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APPLICATION OF TERRA	§	PUBLIC UTILITY COMMISSION
SOUTHWEST, INC. AND UNDINE	§	
DEVELOPMENT, LLC FOR SALE,	§	OF TEXAS
TRANSFER, OR MERGER OF	§	
FACILITIES AND CERTIFICATE	§	
RIGHTS IN DENTON COUNTY	§	

APPLICANTS' RESPONSE TO
MOTION TO INTERVENE

COME NOW Undine Development, LLC (“Undine”) and Terra Southwest, Inc. (“Terra,” and collectively with Undine, the “Applicants”) and file this Response to Central States Water Resources, Inc.’s (“CSWR”) Motion to Intervene. For the reasons set forth below, the Applicants urge that CSWR’s motion should be denied.

Background

Applicants initially filed a sale, transfer, or merger (“STM”) application for the subject assets on December 16, 2020, in Docket No. 51632. On April 19, 2021, Public Utility Commission of Texas (“Commission”) Staff (“Staff”) requested an abatement to the STM proceeding “due to what appear to be conflicting claims as to the utility that will [be] purchasing Terra Southwest,” while noting that the applicants had “provided information supporting the transaction contemplated in the present docket.”¹ Commission Staff’s request to abate noted that CSWR had filed a Notice of Intent to Determine Fair Market Value relating to the subject assets.² Importantly, Terra never agreed to participate in that Fair Market Value matter alongside CSWR.

¹ *Application of Terra Southwest, Inc. and Undine Texas, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Denton County*, Docket No. 51632, Commission Staff’s Motion to Abate at 1 (Apr. 19, 2021) (Interchange Item No. 28).

² *Id.*; see also *Notice of Intent to Determine Fair Market Value*, Project No. 49859, CSWR and Terra Southwest Notice of Intent to Determine Fair Market Value (Apr. 8, 2021).

On November 16, 2021, the Applicants filed the subject STM application and then withdrew their STM application in Docket No. 51632.³ Thus, the Applicants' previously filed STM application was replaced with this current STM application. The current STM application includes the affidavit of Jim Presley, the president of Terra.⁴ Mr. Presley testifies in his affidavit that: (i) there is no binding agreement between CSWR and Terra relating to the subject assets; (ii) Terra has no intention to sell the assets to CSWR; and (iii) Undine is the only legitimate purchaser of the assets. The new STM application also includes a statement of position from counsel for Terra to counsel for CSWR documenting Terra's position that CSWR has no valid rights to the assets.⁵

CSWR filed the subject motion to intervene on November 23, 2021. Accordingly, this response is timely filed.⁶

Argument

In support of its assertion that it has a right to intervene in the docket, CSWR states simply that “[CSWR’s] agreement with [Terra] is directly impacted by Undine’s request for authority to acquire [Terra], and questions as to Central States’ and Undine’s agreements must be addressed in order for the Commission to approve Undine’s application.”⁷

As a preliminary matter, there is no question as to the “agreements.” The subject STM application makes clear, through the supporting affidavit and statement of legal position, that there is

³ Application (Nov. 16, 2021) (Interchange Item No. 1); *Application of Terra Southwest, Inc. and Undine Texas, LLC for Sale, Transfer, or Merger of Facilities and Certificate Rights in Denton County*, Docket No. 51632, Undine Texas, LLC’s Motion to Withdraw Application (Nov. 18, 2021) (Interchange Item No. 44) and Order No. 10 Granting Withdrawal, Dismissing Application, and Closing Docket (Nov. 19, 2021) (Interchange Item No. 45).

⁴ Application, at Attachment “B” (filed confidentially)

⁵ *Id.*

⁶ 16 TAC § 22.78(a) (stating that responsive pleadings are due “within five working days after receipt of the pleading to which the response is made”). The Commission was closed on November 24-26, 2021. Those days are not considered “working days” under Commission rules. *See* 16 TAC § 22.2(48) (defining “working day”). Therefore, the deadline for this response is December 3, 2021.

⁷ CSWR also seems to assert that there is no signed purchase agreement between Terra and Undine, and therefor “Undine is not acquiring [Terra] and [Terra] is not being purchased by Undine.” Motion to Intervene at p. 1. That issue is not relevant to whether CSWR has a right to intervene in the matter. And, Applicants note that the documentation of the transaction provided in the subject application is the same documentation approved by Commission Staff in the previous STM application (and numerous other STM applications initiated by Undine and approved by the Commission).

one party to which Terra will be selling its assets--Undine. There is one STM application for the sale and transfer of the Terra assets, and that is the subject STM application between Terra and Undine. Importantly, there is no competing STM application for these assets. In fact, there cannot be a competing STM application for the assets, because that would require the participation of Terra in that competing STM application, which, as reflected in the affidavit, Terra has committed it will not participate in.⁸

More relevant, however, is that contrary to CSWR's assertion, questions as to the agreements need not be addressed and, indeed, cannot be addressed by the Commission pursuant to an STM application. Because that is the sole basis for CSWR's assertion of a right to intervene in the docket, CSWR's motion should be denied.

A. STM Review

The STM process is governed by Texas Water Code ("TWC") §§ 13.251 and 13.301. TWC § 13.251 states:

Except as provided by Section 13.255, a utility or a water supply or sewer service corporation may not sell, assign, or lease a certificate of public convenience and necessity or any right obtained under a certificate unless the utility commission has determined that the purchaser, assignee, or lessee is capable of rendering adequate and continuous service to every consumer within the certified area, after considering the factors under Section 13.246(c). The sale, assignment, or lease shall be on the conditions prescribed by the utility commission.

Similarly, TWC § 13.301 speaks to Commission review of the "public interest" in STM applications. That section allows a hearing if the Commission has concerns about the "financial, managerial, and technical capability" of the acquiring person or "after the application of the considerations provided by Section 13.246(c) for determining whether to grant a certificate of convenience and necessity."⁹ Thus, the applicable statutes direct that the utility commission make an evaluation about the

⁸ Application, at Attachment "B" (filed confidentially) ("nor does Terra have any intention of selling the assets to CSWR").

⁹ TWC § 13.301(e).

prospective purchaser and the impact of the transaction on the service area. Nowhere in TWC §§ 13.251, 13.301, or the referenced 13.246(c)¹⁰ is there any suggestion by the legislature that the PUC should endeavor to undertake an examination of potential third-party legal disputes.

Similarly, the PUC regulations implementing TWC § 13.301, at 16 Tex. Admin. Code (“TAC”) § 24.239(e), specify the parameters of the evaluation:

A retail public utility or person that files an application under this section to purchase, transfer, merge, acquire, lease, rent, or consolidate a utility or system *must demonstrate adequate financial, managerial, and technical capability* for providing continuous and adequate service to the requested area and the transferee’s certificated service area as required by § 24.227(a) of this title, relating to Criteria for Granting or Amending a Certificate of Convenience and Necessity. (*emphasis added*).

16 TAC § 24.239(h) implements TWC § 13.301(e) similarly.¹¹ As with the statute, nothing in the implementing regulations provides for the Commission to evaluate potential third-party legal disputes as part of its evaluation of an STM application.

The Commission properly lacks authority to consider third party legal disputes in considering STM applications. The Commission does not have, nor should it desire to have, the authority to involve itself in such disputes. Such action would create overlapping and conflicting actions between

¹⁰ TWC § 13.246(c) states:

Certificates of public convenience and necessity and amendments to certificates shall be granted by the utility commission on a nondiscriminatory basis after consideration by the utility commission of:

- (1) the adequacy of service currently provided to the requested area;
- (2) the need for additional service in the requested area, including whether any landowners, prospective landowners, tenants, or residents have requested service;
- (3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area;
- (4) the ability of the applicant to provide adequate service, including meeting the standards of the commission, taking into consideration the current and projected density and land use of the area;
- (5) the feasibility of obtaining service from an adjacent retail public utility;
- (6) the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
- (7) environmental integrity;
- (8) the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and
- (9) the effect on the land to be included in the certificated area.

¹¹ 16 TAC § 24.239(h).

the Commission and the judicial system. In this instance, CSWR seeks by its intervention to require the Commission to determine the proper purchaser of Terra's assets in the absence of any conflicting STM application. It seeks the extreme recourse of requiring the Commission to impose upon Terra the sale of its assets to a party (*i.e.*, CSWR) that Terra has already rejected as a purchaser of the assets. Certainly, the legislature has not granted to the Commission the authority to impose such a decision on a voluntary seller. If a party believes itself to be the proper recipient of the assets that are the subject of an STM application, that party's recourse is properly in the courts and not before the Commission. The Commission has no authority to engage that dispute, and it would be creating an untenable precedent in doing so. The Commission is necessarily stepping into an evaluation and determination of that dispute if the Commission grants the intervention. There is no other basis for the intervention.

B. Standing

16 TAC § 22.103 provides that a person has a right to intervene in an STM application if that person:

- (1) has a right to participate which is expressly conferred by statute, commission rule or order or other law; or
- (2) has or represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding.

CSWR can nowhere point to a "statute, Commission rule or order or other law" to establish standing pursuant to § 22.103(b)(1). Nor does CSWR have a justiciable interest in the outcome of the proceedings as required by § 22.103(b)(2). As set out in its motion to intervene, CSWR's sole interest in the application is as it relates to a private claim to the assets at issue in the application. That is not an interest that is contemplated or implicated by this STM proceeding.

As set out in the statute and the implementing regulations, the consideration in an STM application is whether “the purchaser, assignee, or lessee is capable of rendering adequate and continuous service to every consumer within the certified area” and whether it can “demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service.” CSWR’s interest in raising a dispute about its rights to separately acquire the assets is not within the purview of the STM process. It is not an injury that is “fairly traceable” to the approval of the pending STM application, as required under *City of Waco v. Texas Comm’n on Environmental Quality*.¹² CSWR is not a party sought to be protected by the STM process. Accordingly, CSWR has no standing to intervene in the proceeding.

Conclusion

CSWR seeks to intervene in this STM application on the sole basis that it purports to have an interest in the assets that are the subject of the application.¹³ The interest CSWR seeks to protect by its request to intervene is not an interest that confers standing on CSWR in an STM application. By its request to intervene, CSWR is necessarily seeking to have the Commission adjudicate an alleged private party dispute.¹⁴ It seeks to have the Commission adjudicate that dispute when there is no conflicting STM application before the Commission. The Commission would be creating an untenable precedent in stepping into and evaluating such disputes as part of an STM application, and it would be acting outside of its authority in doing so. Accordingly, the Applicants urge that CSWR’s motion in intervene be denied.

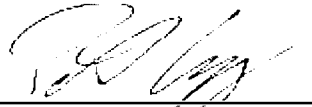
¹² *City of Waco v. Texas Comm’n on Environmental Quality*, 346 S.W.3d 781, 802 (Tex. App. – Austin, 2011), *rev’d on other grounds*, 413 S.W. 3d 409 (Tex. 2013) (the injury must be “fairly traceable” to the issuance of the authorization as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the authorization).

¹³ See Motion to Intervene, p. 1 (“[CSWR’s] agreement with [Terra] is directly impacted by Undine’s request for authority to acquire [Terra], and questions as to Central States’ and Undine’s agreements must be addressed in order for the Commission to approve Undine’s application.”)

¹⁴ As discussed, the application and supporting affidavit and statement of legal position, in fact, establish that there is no dispute.

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CERTIFICATE OF SERVICE

I certify by my signature above that on this the 3rd day of December 2021, notice of this document was provided to all parties of record via electronic mail in accordance with the Order Suspending Rules, issued in Project No. 50664.

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