



Filing Receipt

Received - 2021-11-23 01:58:17 PM

Control Number - 52380

ItemNumber - 16

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. 6 MOTION TO DISMISS**

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. 6 Motion to Dismiss (Motion) in this matter initiated by HBUC and the City of Austin (City) (collectively, Applicants).¹ In support, HBUC respectfully shows the following.

I. INTRODUCTION

On November 5, 2021, the presiding Administrative Law Judge (ALJ) issued the Motion and provided 20 days for responses.² Therefore, this response is timely filed. The Motion posits that the Applicants’ request for approval of the Settlement Agreement, dated October 20, 2003, (Original Agreement) should be dismissed because of the prior Texas Commission on Environmental Quality (TCEQ) approval of same.³ Applicants maintain that the Original Agreement and its amendments should be approved together as a single comprehensive service area designation agreement as authorized by Texas Water Code § 13.248.

¹ Order No. 6 Motion to Dismiss (Nov. 5, 2021).

² *Id.*

³ *Id.*

II. ARGUMENTS AND AUTHORITIES

Each Original Agreement amendment indicates intent to build on the Original Agreement and previous amendments, but otherwise leave them “in full force and effect” unless there is a conflict between the latest amendment and the prior Original Agreement as amended.⁴ Thus, the Original Agreement and its amendments constitute the entire service area designation agreement as it exists today between the Applicants. Applicants do not seek Commission review and approval of the Original Agreement individually anew since, as the Motion points out, TCEQ already approved the Original Agreement. The Original Agreement evolved via the First, Second, and Third Amendments which did not require Commission approval (or TCEQ approval) because they did not alter the service area designations agreed upon in the Original Agreement.⁵ Conversely, the Fourth Amendment does just that.⁶ Thus, Applicants view their service area designation agreement today as the Original Agreement as amended by all four later amendments and would like Commission approval of all together as a single agreement.

The presiding ALJ indicates he is “dubious of the premise that the five agreements can be treated as a single agreement” and submits that “each must be treated as a separate contract for purposes of consideration for approval under TWC § 13.248 and 16 TAC § 24.253.”⁷ Respectfully, that mischaracterizes Applicants’ agreement which is now a single comprehensive amended agreement. It is commonplace for contracts to be amended and then treated comprehensively as the resulting contract for enforcement purposes.⁸ Moreover, nothing in TWC

⁴ Application at Exhibit 3 – First Amendment to the 13.248 Agreement at 3 (Dec. 4, 2014), Exhibit 4 – Second Amendment to the 13.248 Agreement at 2-3 (May 24, 2017), Exhibit 5 – Third Amendment to the 13.248 Agreement at 2 (Sep. 20, 2020), and Exhibit 6 – Fourth Amendment to the 13.248 Agreement at 4 (Jun 1, 2021).

⁵ TWC § 13.248 (stating that “[c]ontracts between retail public utilities *designating areas to be served and customers to be served* by those retail public utilities, when approved . . . are valid enforceable and are incorporated into the appropriate areas of public convenience and necessity.”) (emphasis added).

⁶ *Id.*

⁷ Order No. 6 Motion to Dismiss at 2 (Nov. 5, 2021).

⁸ See, e.g., *Luftak v. Gainsborough*, No. 1-15-1068-CV, 2017 LEXIS 4554, 2017 WL 2180716, at *7-11 (Tex. App.—

§ 13.248 or 16 TAC § 24.253 specifies the format of service area designation agreements under those provisions, and it is permissible to establish such an agreement by either a single or multiple documents.⁹ There is certainly nothing in those provisions or other applicable law that should lead to dismissal of the Original Agreement, which is merely a part of the application filed, for lack of jurisdiction, a moot or obsolete question or obsolete petition, res judicata, or collateral estoppel.¹⁰ The Original Agreement as amended should be considered together today as requested.

III. CONCLUSION

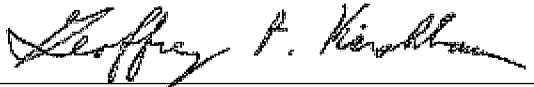
HBUC respectfully requests that the Order No. 6 Motion to Dismiss, along with Commission Staff's Motion to Dismiss, be denied and continued processing of the Application under TWC § 13.248 and 16 TAC § 24.253, or just TWC § 13.248 if deemed appropriate, with respect to the 13.248 Agreement and as amended 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.

Houston [1st Dist.] May 18, 2017, no pet.) (memorandum opinion) (analyzing "as is" clause in home purchase contract and amendment adding additional terms together in deciding rulings on fraud and other claims).

⁹ TWC § 13.248; 16 TAC § 24.253(a).

¹⁰ Order No. 6 Motion to Dismiss at 4 (Nov. 5, 2021).

Respectfully submitted,

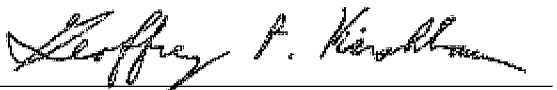
By: 

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