



Control Number: 52380



Item Number: 27

DOCKET NO. 52380

RECEIVED
2022 SEP -2 AM 10:59
PUBLIC UTILITY COMMISSION
FILED CLERK

**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 §**

**PUBLIC UTILITY COMMISSION
OF TEXAS**

ORDER

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 retail water and sewer service. SWWC Utilities holds water certificate of convenience and necessity (CCN) number 11978 and sewer CCN number 20650. The City of 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.

Commission Staff filed a motion to dismiss without prejudice for failure to state a claim for which relief can be granted. The administrative law judge (ALJ) also filed a motion to dismiss on multiple grounds. The administrative law judge (ALJ) then filed a proposal for decision recommending 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, or in the alternative, that the Commission dismiss a portion of the petition 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. The ALJ recommends the dismissal be with prejudice.

The Commission grants the motions to dismiss and dismisses the petition of SWWC Utilities and the City of Austin, with prejudice, for failure to state a claim for which relief can be granted. The Commission adopts the proposal for decision, including findings of fact and conclusions of law, to the extent provided in this Order.

The Commission makes the following modifications to the proposal for decision. The Commission modifies ordering paragraph 2 to remove the two alternative bases for dismissal: lack of jurisdiction and a moot question or obsolete petition. The Commission deletes conclusions of law 7 through 13 and modifies conclusion of law 14 for consistency with its modifications to ordering paragraph 2 that clarify the grounds for dismissal. Finally, the Commission makes non-substantive changes for such matters as capitalization, spelling, grammar, punctuation, style, correction of numbering, and readability.

I. Findings of Fact

The Commission adopts 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 Utilities is the successor in interest to Hornsby Bend Utility Company, Inc.
3. SWWC Utilities is registered to do business as Hornsby Bend Utility Company, Inc. with the Texas secretary of state.
4. SWWC Utilities operates, maintains, and controls in Texas facilities for providing potable water and sewer service for compensation, and holds water CCN number 11978 and sewer CCN number 20650.
5. The City of Austin is a municipality.
6. The City of 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 Utilities and the City of 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 Utilities and the City of 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 Utilities and the City of 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 Utilities and the City of Austin designated large areas of eastern Travis County lying outside of the then-existing CCN boundaries for SWWC Utilities and the City of Austin and specified which of those areas SWWC Utilities would be entitled to serve, and which of those areas the City of 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 Utilities and the City of Austin.
 13. After executing the Original Agreement, SWWC Utilities and the City of 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 Utilities and the City of Austin in the Original Agreement.
15. Because the areas designated in the Original Agreement were, in 2004, incorporated into the CCNs of SWWC Utilities and the City of 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 petitioners' CCN boundaries.
17. On January 14, 2021, the Commission, in Docket No. 51166,¹ 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 Utilities' water and sewer CCNs.
18. Shortly after streamlined expedited release was granted in Docket No. 51166, SWWC Utilities filed a lawsuit against the City of 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 Utilities and the City of 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 Utilities' CCNs.
21. Like the Original Agreement, the Fourth Agreement attempts to allocate between SWWC Utilities and the City of Austin areas outside their CCNs. It does not involve the transfer of any existing certificated service areas and customers between SWWC Utilities and the City of Austin.

¹ *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).

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 TWC § 13.248 and 16 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 petitioners 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 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 Utilities and the City of 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 Utilities and the City of 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.

II. Conclusions of Law

The Commission adopts the following conclusions of law.

1. SWWC Utilities 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 Utilities and the City of 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. DELETED.
8. DELETED.
9. DELETED.
10. DELETED.
11. DELETED.
12. DELETED.

13. DELETED.
14. The Commission may dismiss a proceeding with or without prejudice for, among other reasons, 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 proposal for decision.
17. The proposal for decision was issued in accordance with Texas Government Code § 2001.062 and 16 TAC § 22.261(a).


III. Ordering Paragraphs

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

1. The Commission adopts the proposal for decision, including findings of fact and conclusions of law except as provided in this Order.
2. The motions to dismiss are granted.
3. The Commission dismisses the petition of SWWC Utilities and the City of Austin, with prejudice, for failure to state a claim for which relief can be granted.
4. 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 2 day of September 2022.

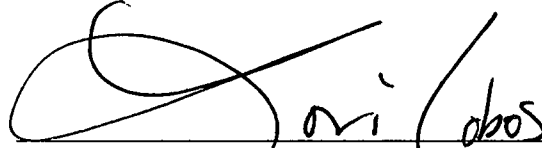
PUBLIC UTILITY COMMISSION OF TEXAS



PETER M. LAKE, CHAIRMAN



WILL MCADAMS, COMMISSIONER



LORI COBOS, COMMISSIONER



JIMMY GLOTFELTY, COMMISSIONER



KATHLEEN JACKSON, COMMISSIONER