner had electronically filed their evaluation report around 5:00 pm that day. While the Petitioner did file on March 25, the filing after 3:00 pm led me to believe that the Petitioner had calculated March 26 as the deadline as well, as any filings at the Commission are treated as being filed the next day if filed after 3:00 pm.
5. I spoke to counsel for Petitioner at around 9:00 am on March 26 regarding potential confidential material being included in its filing. Counsel for Petitioner asked me when we would be filing our appraiser report and I told him we would be filing it shortly as this was the day I calculated as the due date. During that conversation, counsel for Petitioner raised no objection to the HBUC filing on March 26, but only stated that he would like a copy of the report as soon as possible. Later that day, after HBUC had filed its appraiser report with the Commission, I read a letter the Petitioner's counsel sent to the ALJ, seeking clarification concerning the deadline. That letter was filed at 3:34 pm on March 26, but was not served on our office. I then conferred with my co-counsel and upon reexamination of the deadline determined that my initial calculation was incorrect. That is when we realized that HBUC and the Petitioner both filed their reports after the 3:00 pm deadline on March 25.
6. We immediately drafted a request to the ALJ for a good cause exception to the filing deadline for both parties, pursuant to 16 Tex. Admin. Code §§ 22.5(b) and 24.5. It was electronically transmitted to the Commission and served on all parties on Friday evening, and officially filed by the Commission's Central Records at 9:16 am on Monday, March 29, 2021.
7. It was always my intent and HBUC's intent to timely file the appraiser report consistent with the Commission's rules. I did not act in bad faith, or with conscious indifference. I did not willfully disregard the Commission's rules. The late filing was the result of an accident or mistake. It was an honest miscalculation.

FURTHER, AFFIANT SAYETH NOT.



William A. Faulk, III

SUBSCRIBED AND SWORN TO BEFORE ME on this 4th day of April,
2021, to certify which witness my hand and seal of office.



Notary Public in and for the State of Texas

EXHIBIT B

Docket No. 48397: *Petition of Stoecker Corporation to Amend the City of Cut And Shoot's Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = September 14, 2018
- Notice of Approval = September 21, 2018

Docket No. 48484: *Petition of EQK Bridgeview Plaza, LLC to Amend High Point Water Supply Corporation's Certificate of Convenience and Necessity in Kaufman County by Expedited Release*

- Sixty-day administrative approval = September 24, 2018
- Notice of Approval = September 27, 2018

Docket No. 48587: *Petition of Raymond Martin to Amend High Point Water Supply Corporation's Certificate of Convenience and Necessity in Rockwall County by Expedited Release*

- Sixty-day administrative approval = January 11, 2019
- Notice of Approval = January 22, 2019

Docket No. 48590: *Petition of Dennis Wilkerson, Trustee to Amend the Town of Cut And Shoot's Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = January 7, 2019
- Notice of Approval = January 22, 2019

Docket No. 48603: *Petition of Stoecker Corporation to Amend Town of Cut And Shoot's Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = November 12, 2018
- Notice of Approval = November 29, 2018

Docket No. 48742: *Petition of Tonkawa Farms, L.P. to Amend Pattison Water Supply Corporation's Water Certificate of Convenience and Necessity in Waller County by Expedited Release*

- Sixty-day administrative approval = January 7, 2019
- Notice of Approval = January 22, 2019

Docket No. 48801: *Petition of T.J. Bradshaw Construction, Ltd. to Amend Jonah Special Utility District's Certificates of Convenience and Necessity in Williamson County by Expedited Release*

- Sixty-day administrative approval = January 25, 2019
- Petitioners withdrew Petition = November 8, 2019

Docket No. 48824: *Petition of Tejas Creek, Ltd. to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = February 10, 2019
- Final Order = March 1, 2019
 - In a memorandum dated February 11, 2019, OPDM said: “The need to have Tejas Creek’s petition considered within the 60-day timeline set forth in TWC § 13.254(a-6) serves as good cause to waive the 20-day requirement in 16 Texas Administrative Code (TAC) § 22.35 and have the petition considered at the next regularly scheduled open meeting.” This good cause exception was filed one day after the administrative deadline had already passed.

Docket No. 48935: *Petition of AIRW 2017-7, LP to Amend the City of McKinney’s Certificate of Convenience and Necessity in Collin County by Expedited Release*

- Sixty-day administrative approval = March 5, 2019
- Petitioners withdrew Petition = April 4, 2019
 - On February 25, 2019, Petitioner asked for “motion to continue final action,” essentially asking for an extension of the sixty-day deadline. The Commission did not grant or deny the extension request, but notably did not file its approval within the sixty days, so impliedly, the extension was granted. The motion for extension of time can be found here:
http://interchange.puc.texas.gov/Documents/48935_13_1009293.PDF

Docket No. 49167: *Petition of Julie and Brad Dubros to Amend the City of Cut And Shoot’s Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = June 1, 2019
- Notice of Approval = June 3, 2019
 - However, June 1 was a Saturday, so next business day was June 3.

Docket No. 49168: *Petition of FM Properties to Amend the City of Cut And Shoot’s Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = June 1, 2019
- Notice of Approval = June 3, 2019
 - However, June 1 was a Saturday, so next business day was June 3.

Docket No. 49259: *Application of Presnall Construction, LLC, Gwendolyn Welch Tye, Carolyn Presnall Simpson, Joe A. Presnall Sullivan, and Stephen B. Cox, Trustee to Amend Aqua Texas, Inc.’s Water Certificate of Convenience and Necessity in Chambers County by Expedited Release*

- Sixty-day administrative approval = May 27, 2019
- Notice of Approval = July 26, 2019
 - Commission granted petitioner extension to cure ownership issue and found error in initial filing, so found extension would also allow petitioner time to cure notarized affidavit requirement.

Docket No. 49280: *Petition of Previllege, LLC to Amend HMW Special Utility District's Water Certificate of Convenience and Necessity in Harris County by Expedited Release*

- Sixty-day administrative approval = November 4, 2019
- Final Order = December 13, 2019

Docket No. 49360: *Petition of John Kimbro to Amend Monarch Utilities I, LP's Certificate of Convenience and Necessity in Hays County by Expedited Release*

- Sixty-day administrative approval = July 15, 2019
- Order = September 27, 2019
 - On August 30, 2019, Petitioner filed "Request for Action on Application," stating, "the Commission has not granted the Petition within the time period required by TEXAS WATER CODE § 13.254(a-5)—(a-6) and 16 TEX. ADMIN. CODE § 24.245(1). Therefore, Petitioner respectfully requests that the Commission either act to grant the Petition through its presiding ALJ immediately or schedule this matter for a Commission open meeting no later than September 12, 2019 so that Petitioner's Property is released as requested from Monarch Utilities I, LP's water CCN No. 12983."

Docket No. 49366: *Petition of Frost Bank National Bank, as Trustee of the Freeman Educational Foundation to Amend the City of San Marcos' Water Certificate of Convenience and Necessity in Hays County by Expedited Release*

- Sixty-day administrative approval = November 12, 2019
- Final Order = December 13, 2019

Docket No. 49385: *Petition of Sherry B. Dill to Amend Aqua Water Supply Corporation's Sewer Certificate of Convenience and Necessity in Bastrop County by Expedited Release*

- Sixty-day administrative approval = August 26, 2019
- Notice of Approval = August 31, 2019

Docket No. 49433: *Petition of LGI Homes - Texas, LLC, Big Sky LLC, and Mindy L. Koehne (Trustee) to Amend Bolivar Water Supply Corporation's Water Certificate of Convenience and Necessity in Denton County by Expedited Release*

- Sixty-day administrative approval = November 25, 2019
- Final Order = March 2, 2020

Docket No. 49460: *Petition of Tyler Oak Springs Development, LLC to Amend Liberty Utilities (Tall Timber Sewer) Corp.'s Sewer Certificate of Convenience and Necessity in Smith County by Expedited Release*

- Sixty-day administrative approval = July 29, 2019
- Final Order = September 27, 2019

Docket No. 49564: *Petition of Sunbelt Estates, LLC to Amend the City of Elmendorf's Water Certificate of Convenience and Necessity in Bexar and Wilson Counties by Expedited Release*

- Sixty-day administrative approval = August 19, 2019
- Final Order = September 27, 2019

Docket No. 49863: *Petition of Alamo Mission LLC to Amend Rockett Special Utility District's Water Certificate of Convenience and Necessity in Ellis County by Expedited Release*

- Sixty-day administrative approval = January 12, 2021
- Final Order = January 14, 2021

Docket No. 49871: *Petition of the City of Red Oak Industrial Development Corporation to Amend Rockett Special Utility District's Water Certificate of Convenience and Necessity in Dallas and Ellis Counties by Expedited Release*

- Sixty-day administrative approval = January 15, 2021
- Order = March 5, 2021
 - The docket was unabated on November 10, 2020 and the deadline for approval established by the Commission was January 15, 2021, 66 days later. There is no discussion of how the deadline was calculated.

Docket No. 49904: *Petition of Republic Business Center LLC to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Harris County by Expedited Release*

- Sixty-day administrative approval = December 17, 2019
- Notice of Approval = February 7, 2020

Docket No. 49924: *Petition of Maple Heights Development LLC to Amend Porter Municipal District's Sewer Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = February 3, 2020
- Final Order = March 13, 2020

Docket No. 49939: *Petition of Big Sky LLC to Amend Bolivar Water Supply Corporation's Water Certificate of Convenience and Necessity in Denton County by Expedited Release*

- Sixty-day administrative approval = December 23, 2019
- Final Order = March 2, 2020

Docket No. 50077: *Petition of Kristen Calfee Bybee to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = January 13, 2020
- Order = February 27, 2020

Docket No. 50259: *Petition of Clay Road 628 Development, LP to Amend Stanley Lake Municipal Utility District's Certificates of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = April 20, 2020
- Order = June 12, 2020
 - This is one of four dockets re: Clay Road.

Docket No. 50260: *Petition of Clay Road 628 Development, LP to Amend Simply Aquatic's Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

- Sixty-day administrative approval = March 9, 2020
- Order = June 12, 2020
 - This is one of four dockets re: Clay Road.

Docket No. 50261: *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*

- Sixty-day administrative approval = March 9, 2020
- Order denying SER = April 29, 2020
 - This is one of four dockets re: Clay Road.

Docket No. 50404: *Petition of Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under Agreement of the DD 2014-B Grantor Retained Annuity Trust to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*

- Sixty-day administrative approval = August 11, 2020
- Order = Still not issued

Docket No. 50405: *Petition of The Sanctuary Texas, LLC to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Denton County by Expedited Release*

- Sixty-day administrative approval = September 8, 2020
- Order = October 16, 2020

Docket No. 50495: *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*

- Sixty-day administrative approval = June 15, 2020
- Order = December 17, 2020
 - On July 3, Petitioner filed a "Motion for Entry of Order Granting Administrative Approval."

Docket No. 50581: *Petition of Cole, Prewitt, and Rudisill, LLC to Amend Southern Utilities Company's Certificate of Convenience and Necessity in Smith County by Expedited Release*

- Sixty-day administrative approval = August 3, 2020
- Order = August 13, 2020

Docket No. 50787: *Petition of Tyler Oak Creek Development, LLC to Amend Liberty Utilities (Tall Timber Sewer) Corp.'s Certificate of Convenience and Necessity in Smith County by Expedited Release*

- Sixty-day administrative approval = September 14, 2020
- Order = December 17, 2020

Docket No. 51044: *Petition of FCS Lancaster, Ltd. to Amend Rockett Special Utility District's Certificate of Convenience and Necessity in Dallas County by Expedited Release*

- Sixty-day administrative approval = January 19, 2021

- Order = January 29, 2021

Docket No. 51114: *Petition of Imperial Heights, Ltd. to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Harris County by Expedited Release*

- Sixty-day administrative approval = October 30, 2020
- Order = December 17, 2020

Docket No. 51150: *Petition of DJD Land Partners LLC to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity in Johnson County by Expedited Release*

- Sixty-day administrative approval = November 9, 2020
- Order = December 17, 2020

Docket No. 51158: *Petition of Johnston & Associates, LLP and Frank Carvalho to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity in Johnson County by Streamlined Expedited Release*

- Sixty-day administrative approval = November 30, 2020
- Order = January 29, 2021

Docket No. 51163: *Petition of Olex (United States), Inc., FKA Olex Corporation NV to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Denton County by Expedited Release*

- Sixty-day administrative approval = January 25, 2021
- Order = March 5, 2021

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*

- Sixty-day administrative approval = January 4, 2021
- Order = January 14, 2021

Docket No. 51249: *Petition of Crook Rose, Inc. to Amend Lindale Rural Water Supply Corporation's Certificate of Convenience and Necessity in Smith County by Expedited Release*

- Sixty-day administrative approval = December 7, 2020
- Order = Still not issued
 - Abated, but not until well after administrative deadline passed.

Docket No. 51349: *Petition of David Speer and Kevin Speer to Amend Gulf Coast Waste Disposal Authority's Sewer Certificate of Convenience and Necessity in Chambers County by Expedited Release*

- Sixty-day administrative approval = December 21, 2020
- Order = December 31, 2020

Docket No. 51352: *Petition of Carnegie Development, LLC to Amend James A. Dyche DBA Crest Water Company's Certificate of Convenience and Necessity in Johnson County by Streamlined Expedited Release*

- Sixty-day administrative approval = December 20, 2020
- Order = Still not issued

Docket No. 51355: *Petition of LDG001, LLC to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity in Johnson County by Expedited Release*

- Sixty-day administrative approval = December 22, 2020
- Order = January 29, 2021

Docket No. 51400: *Petition of RCR Hempstead Rail, LP to Amend G&W Water Supply Company's Certificate of Convenience and Necessity in Waller County by Expedited Release*

- Sixty-day administrative approval = March 8, 2021
- Order = Still not issued

Docket No. 51492: *Petition of Denton 114 LP to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Denton County by Expedited Release*

- Sixty-day administrative approval = February 8, 2021
- Order = March 5, 2021