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Public Utility Commission of Texas

TO: Stephen Journey
Commission Counsel

All Parties of Record

A handwritten signature in blue ink, appearing to be "HB".

FROM: Hunter Burkhalter
Chief Administrative Law Judge

RE: **Docket No. 52380** – *Petition of SWWC Utilities, Inc. dba Hornsby Bend Utility Company, Inc. and City of Austin for Approval of Service Area Contract Under Texas Water Code § 13.248 and to Amend Certificates of Convenience and Necessity in Travis County*

DATE: July 8, 2022

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this memo, the parties to this proceeding are being served with the PFD.

Please place this docket on an open meeting agenda for the Commissioners' consideration. Please notify me and the parties of the open meeting date, as well as the deadline for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

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DOCKET NO. 52380

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 §

PROPOSAL FOR DECISION

The petitioners 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 11978 and sewer CCN number 20650. Austin holds water CCN number 11322 and sewer CCN number 20636. The petitioners seek Commission approval and enforcement of a collection of agreements between them under Texas Water Code (TWC) § 13.248 and 16 Texas Administrative Code (TAC) § 24.253. In this Proposal for Decision (PFD), the administrative law judge (ALJ) recommends that the Commission dismiss the petition, under 16 TAC § 22.181(d)(8), for failure to state a claim for which relief can be granted. The ALJ recommends the dismissal be with prejudice.

I. Background

SWWC is a corporation. Austin is a municipality. They both operate, maintain, and control in Texas facilities for providing potable water and sewer service for compensation. As such, they are both retail public utilities, as that term is defined in TWC § 13.002(19) and 16 TAC § 24.3(31).

Over the last 18 years, the petitioners have executed the following five agreements:

- A Settlement Agreement, dated October 20, 2003 (the Original Agreement);
- A First Amendment to the Settlement Agreement, dated December 9, 2014 (the First Amendment);
- A Second Amendment to the Settlement Agreement, dated May 24, 2017 (the Second Amendment);

- A Third Amendment to the Settlement Agreement, executed on an unspecified date in 2020 (the Third Amendment); and
- A Fourth Amendment to the Settlement Agreement, dated June 1, 2021 (the Fourth Amendment).

Under TWC § 13.248, a contract between retail public utilities that designates areas to be served and customers to be served by those retail public utilities is, if approved by the Commission, valid and enforceable and incorporated into the applicable CCNs. In this proceeding, the petitioners contend that the Original Agreement and the four amendments should be read together as a single contract designating areas and customers to be served by them and for which they seek approval under TWC § 13.248.

On September 30, 2021, Commission Staff filed a motion to dismiss, contending that the petition fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8). SWWC and Austin each responded in opposition to Commission Staff's motion to dismiss on November 1, 2021.

In Order No. 6 filed on November 5, 2021, the ALJ moved to dismiss, contending that the petition should be dismissed, wholly or in part, 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). SWWC and Austin each responded in opposition to the ALJ's motion to dismiss on November 23, 2021. Commission Staff responded in favor of the ALJ's motion to dismiss on November 30, 2021.

No hearing was held on the motions to dismiss.

II. Discussion and Analysis

The petitioners seek relief under TWC § 13.248 and 16 TAC § 24.253. In Commission parlance, these provisions empower the Commission to approve "service-area contracts" between retail public utilities. The question raised by Commission Staff's motion to dismiss is whether the contracts for which the petitioners seek approval truly constitute service-area contracts under TWC § 13.248 and 16 TAC § 24.253 for which the Commission may grant approval. The statute, TWC § 13.248, reads in its entirety, as follows:

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 utility commission after public

notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.

The Commission's corresponding rule, 16 TAC § 24.253(a), reads as follows:

If approved by the commission after notice and hearing, contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities are valid and enforceable and are incorporated into the corresponding certificates of convenience and necessity (CCNs). This section only applies to the transfer of certificated service area and customers between existing CCN holders. Nothing in this provision negates the requirements of TWC §13.301 to obtain a new CCN and document the transfer of assets and facilities between retail public utilities.

Commission Staff argues that the petition and the underlying agreements do not contemplate the actual transfer of designated areas and customers between SWWC and Austin. Rather, the transfer of certificated service area is being sought by SWWC and Austin in an entirely different matter, Docket No. 52492.¹

For a number of reasons, the ALJ is dubious of the petitioners' assertion that the five agreements should be treated as a single contract for purposes of consideration for approval under TWC § 13.248 and 16 TAC § 24.253. Each agreement was separately executed by the parties, each addresses discrete and different topics, and each is separate in time from the others by years, some by many years. Moreover, as discussed further below, one of the agreements, the Original Agreement, was executed more than a decade before the Commission was given jurisdiction to consider and approve service-area contracts, and the Original Agreement was, arguably, already considered and approved, under TWC § 13.248, by the Texas Commission on Environmental Quality (TCEQ) in 2004. Accordingly, in this PFD, the ALJ analyzes each agreement separately for purposes of the motions to dismiss.

A. The Original Agreement

In 2003, and prior to the execution of the Original Agreement, SWWC and Austin each had pending before the TCEQ multiple applications to obtain or amend water and sewer CCNs.² 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 uncertificated service areas

¹ *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, Notice of Approval (Mar. 25, 2022).

² Hornsby Bend Utility Company, Inc., SWWC's predecessor in interest, had the pending applications. However, for ease of reading, the ALJ will simply refer to SWWC.

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 areas, such that there would no longer be any overlap. 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 CCN applications so that the boundaries of the uncertificated service areas they sought conformed to the terms of the Original Agreement. The TCEQ then granted the petitioners' pending CCN applications, using the maps approved in the Original Agreement.³ Stated differently, the TCEQ incorporated into the respective CCNs the areas to be served and customers to be served as designated by SWWC and Austin in the Original Agreement.

In their petition, the petitioners acknowledge that "the TCEQ approved the [Original Agreement]" and "incorporated the Applicants' service area designations into their respective CCN service territories."⁴ However, the petitioners now ask the Commission to "approve and enforce" the Original Agreement and the four amendments "as a follow up to . . . TCEQ approval in 2003."⁵

For a number of reasons, the ALJ concludes that the petitioners' request for Commission approval of the Original Agreement should be dismissed.

1. Failure to State a Claim for Which Relief Can be Granted

The request for approval of the Original Agreement should be dismissed because it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8). This is because the Original Agreement is not a service-area contract within the scope of TWC § 13.248 and 16 TAC § 24.253. The rule states: "This section only applies to the transfer of certificated service area and customers between existing CCN holders." In other words, the purpose of TWC § 13.248 and 16 TAC § 24.253 is to enable two CCN holders to agree, by contract, to transfer *existing certificated service areas* between them. For example, CCN holder A and CCN holder B may agree to transfer a portion of CCN holder A's certificated service area to CCN holder B's certificated service area, or vice versa. When such an agreement is approved by the Commission,

³ *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).

⁴ Application at 2.

⁵ Application at 1.

TWC § 13.248 explains that the agreed-to changes “are incorporated into the appropriate areas of public convenience and necessity.” Similarly, 16 TAC § 24.253(a) explains that the agreed-to changes “are incorporated into the corresponding [CCNs].”

The Original Agreement is not, however, a service-area agreement because, in it, SWWC and Austin did not agree to allocate between them any of their existing certificated service areas. Indeed, the petitioners admit that all of the agreements at issue in this case “resolve disputes *regarding areas outside the CCNs of the City and [SWWC] that could be served or brought into the other’s CCNs in the future.*”⁶ The Original Agreement designated large areas of eastern Travis County outside of the then-existing CCN boundaries for SWWC and Austin and specified which of those areas SWWC would be entitled to serve, and which of those areas Austin would be entitled to serve. This is simply not the type of agreement for which approval under TWC § 13.248 and 16 TAC § 24.253 is authorized.

The petitioners concede that, in this case, they “do not require any CCN boundary adjustments at this time,” but they “may request CCN adjustments in line with the Settlement Agreement as amended in the future through separate application.”⁷ In other words, the petitioners do not seek approval of the agreements to effectuate CCN boundary changes. Rather, they hope that the Commission will “approve” the agreements “so that the underlying litigation [between them] in Travis County District Court can be fully resolved.”⁸ The purpose of TWC § 13.248 and 16 TAC § 24.253 is not to resolve civil litigation between water and sewer utilities.

As noted above, 16 TAC § 24.253(a) includes the following sentence: “This section only applies to the transfer of certificated service area and customers between existing CCN holders.” The petitioners argue that this language is unenforceable, and therefore should be ignored, because it goes beyond the text of TWC § 13.248.⁹ The ALJ disagrees. The statute must be interpreted in a manner that is in harmony with the remainder of TWC chapter 13. Typically, if a CCN holder wishes to expand the boundaries of its certificated service area, it must prove to the Commission that it satisfies a long list of requirements found in multiple statutes and rules—such as TWC §§ 13.241 and 13.246 and 16 TAC §§ 24.11 and 24.227—in order to ensure that the CCN

⁶ SWWC’s response to Order No. 5 requiring clarification at 5-6 (emphasis added).

⁷ Petition at 4.

⁸ SWWC’s response to Commission Staff’s motion to dismiss at 1.

⁹ See SWWC’s response to Commission Staff’s motion to dismiss at 5-7.

holder has the ability to provide continuous and adequate service to the area it seeks to add.¹⁰ If CCN holders could contract between themselves, under TWC § 13.248, to add to their certificated service areas lands lying outside of either of their CCN boundaries, they could avoid having to prove their ability to provide continuous and adequate service to the new areas. For example, two small CCN holders could simply enter into a “service-area agreement” whereby they agreed between themselves that each could add 10,000 acres to its CCN area.

Because the Original Agreement does not involve the allocation of existing certificated service areas between SWWC and Austin, it is not a service-area contract within the scope of TWC § 13.248 and 16 TAC § 24.253. For this reason, as to the Original Agreement, the petition should be dismissed because it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8).

2. Alternate Grounds for Partial Dismissal

In the event the Commission disagrees with this PFD’s conclusion that the petition should be dismissed for failure to state a claim for which relief can be granted, there are other reasons why at least partial dismissal of the petition is warranted.

a. Lack of Jurisdiction

As to the Original Agreement, the petition should be dismissed for lack of jurisdiction, under 16 TAC § 22.181(d)(1), because the Commission lacks jurisdiction to approve, under TWC § 13.248 and 16 TAC § 24.253, an agreement that was entered into in 2003. In that year, the Commission did not have regulatory authority over retail public utilities. Instead, the TCEQ was the state agency with regulatory authority over such utilities. At that time, TWC § 13.248 read as follows:

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.¹¹

¹⁰ See, e.g., *Application of the City of Galveston to Amend its Certificates of Convenience and Necessity in Galveston County*, Docket No. 52137, Order (May 26, 2022).

¹¹ Act of May 31, 1989, 71st Leg., R.S., ch. 567, § 26 (emphasis added).

At the time, “commission” was defined at TWC § 13.002(5) to mean the Texas Natural Resource Conservation Commission (TNRCC), the predecessor to the TCEQ.¹² In 2007, the definition was revised to reference the TCEQ, not the TNRCC.¹³

Responsibility for regulating water and sewer utilities was transferred from the TCEQ to the Commission following the passage of H.B. 1600 in 2013.¹⁴ The transfer became effective on September 1, 2014.¹⁵ H.B. 1600 revised TWC § 13.248 by adding only one word—the insertion of “utility” before “commission.”¹⁶ Thus, the Commission had no jurisdiction to approve service-area contracts under TWC § 13.248 until 11 years after the petitioners entered into the Original Agreement, and ten years after the TCEQ “approved” the Original Agreement.

b. Moot Question or Obsolete Petition

As to the Original Agreement, the petition should be dismissed under 16 TAC § 22.181(d)(2) because it raises a moot question or is an obsolete petition.

In the petition, the petitioners assert that “the TCEQ approved the [Original Agreement]” and “incorporated the Applicants’ service area designations into their respective CCN service territories.”¹⁷ Technically, it does not appear as though the TCEQ approved the Original Agreement under TWC § 13.248. Rather, after executing the Original Agreement, SWWC and Austin then amended their CCN applications that were then pending before the TCEQ so that the boundaries of the uncertificated service areas they sought in their CCN applications conformed to the terms of the Original Agreement. The TCEQ then granted the petitioners’ pending CCN applications.¹⁸ In other words, the TCEQ did not approve a service-area contract, it approved a collection of CCN applications.

The question of whether the TCEQ approved the Original Agreement or approved the CCN applications need not, however, be resolved. The *effect* of the TCEQ’s action was that the areas

¹² Act of Aug. 1, 1991, 72nd Leg., 1st C.S., ch. 3, § 1.058.

¹³ Act of May 29, 2007, 80th Leg., R.S., ch. 1430, § 2.05.

¹⁴ Acts of May 14, 2013, 83rd Leg., R.S., ch. 170, § 2.49.

¹⁵ *Id.*, at § 2.96(a)(1).

¹⁶ *Id.*, at § 2.49.

¹⁷ Application at 2.

¹⁸ *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).

designated in the Original Agreement were, in 2004, incorporated into the CCNs of SWWC and Austin. In other words, as to the Original Agreement, there are now no service-area changes for the Commission to act on. As such, as to the Original Agreement, the petition should be dismissed as moot and obsolete.

B. The First, Second, and Third Amendments

The First Amendment, Second Amendment, and Third Amendment are not service-area contracts because, as the petitioners admit, those amendments do “not alter any of the agreed designated service areas” between SWWC and Austin.¹⁹ That is, none of these amendments has anything to do with “designating areas to be served and customers to be served” between SWWC and Austin, either inside of, or outside of, the utilities’ CCN boundaries. As such, there is no service-area contract for the Commission to consider or approve under TWC § 13.248 and 16 TAC § 24.253. Thus, as to those amendments, the petition should be dismissed because it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8)

C. The Fourth Amendment

In order to understand the Fourth Amendment, it is necessary to know some background. On January 14, 2021, the Commission, in Docket No. 51166,²⁰ granted the petition of a large landowner, Colorado River Project, LLC (CRP) for streamlined expedited release, and released CRP’s 1,370-acre tract of land from SWWC’s water and sewer CCNs. As explained in the Fourth Amendment, CRP is affiliated with Tesla, Inc., and the 1,370-acre tract is the location of the new Tesla factory in east Travis County. Shortly after streamlined expedited release was granted, SWWC filed a lawsuit against Austin in a Travis County district court, attempting to enjoin Austin from providing water or sewer service to the CRP tract. That litigation apparently remains pending.

As explained by the petitioners, the Fourth Amendment “revises the service area designations and customers to be served within those areas in part when compared to the [Original Agreement].”²¹ Specifically, “the fourth amendment contemplates incorporating part of the [SWWC] areas released in Docket No. 51166 back into [SWWC] CCN Nos. 11978 and 20650. . . .

¹⁹ Petition at 2.

²⁰ *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. 51166, Order (Jan. 14, 2021).

²¹ Petition at 2.

No transfer from [Austin] for those areas can occur here because those areas are not within [Austin's] CCNs.”²² In other words, like the Original Agreement, the Fourth Agreement does not allocate existing certificated service areas between SWWC and Austin. Rather, it attempts to allocate between them areas outside their CCNs. For this reason, as to the Fourth Amendment, the petition should also be dismissed because it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8).

The stated purpose of the Fourth Amendment is to settle the issues in the litigation.²³ The petitioners' prime objective appears to be to obtain the Commission's approval of various unspecified contractual terms within the Fourth Amendment. “There are terms detailed in the Fourth Amendment [that the petitioners] would like the Commission to approve and enforce which may bear on separate CCN applications to be filed with the Commission in the future.”²⁴ Austin admits that the petition “does not seek to establish certificate rights to any new service area for either party, nor does it amend either party's existing certificate rights or service area boundaries.”²⁵ Instead, argues Austin, the petition “only seeks to establish the validity and enforceability of the amendments to the Agreement that were executed subsequent to the TCEQ's original approval.”²⁶

The petitioners' goals overstate the purpose of TWC § 13.248, and 16 TAC § 24.253. The purpose of the statute and rule is limited. It is merely to provide a mechanism whereby existing CCN holders can agree to transfer existing certificated service area and customers between themselves. The statute and rule are not meant to be a mechanism whereby utilities can settle civil litigation between them or obtain Commission approval and enforcement of general contract terms that go beyond the transfer of existing certificated service area and customers.

In summary, the ALJ concludes that the petition, in its entirety, should be dismissed because it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8).

Alternatively, if the petition is not dismissed under 16 TAC § 22.181(d)(8), the ALJ concludes that the portion of the petition seeking Commission approval of the Original Agreement

²² Supplemental Application Information filed on September 16, 2021, at 2-3.

²³ See Fourth Amendment at 1-2 (the Fourth Amendment is attached to the petition as exhibit 6).

²⁴ Petition at 2.

²⁵ Austin's response to Commission Staff's motion to dismiss at 2.

²⁶ *Id.*

should be dismissed under 16 TAC § 22.181(d)(1), for lack of jurisdiction, and under 16 TAC § 22.181(d)(2), because it raises a moot question or is an obsolete petition.

III. Findings of Fact

The ALJ makes the following findings of fact.

Petitioners

1. SWWC Utilities, Inc. is a Delaware corporation registered with the Texas secretary of state under filing number 800832416.
2. SWWC is the successor in interest to Hornsby Bend Utility Company, Inc.
3. SWWC is registered to do business as Hornsby Bend Utility Company, Inc. with the Texas secretary of state.
4. SWWC operates, maintains, and controls in Texas facilities for providing potable water and sewer service for compensation, and holds water certificate of convenience and necessity (CCN) number 11978 and sewer CCN number 20650.
5. The City of Austin is a municipality.
6. Austin operates, maintains, and controls in Texas facilities for providing potable water and sewer service for compensation, and holds water CCN number 11322 and sewer CCN number 20636.

The Underlying Agreements

7. The petition in this proceeding concerns the following five agreements that the petitioners have entered into over the prior 18 years:
 - a. A Settlement Agreement, dated October 20, 2003 (the Original Agreement);
 - b. A First Amendment to the Settlement Agreement, dated December 9, 2014 (the First Amendment);
 - c. A Second Amendment to the Settlement Agreement, dated May 24, 2017 (the Second Amendment);
 - d. A Third Amendment to the Settlement Agreement, executed on an unspecified date in 2020 (the Third Amendment); and

- e. A Fourth Amendment to the Settlement Agreement, dated June 1, 2021 (the Fourth Amendment).
8. In 2003, and prior to the execution of the Original Agreement, SWWC and Austin each had pending before the Texas Commission on Environmental Quality (TCEQ) multiple applications to obtain or amend water and sewer CCNs.
9. In the applications, SWWC and Austin were both seeking to expand their certificated service areas, and portions of the uncertificated service areas they sought overlapped with one another. Each was opposing the other's applications.
10. In order to resolve the impasse, SWWC and Austin entered into the Original Agreement, by which they agreed to divide the disputed areas, such that there would be no longer be overlap between the CCN applications.
11. In the Original Agreement, SWWC and Austin designated large areas of eastern Travis County lying outside of the then-existing CCN boundaries for SWWC and Austin and specified which of those areas SWWC would be entitled to serve, and which of those areas Austin would be entitled to serve.
12. The Original Agreement did not involve the transfer of any existing certificated service areas and customers between SWWC and Austin.
13. After executing the Original Agreement, SWWC and Austin amended their pending CCN applications so that the boundaries of the uncertificated service areas they sought conformed to the areas designated in the Original Agreement.
14. In 2004, the TCEQ granted the petitioners' pending CCN applications, incorporating into the respective CCNs held by the petitioners the areas to be served and customers to be served as designated by SWWC and Austin in the Original Agreement.
15. Because the areas designated in the Original Agreement were, in 2004, incorporated into the CCNs of SWWC and Austin, there are now no service-area changes for the Commission to act on, with respect to the Original Agreement.
16. The First Amendment, Second Amendment, and Third Amendment do not designate areas to be served and customers to be served, either inside of, or outside of, the utilities' CCN boundaries.

17. On January 14, 2021, the Commission, in Docket No. 51166,²⁷ granted the petition of Colorado River Project, LLC (CRP), for streamlined expedited release, and released CRP's 1,370-acre tract of land from SWWC's water and sewer CCNs.
18. Shortly after streamlined expedited release was granted in Docket No. 51166, SWWC filed a lawsuit against Austin in a Travis County district court, attempting to enjoin the city from providing water or sewer service to the CRP tract. The litigation remains pending.
19. SWWC and Austin entered into the Fourth Amendment to facilitate settling the civil litigation.
20. The Fourth Amendment revises the service area designations and customers to be served as compared to the Original Agreement. Specifically, the Fourth Amendment contemplates incorporating part of the area released in Docket No. 51166 back into SWWC's CCNs.
21. Like the Original Agreement, the Fourth Agreement attempts to allocate between SWWC and Austin areas outside their CCNs. It does not involve the transfer of any existing certificated service areas and customers between SWWC and Austin.

The Petition

22. The petitioners filed the petition at issue in this case on August 2, 2021.
23. The petitioners ask the Commission to approve and enforce the Original Agreement and the four amendments "as a follow up" to the TCEQ's approval in 2004.
24. The petitioners purport to seek approval of the five agreements under Texas Water Code (TWC) § 13.248 and 16 Texas Administrative Code (TAC) § 24.253.
25. The petitioners do not, however, seek approval of the agreements to effectuate any CCN boundary changes, and do not seek to establish certificate rights to any new service area for either party.
26. Rather, the petitioner ask the Commission to approve the agreements so that the litigation between them in Travis County district court can be resolved, and so that the Commission will approve and enforce various unspecified contractual terms within the Fourth

²⁷ *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. 51166, Order (Jan. 14, 2021).

Amendment which the petitioners believe may bear on separate CCN applications to be filed with the Commission in the future.

The Motions to Dismiss

27. On September 30, 2021, Commission Staff filed a motion to dismiss, contending that the petition fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8).
28. SWWC and Austin each responded to Commission Staff's motion to dismiss on November 1, 2021.
29. In Order No. 6 filed on November 5, 2021, the ALJ moved to dismiss, contending that the petition should be dismissed, wholly or in part, 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).
30. SWWC and Austin each responded to the ALJ's motion to dismiss on November 23, 2021.
31. Commission Staff responded to the ALJ's motion to dismiss on November 30, 2021.
32. No hearing was held on the motions to dismiss.

IV. Conclusions of Law

The ALJ makes the following conclusions of law.

1. SWWC and Austin are both retail public utilities as defined in TWC § 13.002(19) and 16 TAC § 24.3(31).
2. Under TWC § 13.248 and 16 TAC § 24.253, the Commission may approve "service-area contracts" between retail public utilities.
3. In order to constitute a service-area contract within the scope of TWC § 13.248 and 16 TAC § 24.253, a contract between retail public utilities must involve the transfer of existing certificated service areas and customers between CCN holders.
4. Because none of the five agreements at issue in this proceeding involve the transfer of any existing certificated service areas and customers between SWWC and Austin, the agreements do not fall within the scope of TWC § 13.248 and 16 TAC § 24.253.
5. The petition should be dismissed, in its entirety, because it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8).

6. The purpose of TWC § 13.248 and 16 TAC § 24.253 is to provide a mechanism whereby CCN holders can agree to transfer existing certificated service areas and customers between themselves; the statute and rule are not meant to be a mechanism whereby utilities can settle civil litigation between them or obtain Commission approval and enforcement of general contract terms that go beyond the transfer of existing certificated service areas and customers.
7. In 2003, the year that the Original Agreement was entered into, the Commission did not have the legal authority to approve service-area contracts under TWC § 13.248, and 16 TAC § 24.253 had not yet been adopted.
8. In 2003, the state agency with the legal authority to approve service-area contracts under TWC § 13.248 was the TCEQ.
9. Responsibility for regulating water and sewer utilities, including the authority to approve service-area contracts under TWC § 13.248, was transferred from the TCEQ to the Commission with the passage of H.B. 1600 in 2013.
10. The transfer of authority became effective on September 1, 2014.
11. The Commission lacks jurisdiction to approve the Original Agreement because it was executed at a time when the TCEQ, not the Commission, was responsible for approving such agreements; the TCEQ already incorporated into the respective CCNs the changes agreed to in the Original Agreement; and the Commission did not obtain the authority to approve service-area contracts under TWC § 13.248 until 11 years after the Original Agreement was executed.
12. As to the Original Agreement, the petition should be dismissed for lack of jurisdiction, under 16 TAC § 22.181(d)(1).
13. Because the areas designated in the Original Agreement were long ago incorporated by the TCEQ into the CCNs of SWWC and Austin, as to the Original Agreement, the petition should be dismissed under 16 TAC § 22.181(d)(2) because it raises a moot question or is an obsolete petition.
14. The Commission may dismiss a proceeding with or without prejudice for, among other reasons, a lack of jurisdiction under 16 TAC § 22.181(d)(1), a moot question or obsolete petition under 16 TAC § 22.181(d)(2), or a failure to state a claim for which relief can be granted under 16 TAC § 22.181(d)(8).

15. Under 16 TAC § 22.181(c), dismissal of this case does not require a hearing because the facts necessary to support the dismissal are uncontested.
16. Under 16 TAC § 22.181(f)(2), dismissal of a case for reasons other than those specified in 16 TAC § 22.181(g)(1) or (2) requires preparation of a PFD.
17. This PFD was issued in accordance with Texas Government Code § 2001.062 and 16 TAC § 22.261(a).

V. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the ALJ recommends the following ordering paragraphs.

1. The motions to dismiss are granted.
2. The Commission dismisses the petition of SWWC and Austin, for failure to state a claim for which relief can be granted, lack of jurisdiction, and a moot question or obsolete petition, with prejudice.
3. The Commission denies all other motions and any other requests for general or specific relief that have not been expressly granted.

Signed at Austin, Texas the 8th day of July 2022.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE