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PETITION OF SWWC UTILITIES, INC.	§	PUBLIC UTILITY COMMISSION
DBA HORNSBY BEND UTILITY	§	
COMPANY, INC. AND CITY OF	§	OF TEXAS
AUSTIN FOR APPROVAL OF	§	
SERVICE AREA CONTRACT UNDER	§	
TEXAS WATER CODE § 13.248 AND	§	
TO AMEND CERTIFICATES OF	§	
CONVENIENCE AND NECESSITY IN	§	
TRAVIS COUNTY	§	

**ORDER NO. 6
MOTION TO DISMISS**

The applicants in this proceeding are SWWC Utilities, Inc. dba Hornsby Bend Utility Company, Inc. and the City of Austin. Both are retail public utilities providing water and sewer service. SWWC holds water certificate of convenience and necessity (CCN) number 111978 and sewer CCN number 20650. Austin holds water CCN number 11322 and sewer CCN number 20636. The applicants seek Commission approval of a collection of agreements between them (which they contend should be treated as a single agreement) under Texas Water Code (TWC) § 13.248 and 16 Texas Administrative Code (TAC) § 24.253.

On September 30, 2021, Commission Staff filed a motion to dismiss, contending that the application should be dismissed under 16 TAC § 22.181(d)(8), for failure to state a claim for which relief can be granted. Both applicants have filed responses to Commission Staff's motion to dismiss.

In reviewing the briefing from the parties, the administrative law judge (ALJ) has formed the opinion that there are additional grounds for dismissal that must be considered. The ALJ would benefit from briefing from the parties on these grounds. Specifically, the ALJ believes the case should be, wholly or in part, dismissed under:

- 16 TAC § 22.181(d)(1) for lack of jurisdiction;
- 16 TAC § 22.181(d)(2) for a moot question or obsolete petition;
- 16 TAC § 22.181(d)(3) for res judicata; and
- 16 TAC § 22.181(d)(4) for collateral estoppel.

The bases for dismissal and the material facts supporting dismissal are summarized in this Order. Under 16 TAC § 22.181(a) and (e), dismissal of a proceeding may be made upon the motion of the ALJ. This Order constitutes such a motion.¹

Over the last 18 years, the applicants have executed the following five agreements that are at issue in this case:

- A Settlement Agreement, dated October 20, 2003 (the Original Agreement);²
- A First Amendment to the Settlement Agreement, dated December 9, 2014;
- A Second Amendment to the Settlement Agreement, dated May 24, 2017;
- A Third Amendment to the Settlement Agreement, executed on an unspecified date in 2020; and
- A Fourth Amendment to the Settlement Agreement, dated June 1, 2021.

A copy of each document is attached to the petition.

In their application, the applicants seek to treat the Original Agreement and the four amendments as a single contract for which they request approval under TWC § 13.248 and 16 TAC § 24.253. For a number of reasons, the ALJ is dubious of the premise that the five agreements can be treated as a single agreement. Rather, the ALJ is of the opinion that each of the five agreements must be treated as a separate contract for purposes of consideration for approval under TWC § 13.248 and 16 TAC § 24.253. Each was separately executed by the parties, each addresses discrete and different topic(s), and each is separate in time from the others by years, or even many years. Finally, as discussed more below, one of the agreements, the Original Agreement, has already been approved by the Texas Commission on Environmental Quality (TCEQ) in 2003.

In 2003, when the Original Agreement was entered into, the Commission did not have regulatory authority over water and sewer utilities. Instead, the TCEQ was the state agency with regulatory authority over water and sewer utilities such as the applicants. At that time, TWC § 13.248 read as follows:

¹ The facts described in this Order are derived from the pleadings of the parties and the attachments thereto.

² The Original Agreement was entered into by SWWC's predecessor in interest.

Sec. 13.248. CONTRACTS VALID AND ENFORCEABLE. Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the *commission* after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.³

At that time, “commission” was defined at TWC § 13.002(5) to mean the Texas Natural Resource Conservation Commission (TNRCC), the predecessor to the TCEQ.⁴ In 2007, the definition was corrected to reference the TCEQ, not the TNRCC.⁵

Responsibility for regulating water and sewer utilities was transferred from the TCEQ to the Commission following the passage of H.B. 1600 in 2013.⁶ The transfer became effective on September 1, 2014.⁷ H.B. 1600 revised TWC § 13.248 by adding only one word—the insertion of “utility” before “commission.”⁸ Thus, the Commission had no jurisdiction to approve service-area contracts under TWC § 13.248 until 11 years after the applicants entered into the Original Agreement.

In 2003, and prior to the execution of the Original Agreement, SWWC⁹ and Austin each had pending before the TCEQ multiple applications to obtain or amend water and sewer CCNs. The applications overlapped in certain areas east of the city. That is, SWWC and Austin were both seeking to expand their certificated service areas, and portions of the certificated service areas they sought overlapped with one another. Each was opposing the other’s applications. In order to resolve this impasse, they entered into the Original Agreement, by which they agreed to divide the disputed area, such that there would be no longer be overlap between them. Consistent with TWC § 13.248, SWWC and Austin designated, in the Original Agreement, the areas and customers that would be served by each of them. In accordance with the terms of the Original Agreement, SWWC and Austin then amended their applications so that the boundaries of the certificated service areas they sought conformed to the terms of the Original Agreement. The TCEQ then granted the

³ TWC § 13.248 (2003) (emphasis added).

⁴ TWC § 13.002(5) (2003).

⁵ TWC § 13.002(5) (2007).

⁶ Acts of May 25, 2013, 83rd Leg., R.S., Ch. 170 (H.B. 1600), § 2.49, eff. September 1, 2014.

⁷ *Id.*, at § 2.96(a)(1).

⁸ *Id.*, at § 2.49.

⁹ Actually, it was SWWC’s predecessor in interest that had pending applications. However, for ease of reading, the ALJ will simply refer to SWWC.

applicants' pending applications, using the maps approved in the Original Agreement.¹⁰ Stated differently, and using the terminology from TWC § 13.248, the TCEQ “incorporated into the appropriate areas of public convenience and necessity” the “areas to be served and customers to be served” as designated by SWWC and Austin in the Original Agreement.

In their petition, the applicants acknowledge that “the TCEQ approved the [Original Agreement]” and “incorporated the Applicants’ service area designation into their respective CCN service territories.”¹¹ The applicants now ask the Commission to “approve and enforce” the Original Agreement and the four amendments “as a follow up to . . . TCEQ approval in 2003.”¹²

Based on the foregoing, the ALJ is of the opinion that any attempt to approve, under TWC § 13.248 and 16 TAC § 24.253, the Original Agreement should be dismissed under:

- 16 TAC § 22.181(d)(1) for lack of jurisdiction;
- 16 TAC § 22.181(d)(2) for a moot question or obsolete petition;
- 16 TAC § 22.181(d)(3) for res judicata; and
- 16 TAC § 22.181(d)(4) for collateral estoppel.

Any response to this motion to dismiss is due within 20 days of receipt of the motion.

¹⁰ *In the Matter of the Applications of the City of Austin to Obtain a Water [CCN]. . . and a Sewer [CCN]. . . in Hays, Travis, and Williamson Counties, Texas and In the Matter of the Applications of Hornsby Bend Utility Company, Inc. to Amend CCN Nos. 11978 and 20650 . . .*, TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR, 2002-0756-UCR, and 2002-1197-UCR, Order (Nov. 16, 2004).

¹¹ Application at 2.

¹² Application at 1.

Signed at Austin, Texas the 5th day of November 2021.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE