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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	§	

COMMISSION STAFF’S RESPONSE TO SWWC UTILITIES, INC. DBA HORNSBY BEND UTILITY COMPANY, INC.’S AND THE CITY OF AUSTIN’S MOTION FOR REHEARING

On July 8, 2022, the Commission administrative law judge (ALJ) issued a Proposal for Decision (PFD) recommending that the Commission dismiss the petition of SWWC Utilities, Inc. dba Hornsby Bend Utility Company, Inc. (HBUC) and the City of Austin (collectively, the Petitioners), with prejudice, for failure to state a claim for which relief can be granted, lack of jurisdiction, and a moot question or obsolete petition. On September 2, 2022, the Commission adopted the PFD and dismissed the petition, with prejudice, for failure to state a claim for which relief can be granted. On September 26, 2022, the Petitioners filed a Motion for Rehearing. Staff (Staff) of the Public Utility Commission of Texas responds to the Petitioners’ Motion for Rehearing and recommends the request be denied.

I. DISCUSSION

Alleged Point of Error No. 1: The Commission Order correctly determined 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.”

In its Motion for Rehearing, the Petitioners state that “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.” Texas Water Code (TWC) § 13.248 states that “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 Petitioners’ claim that the service area designation contracts that are included in their Petition that are limited by 16 TAC § 24.253 would otherwise be approved under TWC § 13.248 is dubious at best. The First Amendment, Second Amendment, and Third Amendment do not *designate areas to be served* and *customers to be served*, clearly they would not otherwise be approved under TWC § 13.248. Accordingly, Staff respectfully recommends that the Commission did not err on the conclusion of law stating: “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.”

Alleged Point of Error No. 2: The Commission Order correctly determined 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

The Petitioners argue that the Commission 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. The Petitioners further argue that 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.

Staff finds these arguments unconvincing. The approach used by the Commission was appropriate. If the agreements are viewed independently then 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. Staff supports viewing the agreements independently as it is the best method of allowing the Commission to more fully consider the content of each document. Accordingly, Staff recommends that the Commission did not err on the conclusion of law stating: “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.”

Alleged Point of Error No. 3: The Commission correctly determined 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 Petitioners also state in their Motion for Rehearing that the “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 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.” A plain reading of TWC § 13.248 indicates that the statute was not intended to as a mechanism for utilities to 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. Staff therefore respectfully recommends that the Commission did not err on the conclusion of law stating: “[t]he 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.”

Alleged Point of Error No. 4: The Commission correctly determined 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 Petitioners also state in their Motion for Rehearing that “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).” As stated in Order No. 6, the ALJ believed that the Petition could have been dismissed 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. Regardless of whether the Petition was dismissed under 16 TAC § 22.181, there were several other potential

grounds under which the Petition could have been dismissed. Accordingly, Staff recommends that the Commission did not err in dismissing the Petition in its entirety.

II. CONCLUSION

Staff respectfully recommends that Petitioners' Motion for Rehearing be denied for the above stated reasons.

Dated: October 3, 2022

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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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 October 3, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Arnett D. Caviel

Arnett D. Caviel