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PETITION BY SWWC UTILITIES, INC. D/B/A HORNSBY BEND UTILITY COMPANY, INC. AND CITY OF 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	§ § § § § § § § § §	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

SWWC UTILITIES, INC. D/B/A HORSNBY BEND UTILITY COMPANY, INC.'S MOTION FOR REHEARING

COMES NOW, SWWC Utilities, Inc. d/b/a Hornsby Bend Utility Company, Inc. (HBUC) and hereby files this Motion for Rehearing (Motion) 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 this Motion. In support, HBUC respectfully shows as follows.

I. Summary of the Argument

The Commission's September 2, 2022 Order (Order), if allowed to stand, is premised on legal error.[2] The Commission should have approved and enforced the service area contract filed with the Petition under Texas Water Code § 13.248 on August 2, 2021.[3] That is what TWC § 13.248 requires. Instead, the Commission granted motions to dismiss the Petition, with

[1] Pursuant to 16 TAC § 22.264(a), motions for rehearing shall be governed by the Administrative Procedure Act (APA), which provides that "[a] motion for rehearing in a contested case must be filed by a party not later than the 25th day after the date the decision or order that is the subject of the motion is signed." Tex. Gov't Code § 2001.146(a). The Order for which HBUC seeks rehearing was signed on September 2, 2022. This Motion for Rehearing is timely filed.
[2] Order (Sep. 2, 2022).
[3] Petition (Aug. 2, 2021).

prejudice, for failure to state a claim for which relief can be granted under 16 TAC § 22.181(d)(8).[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. ARGUMENT

The Commission's Order constitutes legal error for the following reasons.

Point of Error No. 1

The Commission Erred in Finding that, in Order to Constitute a Service-area Contract Within the Scope of TWC § 13.248, a Contract between Retail Public Utilities Must Involve the Transfer of Existing Certificated Service Areas and Customers between CCN Holders

The Commission erred by finding as the primary basis for Petition dismissal that, in order to constitute a service-area contract within the scope of TWC § 13.248, a contract between retail public utilities must involve the transfer of existing certificated service areas and customers between CCN holders.[5] The Commission's rule at 16 TAC § 24.253 says, "This section only applies to the transfer of certificated service area and customers between existing CCN holders."[6] But the statute TWC § 13.248 does not include that limitation and 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 after public notice and hearing, are valid and enforceable and are incorporated into the *appropriate* areas of public convenience and necessity," imposing no requirement that only transfers of *existing* CCN areas can be done.[7] Consequently, the Commission has found that its added rule language creates a condition for approving a service

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[4] Order at 6-7 (Sep. 2, 2022).
[5] Order at 6, Conclusion of Law No. 3 (Sep. 2, 2022).
[6] 16 TAC § 24.253(a).
[7] TWC § 13.248 (emphasis added).

area designation contract under TWC § 13.248 not present in that statute. This unnecessarily establishes a conflict between the Commission's rule and TWC § 13.248.[8] That is error and should be reversed.

The "transfer" limitation did not even exist in the Texas Commission on Environmental Quality (TCEQ) implementing rule for TWC § 13.248 when the Original Agreement was executed.[9] The Commission only recently added the extraneous rule language that the Commission based its dismissal upon even though: (1) TWC § 13.248 has been in place since at least the mid-1980s; (2) the Commission previously administered TWC § 13.248 until December 2016 using a rule taken from the TCEQ rule, 30 TAC § 291.117, which did not include the added language; and (3) the TCEQ rule that was previously used to implement TWC § 13.248 for many years never included the added language.[10]

Service area designation contracts such as those included in the Petition that fall outside the limitations of 16 TAC § 24.253 would nevertheless be approvable by the Commission under TWC § 13.248. Perhaps the Commission could adopt a separate rule for such applications. But, in the meantime, finding the Commission's added rule language *prevents* it from approving *any* service area designation contract under TWC § 13.248 outside the narrower parameters of 16 TAC § 24.253 is error. Further, the conclusion of law used as grounds to dismiss the Petition on this

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[8] *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).

[9] 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).

[10] *Compare* 30 TAC § 291.117 (2003) (TCEQ rule implementing TWC § 13.248) and 16 TAC § 24.117 (2014), *with* 16 TAC § 24.117 (2016); *see also Project to Amend Chapter 24 for Non-Rate Related Water/Sewer Rules*, Project No. 45111, Order Adopting Amendments to § 24.1, § 24.3, § 24.8, § 24.101, § 24.103, § 24.104, § 24.105, § 24.106, § 24.107, § 24.109, § 24.110, § 24.111, § 24.115, § 24.117, § 24.118, § 24.119, § 24.142, § 24.143, and Repeal of § 24.112 as Approved at the December 1, 2016 Open Meeting (Dec. 5, 2016) (adopting amended 16 TAC § 24.117 with language later relocated to current 16 TAC § 24.253); *see also* Acts 1985, 69th Leg., ch. 795, Sec. 3.005, eff. Sept. 1, 1985.

ground is error, and the extraneous Commission rule language that purportedly reduces its statutory authority under TWC § 13.248 is invalid.

Point of Error No. 2

The Commission Erred in Finding that Because None of the "Five Agreements" (*i.e.*, Original Agreement and Four Amendments) at Issue in this Proceeding Involve the Transfer of Any Existing Certificated Service Areas and Customers Between HBUC and the City, the "Agreements" do not Fall Within the Scope of TWC § 13.248

For the reasons addressed regarding Point of Error No. 1, the Commission also erred by finding that because none of the documents the Commission refers to as the "five agreements" (which are actually the original agreement and the four subsequent amendments) at issue in this proceeding involve the transfer of any existing certificated areas and customers between HBUC and the City, the agreements do not fall within the scope of TWC § 13.248.[11] That limitation is not included in TWC § 13.248, and the Commission should have approved the subject service area designation agreement. Additionally, the original agreement and its amendments should have been viewed as a single, collective, service area designation contract between the parties and not reviewed separately, as it is commonplace for contracts to be amended and then treated comprehensively as the resulting contract for enforcement purposes.[12]

Collectively, the original agreements and the four subsequent amendments may not specifically seek Commission action to transfer existing CCN areas or customers, but the original service area designation agreement between HBUC and the City that TCEQ approved certainly designated areas to be served pursuant to competing CCN applications.[13] Additionally, the

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[11] Order at 6, Conclusion of Law No. 4 (Sep. 2, 2022).

[12] *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.

[13] *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).

Fourth Amendment called for revised CCN service area designations between HBUC and the City, including putting a previously released CCN service area that the City might otherwise serve back into HBUC's CCN service area through a separate CCN amendment application approved earlier this year.[14] That application was needed because, unlike a Commission-regulated investor-owned "utility" such as HBUC, municipalities such as the City are a type of "retail public utility" not required to possess a CCN or certificated service territory to serve it.[15] In fact, many Texas retail public utilities are allowed to serve a significant amount of territory without a CCN.[16] TWC § 13.248 uses the term "retail public utility," and TWC § 13.248 implementation must respect the need for retail public utilities to enter into service area designation agreements that may not call for transfer of existing CCN service areas or customers.[17] TWC § 13.248 states that parties should bring such agreements to the Commission for approval to be enforceable. Thus, the Commission is compelled to at least consider applications for approval of such agreements without the condition the Commission created by rule. Dismissal is contrary to governing Texas statute and is error.

Point of Error No. 3

The Commission Erred in finding that the Purpose of TWC § 13.248 is not Meant to be a Mechanism Whereby [Retail Public] 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.

The Commission also erred by finding, "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

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[14] *See* Petition (Aug. 2, 2021) at Exhibit 6 – Fourth Amendment to the 13.248 Agreement at 4 (Jun 1, 2021); *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).
[15] TWC § 13.242(a); TWC § 13.002(19) (defining "retail public utility") and TWC § 13.002(23) (defining "utility").
[16] *Id.*
[17] TWC § 13.248.

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."[18] The notion that TWC § 13.248 agreements are not intended to be used to resolve civil litigation related to CCN service area disputes is simply not true. The original agreement between HBUC and the City is a perfect example of that,[19] but there are many other examples over several decades where agreements were filed for approval under TWC § 13.248 to resolve conflicts about competing service areas. There are too many to list.

The Commission's Order does not point to any authority within the legislative history of TWC § 13.248 or otherwise that supports its statement expressing such limited intent for the use of TWC § 13.248. Similarly, there was no authority for this concept expressed in the Commission order adopting its extraneous 16 TAC § 24.253 language that the Commission has now found limits the types of service area designation agreements the Commission will approve.[20]

TWC § 13.248 agreements are valuable tools for retail public utilities that find themselves in conflict over who may serve where. The Commission should encourage such agreements to resolve those conflicts whether they are used to resolve litigation before the Commission or otherwise. The Commission could have elected to approve limited parts of the parties' TWC § 13.248 agreements if it was uncomfortable approving terms beyond the service area designation terms, but, instead, the Commission decided to dismiss the parties' application to approve their agreement in its entirety. That was error under TWC § 13.248.

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[18] Order at 6, Conclusion of Law No. 6 (Sep. 2, 2022).

[19] *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).

[20] *Project to Amend Chapter 24 for Non-Rate Related Water/Sewer Rules*, Project No. 45111, Order Adopting Amendments to § 24.1, § 24.3, § 24.8, § 24.101, § 24.103, § 24.104, § 24.105, § 24.106, § 24.107, § 24.109, § 24.110, § 24.111, § 24.115, § 24.117, § 24.118, § 24.119, § 24.142, § 24.143, and Repeal of § 24.112 as Approved at the December 1, 2016 Open Meeting at 41-43 (Dec. 5, 2016); *see also* 41 Tex. Reg. 9904 (Dec. 16, 2016).

<u>Point of Error No. 4</u>

The Commission Erred in finding that the Petition should be Dismissed, in its Entirety, and that it Fails to State a Claim for Which Relief Can be Granted, under 16 TAC § 22.181(d)(8).

The Commission erred by finding that 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).[21] For the reasons previously discussed, TWC § 13.248 plainly provides authority for Commission approval and enforcement of service area designation agreements without the limitation the Commission has purportedly placed on itself through 16 TAC § 24.253. The Petitioners have filed an application seeking relief which *can* be granted by the Commission pursuant to TWC § 13.248 so that their agreement may be enforced pursuant to same.[22] The Commission erred by dismissing the Petition for failure to state a claim for which relief can be granted based on Commission rule language not included within TWC § 13.248.

To the extent 16 TAC § 24.253 operates to limit the Commission's statutory authority, the rule is invalid, and the Commission erred in operating under an invalid rule. To the extent 16 TAC § 24.253 does not limit the Commission's statutory authority, the Commission erred in dismissing the Petition under the narrower 16 TAC § 24.253 in lieu of proceeding under the broader TWC § 13.248.

III. CONCLUSION

For all these reasons, HBUC respectfully requests that the Commission reverse its decision to grant the motions to dismiss by Commission Staff and the presiding ALJ filed in this case based on failure to state a claim for which relief can be granted under TWC § 13.248 and 16 TAC § 22.181(d)(8). HBUC also requests reversal of the conclusions of law that led the Commission

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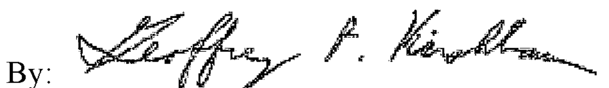
[21] Order at 6, Conclusion of Law No. 5 (Sep. 2, 2022).
[22] Petition (Aug. 2, 2021).

to make that decision. HBUC requests approval 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 presiding ALJ's alternative recommendation included in his proposal for decision.[23] HBUC requests all other and further relief to which it is justly entitled.

Respectfully submitted,

By: 

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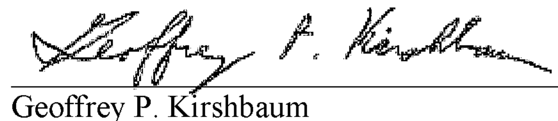
CERTIFICATE OF SERVICE

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 September 26, 2022, in accordance with the Orders Suspending Rules issued in Project No. 50664.



Geoffrey P. Kirshbaum

[23] Memorandum from Hunter Burkhalter, Chief Administrative Law Judge, to Stephen Journeay, Commission Counsel, with attached Proposal for Decision at 6-8, CoL Nos. 7-14 and Ordering Paragraph No. 1-2 (Jul. 8, 2022).