



Filing Receipt

Received - 2021-11-23 01:54:46 PM

Control Number - 52380

ItemNumber - 15

PUC DOCKET NO. 52380

PETITION BY SWWC UTILITIES, INC.	§	BEFORE THE PUBLIC UTILITY
D/B/A HORNSBY BEND UTILITY	§	
COMPANY, INC. AND CITY OF	§	COMMISSION OF TEXAS
AUSTIN, TEXAS, FOR TEXAS WATER	§	
CODE § 13.248 APPROVAL AND	§	
ENFORCEMENT OF A CONTRACT	§	
AND ITS AMENDMENTS	§	
DESIGNATING WATER AND	§	
WASTEWATER SERVICE AREAS IN	§	
TRAVIS COUNTY, TEXAS	§	

**SWWC UTILITIES, INC. D/B/A HORNSBY BEND UTILITY COMPANY, INC.’S
RESPONSE TO ORDER NO. 5 REQUIRING CLARIFICATION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, SWWC Utilities, Inc. d/b/a Hornsby Bend Utility Company, Inc. (HBUC) and hereby files this Response to Order No. 5 Requiring Clarification (Order) in this matter initiated by HBUC and the City of Austin (City) (collectively, Applicants). In support, HBUC respectfully shows the following.

I. INTRODUCTION

The Order sets forth a series of questions for which the presiding Administrative Law Judge (ALJ) has required Applicants to answer for clarification about their Fourth Amendment to the Settlement Agreement, dated June 1, 2021 (the Fourth Amendment).¹ HBUC responds as follows.

II. REQUIRED CLARIFICATIONS

HBUC hereby provides the clarifications Order No. 5 requests in the order requested.

A. Third Amendment Clarifications.

The ALJ is correct that Exhibit A attached to the September 20, 2020 Third Amendment to the Settlement Agreement (Third Amendment) was the governing map for the Settlement

¹ Order No. 5 Requiring Clarification (Nov. 5, 2021); Application at Exhibit 6 – Fourth Amendment to the 13.248 Agreement (Jun. 1, 2021).

Agreement, dated October 20, 2003 (the Original Agreement), and subsequent amendments prior to the Fourth Amendment.² However, the current certificated boundaries of HBUC do not match the boundaries shown in Exhibit A attached to the Third Amendment because portions of HBUC's water and sewer certificate of convenience and necessity (CCN) areas were removed earlier this year in Docket No. 51166.³ Further, to understand what is meant by the "transfer area" and "AELP" areas ("AELP" stands for Austin Estates Limited Partnership, a landowner at the time of the Original Agreement), one must review the Original Agreement because the map that includes this nomenclature was initially developed for use with certain terms therein.⁴ For example, HBUC agreed the City could provide wastewater service in those areas if it paid compensation to HBUC on a per lot connection basis.⁵ In 2020, that map served as the basis to show the relocated highway in Exhibit A to the Third Amendment without further change.⁶ The areas labeled "transfer area" and "AELP" shown in Exhibit A to the Third Amendment are areas within the City's extraterritorial jurisdiction (ETJ) identified in the Original Agreement for the purposes described therein and both are located within the City's sewer CCN No. 20636 today. Yet, this legacy nomenclature has no bearing on the service area designations effected by the Fourth Amendment.

B. Fourth Amendment Clarifications.

The ALJ is correct that the governing maps for the Fourth Amendment are Exhibits A-1 and A-2.⁷ There is no difference between Exhibit A to the Third Amendment and Exhibit A-1 to

² Application at Exhibit 5 – Third Amendment to the 13.248 Agreement (Sep. 20, 2020).

³ *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*, Docket No. 51116, Order (Jan. 14, 2021).

⁴ Application (Aug. 2, 2021) (Application) at Exhibit 1 - Order in TCEQ Docket Nos, 2002-189-UCR, 2000-0112-UCR, 2002-0756-UCR, and 2002-1197-UCR (Nov. 16, 2004), Exhibit 2 - Settlement Agreement between City of Austin and Hornsby Bend Utility Company, Inc. (Oct. 20, 2003) (13.248 Agreement).

⁵ *Id.*

⁶ Application at Exhibit 5 – Third Amendment to the 13.248 Agreement (Sep. 20, 2020).

⁷ Application at Exhibit 6 – Fourth Amendment to the 13.248 Agreement (Jun. 1, 2021).

the Fourth Amendment. As with the Original Agreement, Exhibit A-1's relevance is described where referenced in the Fourth Amendment. Significantly, however, Exhibit A-2 to the Fourth Amendment is the map that depicts the currently agreed upon service area designation changes between HBUC and the City.

Exhibit A-1 to the Fourth Amendment neither reflects changes to HBUC's CCN resulting from Docket No. 51166 nor HBUC's request to add some of that territory back to HBUC's CCN in Docket No. 52492 with the landowner's support.⁸ Exhibit A-2 to the Fourth Amendment provides clarifications regarding what areas the City and HBUC will serve, respectively, as well as the location of 714 acres of land (*i.e.*, the "714 Acre Area") owned by Colorado River Project, LLC (CRP) within the City's ETJ (CRP Land). The CRP Land is area HBUC and the City agreed could be recertified to HBUC without objection from the City. HBUC's application in Docket No. 52492 is to put back part of the decertified CRP Land with CRP's support.

In response to the question about the parties' application statement that they do not want their CCN boundaries adjusted in this proceeding, HBUC clarifies as follows. Ideally, the Applicants could have the portion of CRP Land that is the subject of Docket No. 52492 put back in HBUC's CCNs in this proceeding via City CCN transfers to HBUC. Applicants cannot do that because the land was removed from HBUC's CCNs in Docket No. 51166 at CRP's request and is not included within the City's CCNs. Therefore, based on the Applicants' understanding of the Texas Water Code (TWC), the Applicants filed two separate but related applications: (1) the TWC § 13.248 agreement application pending in this Docket No. 52380; and (2) a CCN amendment application in Docket No. 52492 which will effectively transfer existing City rights to serve an

⁸ *Application of SWWC Utilities, Inc. dba Hornsby Bend Utility Company, Inc. to Amend its Certificates of Convenience and Necessity in Travis County*, Docket No. 52492 (Sept. 1, 2021) (CCN Amendment Application); *see also* CCN Amendment Application, Order No. 1 (Sept. 2, 2021) and Order No. 2, Finding Application Administratively Complete, Requiring Notice, and Establishing Procedural Schedule (Oct. 5, 2021).

uncertificated portion of the CRP Land to HBUC's water and sewer CCNs as agreed in the Fourth Amendment and per Exhibit A-2 with the landowner's support. Applicants are amenable to consolidating the two dockets if the presiding ALJ or Commission deems that appropriate, but Applicants did not initially file with that approach in mind.

Applicants' initial approach is completely "reconcilable with Fourth Amendment Art. 9, paragraph 2, which states that, the parties will cooperate 'to have the water and wastewater service areas depicted in Exhibit A-1 and Exhibit A-2 . . . approved as each Party's respective designated customer service areas and incorporated into each Party's respective service areas as appropriate.'"⁹ Without the Fourth Amendment and its accompanying map Exhibits A-1 and A-2, the City could serve wherever it wants within its ETJ or elsewhere outside the City's CCNs so long as no other utility, including HBUC, holds CCN service area there.¹⁰ Similarly, HBUC could serve uncertificated areas within ¼ mile of its CCNs the City might otherwise want to serve or apply to certificate such areas drawing a City objection.¹¹ The Fourth Amendment, inclusive of the Original Agreement, amendments, and Fourth Amendment exhibits, restrains both the City and HBUC from serving outside their respective agreed upon geographic service areas irrespective of their respective CCN service areas and is intended to more broadly resolve future disputes between HBUC and the City regarding their service territories. Exhibits A-1 and A-2 to the Fourth Amendment functionally serve that agreement's purposes, but those map exhibits do not reflect the proposed recertification of CCN service areas to HBUC requested in Docket No. 52492. Rather, the Fourth Amendment restrains the City from protesting that application since it is within the 714 Acre Area identified in Exhibit A-2. Docket No. 52492 is an example of how HBUC and

⁹ Order No. 5 Requiring Clarification (Nov. 5, 2021); Application at Exhibit 6 – Fourth Amendment to the 13.248 Agreement at 2 (Jun. 1, 2021).

¹⁰ See TWC § 13.242(a); see also Application at Exhibit 6 – Fourth Amendment to the 13.248 Agreement (Jun. 1, 2021).

¹¹ See TWC §§ 13.241-246.

the City plan to proceed with CCN applications as “appropriate,” but does not represent all possible CCN applications per designated areas under the Fourth Amendment which the parties have agreed not to challenge.

The Order also asks how Exhibits A-1 and A-2 are reconcilable and how they can both reflect water and wastewater service areas of the Applicants.¹² The term “service area” as used in the Original Agreement and its amendments is not synonymous with CCN service areas. As discussed above, the City may serve outside its CCNs and the same holds true with more limitation for HBUC. Exhibits A-1 and A-2 designate agreed upon service areas as described in the Fourth Amendment, but do not reflect specific CCN amendments such as the CRP CCN release which occurred in Docket No. 51166 or HBUC’s requested CCN addition in Docket No. 52492. The service area designation agreements reflected in Exhibits A-1 and A-2 hold true for both water and wastewater services in the designated areas.

The Order asks if the following statement is correct: “The applicants appear to envision that, within SWWC’s [d/b/a HBUC] certificated service areas, there will be areas that SWWC cannot serve and Austin can serve and that will be designated as ‘City Service Area.’”¹³ Further, “If so, what is the legal authority for such an arrangement and how is it consistent with TWC Ch. 13?”¹⁴ The statement is not correct. Consistent with the Applicants’ Original Agreement as amended through the Fourth Amendment, the TWC, and Commission rules, HBUC will have exclusive rights to serve customers within HBUC’s CCNs.¹⁵ However, the “City Service Area” is not part of HBUC’s CCN service areas as it was included in the area released at CRP’s request in Docket No. 51166. The parties’ service area designation agreements resolve disputes regarding

¹² Order No. 5 Requiring Clarification at 2 (Nov. 5, 2021).

¹³ Order No. 5 Requiring Clarification at 2-3 (Nov. 5, 2021).

¹⁴ *Id.*

¹⁵ See TWC §§ 13.241-.246; 16 TAC §§ 24.225-24.235.

areas outside the CCNs of the City and HBUC that could be served or brought into the other's CCNs in the future as authorized by TWC § 13.248.

Finally, the Order states, "In its response to the pending motion to dismiss, Austin contends that the application does not seek to 'amend either party's existing certificate rights or service area boundaries'" and asks, "If the Commission approves the Fourth Amendment – such that, within SWWC's [HBUC's] certificated service areas, there will be areas that SWWC cannot serve and Austin can serve and that will be designated as 'City Service Area' – would not existing certificate rights and service area boundaries be affected?"¹⁶ The answer is no. As discussed herein, the "City Service Area" is not part of SWWC's CCN areas and is within the area removed at CRP's request in Docket No. 51166.

C. Summary of the Applicants' Request.

In this Docket No. 52380, HBUC and the City request the Commission approve their Original Agreement as amended by their First, Second, Third, and Fourth Amendments to the Original Agreement, pursuant to TWC § 13.248 (the "13.248 Agreement"). Separately, pursuant to the 13.248 Agreement, HBUC requests a portion of the CRP Land be included in HBUC's water and sewer CCNs in Docket No. 52492. The CRP Land is not currently within HBUC's CCNs. If the 13.248 Agreement did not exist, the City may have chosen to contest that application. Instead, that potential dispute is resolved by the 13.248 Agreement. Nevertheless, HBUC and the City are amenable to consolidating Docket No. 52492 with this docket if the ALJ and Commission deem it appropriate.

To assist the ALJ and Commission, HBUC has prepared the attached CCN chronology summary.¹⁷ This document shows the progression of HBUC's water and sewer CCNs and may

¹⁶ Order No. 5 Requiring Clarification at 3 (Nov. 5, 2021).

¹⁷ HBUC CCN Chronology Summary, **Attachment A**.

be viewed in comparison to Exhibits A-1 and A-2 to the Fourth Amendment. This progression demonstrates how the service area designations reflected in the 13.248 Agreement are not equivalent to HBUC's CCN service areas. HBUC's request in Docket No. 52492 will make them more in line, but the 13.248 Agreement applies more broadly to preclude future service area disputes.

III. CONCLUSION

HBUC respectfully requests the Commission deny Commission Staff's Motion to Dismiss and process the Application under TWC § 13.248 and 16 TAC § 24.253, or just TWC § 13.248 if deemed appropriate, with respect to the 13.248 Agreement comprised of the Original Agreement as amended by Applicants' First, Second, Third, and Fourth Amendments. HBUC further requests the Commission approve and enforce same. Alternatively, HBUC requests the Commission consolidate this Docket No. 52380 with Docket No. 52492 and proceed to approve and enforce the Applicants' 13.248 Agreement as amended together with the CCN amendment request pending in Docket No. 52492. HBUC requests all other and further relief to which it is justly entitled.

Respectfully submitted,

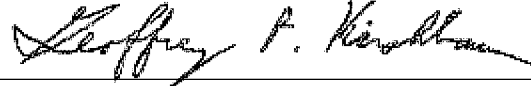
By: 

Geoffrey P. Kirshbaum
State Bar No. 24029665
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
gkirshbaum@terriwwaldrop.com

**ATTORNEYS FOR SWWC UTILITIES, INC.
D/B/A HORNSBY BEND UTILITY COMPANY,
INC.**

CERTIFICATE OF SERVICE

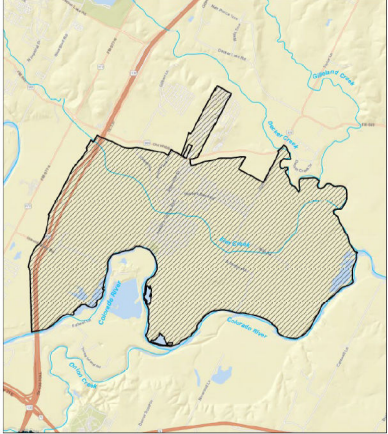
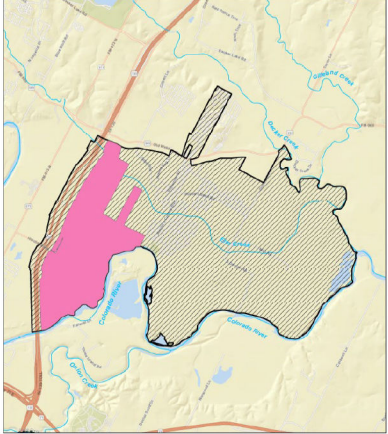
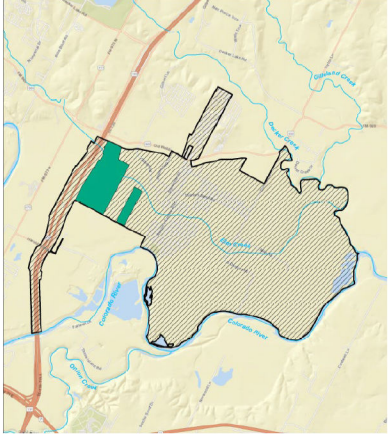
I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on November 23, 2021, in accordance with the Orders Suspending Rules issued in Project No. 50664.



Geoffrey P. Kirshbaum

HBUC CCN CHRONOLOGY SUMMARY:

- 2003 – Settlement Agreement (approved by TCEQ)
 - HBUC & City of Austin agree to respective CCN boundaries
- 2014 – Amendment 1 – no effect on CCN boundaries
- 2017 – Amendment 2 – no effect on CCN boundaries
- 2020 – Amendment 3 – no effect on CCN boundaries ***See Maps 1W & 1S***
- May 2021 – CRP opted out of portion of HBUC CCN (Docket No. 51166) ***See Maps 2W & 2S***
 - CRP opt-out land becomes part of City of Austin’s ETJ
- June 2021 – Amendment 4 ***See Maps 3W & 3S***
 - Portion of CRP opt-out land to be transferred from City’s ETJ back to HBUC’s CCN area

<p>Requested in Docket No. 52492Map 1W – HBUC Water CCN 11978 @ 2020 as of 3rd Amendment</p>	<p>Map 2W – HBUC Water CCN 11978 @ May 2021 with CRP opt-out area (pink) removed</p>	<p>Map 3W – HBUC Water CCN 11978 @ June 2021 with requested CCN addition (green) pursuant to 4th Amendment</p>
		
<p>Map 1S – HBUC Sewer CCN 20650 @ 2020 as of 3rd Amendment</p>	<p>Map 2S – HBUC Sewer CCN 20650 @ May 2021 with CRP opt-out area (pink) removed</p>	<p>Map 3S – HBUC Sewer CCN 20650 @ June 2021 with requested CCN addition (green) pursuant to 4th Amendment</p>
