



Filing Receipt

Received - 2022-07-27 02:17:56 PM

Control Number - 52380

ItemNumber - 23

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
EXCEPTIONS TO PROPOSAL FOR DECISION**

COMES NOW, SWWC Utilities, Inc. d/b/a Hornsby Bend Utility Company, Inc. (HBUC) and hereby files these exceptions to the Proposal for Decision (PFD) in this matter involving a petition for approval and enforcement of a service area contract under Texas Water Code (TWC) § 13.248 (Petition) by HBUC and the City of Austin (City) (collectively, Applicants or Petitioners).¹ HBUC is authorized to state that the City supports these exceptions. In support, HBUC respectfully shows the following.

I. INTRODUCTION

The Commission should reject the PFD recommending Petition dismissal.² The Commission should approve and enforce the service area contract filed with the Petition under Texas Water Code § 13.248 nearly a year ago on August 2, 2021.³ That is what TWC § 13.248 requires.

¹ Memorandum from Hunter Burkhalter, Chief Administrative Law Judge, to Stephen Journey, Commission Counsel, with attached Proposal for Decision (Jul. 8, 2022). This pleading is timely filed. *See* Memorandum from Stephen Journey to All Parties of Record (Jul. 13, 2022) (establishing July 27, 2022 deadline for exceptions to the PFD).

² PFD (Jul. 8, 2022).

³ Petition (Aug. 2, 2021).

But the PFD improperly recommends the Commission dismiss the Petition for failure to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8), or, alternatively, “dismiss the portion of the petition seeking Commission approval of the Original Agreement . . . 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.”⁴ HBUC maintains that the Original Agreement and its amendments should be approved together as a single comprehensive service area designation agreement as authorized by TWC § 13.248, which allows the Commission jurisdiction to grant the requested relief without an immediate CCN transfer so as to be enforceable for Petitioners’ respective service areas.

II. ARGUMENTS AND AUTHORITIES

The PFD offers multiple grounds for dismissal. All flow from the PFD recommendation to not treat the service area contract documents provided for approval in the Petition as a single comprehensive service area designation agreement per TWC § 13.248, and the related concept that 16 TAC § 24.253 requires a CCN service area transfer in each agreement document regardless of the omission of such language in TWC § 13.248. The presiding ALJ is “dubious of the petitioners’ assertion that the five agreements can be treated as a single agreement,”⁵ but HBUC does not understand that doubt. It is commonplace for contracts to be amended and then treated comprehensively as the resulting contract for enforcement purposes.⁶

⁴ PFD at 9-10 (Jul. 8, 2022); *see also* PFD at 13-15, Conclusion of Law (CoL) Nos. 4-5 and 13-14 and Ordering Paragraph Nos. 1-2. The Original Agreement referenced in the PFD is the Settlement Agreement, dated October 20, 2003. *See* Petition (Aug. 2, 2021) at Exhibit 1 - Order in TCEQ Docket Nos, 2002-0189-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).

⁵ PFD at 3 (Jul. 8, 2022).

⁶ *See, e.g., Luftak v. Gainsborough*, No. 1-15-1068-CV, 2017 LEXIS 4554, 2017 WL 2180716, at *7-11 (Tex. App.—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).

First, the PFD recommends dismissing the Petition for failure to state a claim for which relief can be granted based on analysis of each Petition agreement document viewed in isolation.⁷ That recommendation is premised solely on the fact that no CCN transfer is contemplated with the Petition documents in this docket.⁸

Second, there is an alternative recommendation to partially dismiss the Petition with respect to the Original Agreement for lack of jurisdiction or mootness, seemingly without dismissing the subsequent Petition amendment documents.⁹ That ground is essentially because the Original Agreement was already approved by the Texas Commission on Environmental Quality (TCEQ) and the CCN service area changes agreed upon in that document were already implemented.¹⁰

Neither ground described above warrants Petition dismissal. HBUC excepts to the PFD's recommended conclusions of law and ordering paragraphs that would result in Petition dismissal. The Petition should be approved.

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

The PFD wrongfully recommends dismissing the Petition for failure to state a claim for which relief can be granted because of language in 16 TAC § 24.253 that says, "This section only applies to the *transfer* of certificated service area and customers between existing CCN holders."¹¹ But TWC § 13.248 states, "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

⁷ PFD at 2-6 and 8-10 and CoL Nos. 3-6 and Ordering Paragraph No. 1-2.

⁸ PFD at 2-6 and CoL Nos. 3-6 and Ordering Paragraph No. 1-2. The fact that a CCN change is contemplated in a separate docket pursuant to the Fourth Amendment is apparently not considered sufficient. *See 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).

⁹ PFD at 6-8 and CoL Nos. 7-14 and Ordering Paragraph No. 1-2.

¹⁰ PFD at 6-8 and CoL Nos. 7-14 and Ordering Paragraph No. 1-2.

¹¹ PFD at 2-6 and 8-10 and CoL Nos. 3-6 and Ordering Paragraph No. 1-2 (citing 16 TAC § 24.253(a) (emphasis added)).

after public notice and hearing, are valid and enforceable and are incorporated into the *appropriate* areas of public convenience and necessity,” implying that may not be appropriate in some circumstances.¹² The PFD recommendation would unnecessarily establish a conflict between the Commission’s rule and TWC § 13.248 to the extent the Commission declines to apply TWC § 13.248 without the “transfer” limitation in 16 TAC § 24.253 as TWC § 13.248 is written.¹³ That would be wrong and the “transfer” limitation did not even exist in TCEQ’s implementing rule for TWC § 13.248 when the Original Agreement was executed.¹⁴

This is a circumstance where the Petition does not require a CCN transfer here even though a HBUC CCN change that the Petitioners agreed upon in the Fourth Amendment was implemented and completed in a separate docket earlier this year (*i.e.*, Docket No. 52492).¹⁵ But TWC §13.248 is not as limiting as 16 TAC § 24.253, and the added rule language should not control whether the Commission approves the Petitioners’ service area agreement under TWC §13.248. HBUC submits that the Petitioners’ claim can in fact be granted in terms of approving the Original Agreement as amended via the First, Second, Third, and Fourth Amendments when viewed together, especially since the Fourth Amendment prompted an “appropriate” HBUC CCN change in a different docket. Unlike the Original Agreement, there just so happens to be no “appropriate” CCN change affecting the City’s CCN in the Fourth Amendment. But that should not warrant dismissal.

¹² TWC § 13.248 (emphasis added).

¹³ *Cadena Commercial USA Corp. v. Texas Alcoholic Bev. Comm’n*, 518 S.W.3d 318, 325-26 (Tex. 2017) (stating, “We presume the Legislature ‘chooses a statute’s language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.’”) (emphasis added).

¹⁴ 30 TAC § 291.117 (2003) (stating only that “[c]ontracts 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 notice and hearing, are valid and enforceable and are incorporated into the certificates of public convenience and necessity” in line with TWC § 13.248).

¹⁵ *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).

The PFD states, “The statu[t]e 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.”¹⁶ Respectfully, TWC § 13.248 has little purpose other than resolving service area disputes which may otherwise entail litigation. Further, TWC § 13.248 does not indicate terms beyond service area designation cannot be included in such contracts presented for Commission approval as the PFD suggests, and that would be impractical. TWC § 13.248 agreements have been used by retail public utilities as a tool to resolve service area disputes for a long time. But the fact is, unlike investor-owned utilities such as HBUC, many Texas retail public utilities are allowed to serve a significant amount of territory without a CCN.¹⁷ The Commission should recognize this by not limiting the use of TWC § 13.248 contracts as the PFD recommends so that the tool may continue its usefulness in deals between all retail public utilities while recognizing that some, but not all, may still be required to apply to the Commission to obtain or amend a CCN to provide service if required.

In sum, the PFD does not establish a sound basis for dismissing the entire Petition for “failure to state a claim for which relief can be granted” if TWC § 13.248 is properly applied and the Petition is appropriately viewed as a single comprehensive service area designation agreement.¹⁸ HBUC excepts to all PFD recommendations to the contrary.

B. Dismissal of Original Agreement for Lack of Jurisdiction and Mootness

As an alternative to dismissing the entire Petition, the PFD recommends alternative grounds for dismissing the Original Agreement.¹⁹ Those grounds are 16 TAC § 22.181(d)(1),

¹⁶ PFD at 9.

¹⁷ TWC § 13.242(a).

¹⁸ PFD at 2-6 and 8-10 and CoL Nos. 3-6 and Ordering Paragraph No. 1-2 (citing 16 TAC § 24.253(a)).

¹⁹ PFD at 6-8 and CoL Nos. 7-14 and Ordering Paragraph No. 1-2.

lack of jurisdiction, and 16 TAC § 22.181(d)(2), because it raises a moot question or is an obsolete petition.²⁰ HBUC excepts to this PFD recommendation too.

HBUC reiterates that the Original Agreement and its amendments should be viewed as a single comprehensive service area designation agreement authorized by TWC § 13.248. The alternate grounds recommended for dismissing the Original Agreement would only be proper if each agreement document is viewed in isolation as separate from the others. Admittedly, the PFD is correct that the Original Agreement was previously approved by TCEQ and service areas agreed upon in that document were “incorporated into the appropriate areas of public convenience and necessity” long ago.²¹ But the Original Agreement and its amendments comprise a single revised agreement that has not yet been approved by TCEQ or the Commission as a whole. That is the relief the Petitioners have sought here.

If the Commission agrees with this portion of the PFD, HBUC requests the Commission still approve the subsequent amendments as the Petition requests. But HBUC excepts to the PFD recommendation to dismiss the Petition as to any of the agreement documents, including the Original Agreement, on the basis of 16 TAC § 22.181(d)(1), lack of jurisdiction, or 16 TAC § 22.181(d)(2), because it raises a moot question or is an obsolete petition.

III. SPECIFIC EXCEPTIONS

For all these reasons, HBUC specifically excepts to the PFD discussion and analysis on pages 2 through 10 and Conclusions of Law Nos. 3, 4, 5, 6, 11, 12, 13, 14, and 15. HBUC also excepts to Ordering Paragraph Nos. 1 and 2 which would grant both Staff’s and the ALJ’s motions to dismiss. Finally, HBUC excepts to the failure of the PFD to include any Finding of Fact regarding the companion docket to this case, Docket No. 52492, which resulted in approval earlier

²⁰ PFD at 6-8 and CoL Nos. 7-14 and Ordering Paragraph No. 1-2.

²¹ TWC § 13.248.

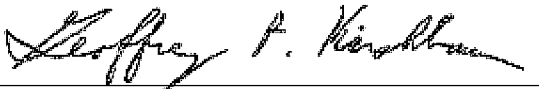
this year for an HBUC CCN change agreed upon in the Fourth Amendment.²² The Petition should not be dismissed.

IV. CONCLUSION

For all these reasons, HBUC respectfully requests that the Commission reject the PFD and deny the motions to dismiss by Commission Staff and the presiding ALJ filed in this case. HBUC requests continued processing of the Petition under TWC § 13.248 and 16 TAC § 24.253, or just TWC § 13.248 if deemed appropriate, with respect to the Original 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 approve only the First, Second, Third, and Fourth Amendments without approving the Original Agreement in line with the PFD's alternative recommendation. HBUC requests all other and further relief to which it is justly entitled.

²² See *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).

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 July 27, 2022, in accordance with the Orders Suspending Rules issued in Project No. 50664.



Geoffrey P. Kirshbaum