



Filing Receipt

Received - 2021-12-16 02:28:27 PM
Control Number - 52852
ItemNumber - 21

DOCKET NO. 52852

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 FOR RECONSIDERATION OR APPEAL OF ORDER NO. 2

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 for Reconsideration or, alternatively, Appeal of Order No. 2 (the “Motion”). For the reasons set forth below, the Applicants urge that CSWR’s motion for reconsideration by the ALJ should be denied and the appeal to the Commission should be dismissed. Pursuant to the 16 Tex. Admin. Code § 22.123(b), a response to a motion for reconsideration shall be filed within three working days of the filing of the motion. Accordingly, this motion is timely filed.

Summary

CSWR’s Motion offers no basis to find that Order No. 2 was “unjustified or improper,” as required under the Commission’s procedural rules.¹ CSWR presents two arguments. First, it reasserts its position that the purported third-party contractual dispute is sufficient to confer standing in an STM proceeding. It offers nothing in that argument that provides a basis for the ALJ to reconsider the Order, much less find that the order was “unjustified or improper.” Second, CSWR, for the first time in the Motion, newly asserts that the ALJ should confer standing based on a purported anticipated purchase of a system located somewhere in the general area of the Terra assets. That assertion is not properly before the ALJ or the Commission pursuant to this Motion, and, regardless, is without merit.

¹ 16 Tex. Admin. Code 122.123(b)

Argument

A. Denial of Request for Intervention based on Purported Agreement between CSWR and Terra was Justified and Proper

CSWR's position that it has standing to intervene in the proceeding by virtue of its agreement with Terra is precisely the position the ALJ properly considered and decided in Order No. 2. Regardless of how it dresses up its argument in its Motion for Reconsideration, CSWR is still asking one thing--that the Commission intervene in a private third-party dispute that resides outside of the purview of the STM process. The ALJ properly considered CSWR's position and determined, correctly, that "Central States Water Resources' interest is limited to the effect the proceeding may have on its agreement to acquire Terra Southwest, which is outside the purview of the Commission in the context of evaluating whether Undine Development is able to demonstrate adequate financial, managerial, and technical capability . . ." ²

CSWR pursues its same argument, but with a dose of factually inaccurate statements. Most significant, CSWR states that "[CSWR] and Terra submitted a notice of intent to determine fair market value . . ." That statement has no support and is, in fact, wrong. As set out in Applicants' Response to Motion to Intervene, Terra did not participate in the submittal of the notice of intent to determine fair market value.³ In fact, Terra had no knowledge that CSWR was submitting a notice of intent to determine fair market value. And, Terra gave no authority to CSWR to submit a notice of intent to determine fair market value regarding Terra's assets.

CSWR also asks the ALJ to focus on the agreement between Undine and Terra relating to the purchase of Terra's assets, which CSWR mischaracterizes as a "letter of intent."⁴ CSWR asserts that it "continues to be unclear as to whether Undine has a binding purchase agreement with Terra."⁵

² Order at p. 1

³ Applicants' Response to Motion to Intervene at p. 1

⁴ See, e.g., Motion at p. 2.

⁵ *Id.*

Setting aside that the Commission has approved several Undine or Undine affiliated company STM applications based on substantially similar agreements, CSWR's position about the sufficiency of the agreement has no bearing on the threshold issue--whether CSWR has a justiciable interest in this matter.

CSWR also puts significant stock in the fact that the ALJ in Docket No. 51632 granted CSWR's intervention request in that matter.⁶ To be clear, the ALJ granted the intervention in that matter as an unopposed motion without objection from the Applicants. The arguments the Applicants have presented to the ALJ in this matter were not before the ALJ in that matter. And, CSWR is wrong in its related assertion that the Applicants' submittal of this application is an attempt to preclude CSWR's participation.⁷ In fact, the Applicants were required under the Commission's rules to submit a new application in light of the substantive modifications to the original transaction between Undine and Terra reflected in Docket No. 51632.⁸ Finally, unlike the STM application in Docket No. 51632, the subject STM application contains sworn facts and other relevant documentation supporting the application that were not part of the application in Docket No. 51632. Ultimately, CSWR is wrong in asserting that the granting of CSWR's motion to intervene in Docket No. 51632 is somehow precedential to the outcome of CSWR's motion to intervene in this matter.

CSWR also asserts that the ALJ's proper decision somehow "defies" this Commission's policy and practice of liberally interpreting the standing requirement.⁹ To be clear, liberal interpretation, if that is in fact the Commission's policy, does not allow for incorrect interpretation. CSWR's argument suggests that any decision to deny standing somehow defies Commission policy. In this instance, the ALJ properly evaluated CSWR's claim against the applicable standard in 16 Tex. Admin. Code §

⁶ See Motion at p. 2

⁷ Motion at p. 2.

⁸ 16 Tex. Admin. Code 24.239(a)

⁹ See Motion at p. 4

22.103 and made a reasoned determination that CSWR's interest does not convey standing based on that standard. Instead of applying a liberal interpretation, the ALJ would need to bend the standard into a pretzel in order to convey standing upon CSWR based on the argument CSWR presented to the ALJ.

And, in contrast to CSWR's assertion in its Motion, nowhere in the ALJ's order is there a suggestion that "the mere existence of a contract dispute" precludes CSWR's standing to intervene. In fact, CSWR's assertion of a contract dispute was the sole basis for CSWR's motion to intervene. And, the "contract dispute" in Docket No. 32242 cited by CSWR in its Motion for Reconsideration differs substantially from the facts in this matter.¹⁰ Here, the Applicants have properly brought an STM application before the Commission and a third-party is seeking standing based on a purported breach of contract claim arising from a separate contract. The Commission matters CSWR cites have no relevance to the consideration of standing in this matter.

Finally, CSWR argues that it has a right to intervene because it has filed a lawsuit relating to the assets, on the basis that "[i]ssues addressed and decisions made by the Commission in this proceeding could affect the pending litigation."¹¹ That argument is untenable. CSWR would have the Commission suspend its administrative duties every time an individual files a lawsuit on a matter that has some tangential relationship to a matter pending before the Commission. CSWR has properly asserted its right to pursue a claim in district court, but that action does not support any assertion of standing in the subject application. CSWR presents nothing to suggest otherwise.

B. New Assertion Outside the Scope of Order No. 2

CSWR filed its Motion to Intervene on November 23, 2021. CSWR identified a single issue in support of its position—that "[CSWR's] agreement with [Terra] is directly impacted by Undine's

¹⁰ Motion at p. 7

¹¹ Motion at p. 3.

request for authority to acquire [Terra], and questions as to [CSWR's] and Undine's agreements must be addressed in order for the Commission to approve Undine's application."¹² Now, having had its motion denied, and under the guise of a motion for reconsideration and appeal of that ruling, CSWR introduces a wholly unrelated assertion—that the ALJ should allow CSWR to intervene based on a purported anticipated purchase of a system located somewhere in the general area of the Terra assets. That new issue is not properly before the ALJ as part of CSWR's Motion for Reconsideration; nor is it properly before the Commission as part of CSWR's appeal. To be clear, CSWR's assertion would be insufficient to convey standing to intervene regardless of whether it was timely presented in a motion to intervene. Since it was not timely raised, it is not properly before the ALJ or the Commission pursuant to this Motion.

Conclusion

The ALJ properly considered CSWR's Motion to Intervene and determined, correctly, that CSWR's interest--the effect the proceeding may have on its agreement to acquire Terra--is outside the purview of the Commission in the context of an STM application. CSWR presents nothing in its Motion for Reconsideration to suggest that the ALJ failed to properly evaluate that issue such that the ALJ's decision was unjustified or improper.¹³ CSWR's new assertion relating to a purported future purchase of an area system is not properly before the ALJ or the Commission, and, regardless, has no merit.

¹² Motion to Intervene, p. 1

¹³ 16 Tex. Admin. Code § 22.123(a) and (b)(3)

Respectfully submitted,

DUBOIS, BRYANT & CAMPBELL, LLP

By: _____

Peter T. Gregg
State Bar No. 00784174
303 Colorado, Suite 2300
Austin, Texas 78701
pgregg@dbcllp.com
(512) 457-8000
(512) 457-8008 (fax)

ATTORNEYS FOR UNDINE DEVELOPMENT, LLC

TERRILL & WALDROP

By: /s/ Geoffrey P. Kirshbaum

Geoffrey P. Kirshbaum
State Bar No. 24029665
810 W. 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
gkirshbaum@terriillwaldrop.com

ATTORNEY FOR TERRA SOUTHWEST, INC.

CERTIFICATE OF SERVICE

I certify by my signature above that on this the 16th 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.

John Harrison
Public Utility Commission of Texas
Legal Division
1701 N. Congress Avenue
P. O. Box 13326
Austin, Texas 78711-3326
john.harrison@puc.texas.gov

Evan D. Johnson
Kate Norman
C. Glenn Adkins
Coffin Renner LLP
1011 W. 31st Street
Austin, Texas 78705
evan.johnson@crtx.law.com
kate.norman@crtxlaw.com
glenn.adkins@crtxlaw.com