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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 CSWR’S NOTICE OF DISTRICT COURT
JUDGMENT, RENEWED MOTION TO INTERVENE, AND MOTION TO ABATE**

COME NOW Undine Development, LLC (“Undine”) and Terra Southwest, Inc. (“Terra,” and collectively with Undine, the “Applicants”) and file this Response to Central Sates Water Resources, Inc.’s (“CSWR”) Notice of District Court Judgment, Renewed Motion to Intervene and Motion to Abate (“Renewed Motion”).¹ For the reasons set forth below, the Applicants urge that CSWR’s Renewed Motion be denied.

I. BACKGROUND

The Administrative Law Judge (ALJ) properly rejected CSWR’s motion to intervene in this docket on December 12, 2022.² The Commission subsequently denied CSWR’s motion for reconsideration or, alternatively, appeal of the ALJ’s order on December 17, 2022.³ The Applicant’s sale, transfer, or merger (STM) application was then accepted by the Commission as administratively complete on January 18, 2022.⁴

Months later, CSWR now seeks to have its twice-rejected motion to intervene considered for a third time. That motion should be denied, because there is no basis for the ALJ to consider

¹ Renewed Motion (May 3, 2022). Responsive pleadings are due within five working days of receipt. 16 TAC § 22.78(a). Therefore, the deadline for this response is May 10, 2022, and it is timely filed.

² Order No. 2 Denying Motion to Intervene (Dec. 7, 2021).

³ Order No. 4 Denying Motion for Reconsideration (Dec. 17, 2021).

⁴ Order No. 5 Finding Application Administratively Complete, Requiring Notice, and Establishing Procedural Schedule (Jan. 18, 2022).

the untimely motion and because there is nothing in CSWR's motion that suggests the ALJ and Commission's previous rulings were in error.

Moreover, it is important that the ALJ recognize CSWR in its Renewed Motion is relying on misrepresentations of the district court's jurisdictional rulings in CSWR's breach of contract lawsuit against Terra and Undine. Applicants have worked for over a year and a half to reach a point where they may close their proposed water utility system sale transaction, and CSWR's repeated, procedurally improper attempts to delay that sale should be flatly rejected.

II. ARGUMENTS AND AUTHORITIES

A. No Good Cause Exception for Late Intervention

CSWR claims a good faith exception to the intervention deadline of April 12, 2022, pursuant to 16 TAC 22.5(b).⁵ To be clear, CSWR is not seeking a good faith exception to file a motion to intervene but is instead seeking a good faith exception to file a *second* motion to intervene. In support for its request for an exception to the intervention deadline, CSWR notes that the procedural schedule for the proceeding was issued on March 24, 2022, and the deadline to intervene was prior to CSWR's filing its appeal in the Second Court of Appeals. However, the District Court order that serves as the basis for CSWR's Renewed Motion was issued on March 25, 2022, over two weeks before the intervention deadline of April 12, 2022. The fact that the procedural schedule was issued a day before the district court order or that CSWR filed its appeal after the intervention deadline is, by all accounts, irrelevant. CSWR has not provided good cause under 16 TAC § 22.5(b) to justify its late filing, particularly recognizing the late stage of this proceeding and the fact that CSWR is not seeking an exception to file a late intervention, but instead seeking to file a late second intervention.

⁵ "Notwithstanding any other provision of this chapter, the presiding officer may grant exceptions to any requirement in this chapter or in a commission-prescribed form for good cause." 16 TAC § 22.5(b).

B. No Basis for Reconsideration of Denial of Intervention

CSWR claims a right to have its motion to intervene considered for a second time based on “changed circumstances in this proceeding with regards to the jurisdictional questions that served as the basis for rejecting Central States' previous request to intervene in this proceeding.”⁶ CSWR claims changed circumstances based on the disposition of related claims by CSWR being adjudicated in district court. However, CSWR has fundamentally misrepresented the court’s consideration of the arguments and its ruling in that related case on the critical issue of the remaining available remedies and on the ruling’s proffered impact on the PUC proceedings. There are no changed circumstances that would justify a reversal of the ALJ and Commission’s previous rejection of CSWR’s request to intervene.

First, CSWR misinforms the ALJ that there has been a “judgment” in the district court. Not so. The district court granted Terra’s plea to the jurisdiction against CSWR’s claims attempting to mandate to whom the Commission allowed Terra to sell the water utility system, but the district court expressly allowed CSWR’s breach of contract claims for damages to proceed:

The Court finds that it has jurisdiction over Plaintiff Central States Water Resources, Inc.’s claim for breach of contract against Defendant Terra Southwest, Inc., and that breach of contract claim remains to be litigated in this case.⁷

There has been no final judgment. If CSWR can prove that Terra has breached the parties’ contract by selling the water utility system, CSWR can seek any damages in the lawsuit for such a breach of contract. But, as the ALJ and Commission have already concluded, CSWR cannot get relief from the Commission because CSWR’s dispute is a contractual one.

⁶ See Renewed Motion at 1 (May 3, 2022).

⁷ See **Exhibit C** (Order Granting Plea to the Jurisdiction) at 2.

Second, CSWR misinforms the ALJ that the district court's orders leave CSWR with "no . . . remedy."⁸ Not so. As the district court concluded, CSWR may seek damages as a possible remedy in court. But what Terra argued in its plea to the jurisdiction before the court, and what the court agreed with in granting that plea, is that CSWR may not seek a court determination on *who* may operate Terra's utility going forward—just a decision as to whether damages are justified. Terra's amended plea to the jurisdiction (CSWR only provided the ALJ the original, superseded plea) specified that "Plaintiff cannot obtain declaratory or injunctive relief that would determine to whom Terra requests approval of a sale of the subject utility by the PUC or to whom the PUC approves such a sale of the subject utility."⁹ Terra acknowledged at the hearing on its amended plea that CSWR retained a claim for damages:

THE COURT: [A]re you conceding I have jurisdiction to hear whether there are damages, I just don't have authority to enforce specific performance?

MR. GREENE: Yes, absolutely. This Court has jurisdiction over their damage claim under their breach of contract allegations. The Court does not have jurisdiction over this area that the statute says the PUC has exclusive jurisdiction[:] rates, operations, [and] services.¹⁰

The district court agreed, granting Terra's amended plea with respect to CSWR's equitable claims seeking to interfere with the Commission's approval of the water utility system sale, but expressly allowing CSWR to proceed on any damage claims.¹¹

The decision on utility operations is within the exclusive purview of the Commission.¹² That does not mean CSWR has no adequate remedy at law as CSWR claims.¹³ It instead means CSWR may not seek injunctive relief from the court to stop the Commission from approving Terra

⁸ Renewed Motion at 5 (May 3, 2022).

⁹ See **Exhibit A** (Terra's First Amended Plea to the Jurisdiction, with exhibits omitted) at 1.

¹⁰ See **Exhibit B** (excerpts from Reporter's Record) at 8.

¹¹ See **Exhibit C** (Order Granting Plea to the Jurisdiction) at 1-2.

¹² Texas Water Code (TWC) §§ 13.001, 13.042(e), and 13.301.

¹³ Renewed Motion at 5.

and Undine’s STM application and transaction if the Commission otherwise deems the application compliant with the applicable statutory and regulatory criteria focused on future utility operation by Undine. Applicants note that CSWR attached Terra’s plea to the jurisdiction and original answer to its Renewed Motion *instead* of Terra’s First Amended Answer and Plea to the Jurisdiction where Terra specifically clarified that its plea was directed at attempts to have the court adjudicate who should operate the utility.¹⁴ That omission from the Renewed Motion is significant.

Decisions about standing in a STM proceeding are also part of the Commission’s exclusive jurisdiction over STM application issues. CSWR points to the Commission’s Chapter 22 standing rules as support for its standing claim.¹⁵ But as the ALJ previously found, CSWR’s “sole interest in the application relates to a private claim to the assets at issue in the application, which is not an interest that is contemplated or implicated by a proceeding involving the sale, transfer, or merger of facilities and certificate rights.”¹⁶ The ALJ also found,

A justiciable interest is an interest that is within the purview of the Commission given the context of the proceeding. The application at issue in this proceeding concerns whether the transferee is able to demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the area subject to the application and any area it already serves. However, [CSWR’s] interest is limited to the effect the proceeding may have on its agreement to acquire [Terra], which is outside the purview of the Commission in the context of evaluating whether [Undine] is able to demonstrate adequate financial, managerial, and technical capability as set forth above.¹⁷

The ALJ’s description of the nature of this STM proceeding and his decision to exclude CSWR from intervenor status remains proper. Nothing in the Renewed Motion warrants a different decision.

¹⁴ Compare Renewed Motion at Exhibit B, with **Exhibit A** at 1.

¹⁵ Renewed Motion at 8 (citing 16 TAC § 22.103(b)).

¹⁶ Order No. 2 Denying Motion to Intervene at 1-2 (Dec. 7, 2021).

¹⁷ *Id.*

CSWR makes much of the fact that Terra and Undine have a *proposed* transaction and CSWR questions the binding nature of Applicants' contract.¹⁸ First, this assertion does not bear on whether CSWR has the right to intervene in the proceeding. Applicants' agreement between each other has no conceivable effect on CSWR's alleged interests as claimed. Second, the assertion is incorrect. Nothing in the STM statute or rule *requires* a "binding agreement" be included in a STM application. *Proposed* transaction agreements may not move forward without a preceding sale, transfer, or merger (STM) application Commission approval or they are void.¹⁹ At a minimum, utility system sales agreements must be conditioned on Commission approval. CSWR will never get that approval because Terra will not sign onto any STM application with CSWR now or in the future. Terra *has* signed onto the STM application that is the subject of this docket with Undine. The court order discussed in the Renewed Motion cannot change that fact.

Nothing in the court order highlighted in the Renewed Motion changes the fact that CSWR's interest in raising a dispute about its rights to separately acquire the assets is not within the purview of the STM process.²⁰ 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*.²¹ CSWR is not a party the STM process seeks to protect. Accordingly, CSWR has no standing to intervene in this proceeding, late or otherwise.²²

¹⁸ Renewed Motion at 3-5.

¹⁹ TWC § 13.301(h); 16 TAC § 24.239(o).

²⁰ See **Exhibit C**.

²¹ *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).

²² Renewed Motion at 8 (requesting a good cause exception for late intervention – even though it already attempted intervention within the time the Commission allows). As discussed herein, CSWR actually does have an "adequate remedy to protect its contract rights" in the form of potential damages.

Finally, Applicants respectfully request the ALJ deny CSWR's motion to abate included within the Renewed Motion as it contains zero support.²³ CSWR cites no authority to allow it to seek abatement as "amicus" and it is unlikely that any ruling on appeal about contract rights would impact the Commission's review of Applicants' STM application or CSWR's standing issues. CSWR's goal is delay. CSWR is wrong when it says, "[A]batement harms no one." Terra and Undine have already been substantially harmed by the delay prompted by CSWR's legal challenges at the Commission and in the courts. Terra has still not received approval to sell its utility systems and the compensation that would accompany such a sale. Undine is losing money in the form of revenue each day it does not own the utility systems. Both Applicants have incurred legal expenses required to respond to CSWR and desire a Commission decision allowing the transaction to proceed as soon as possible.

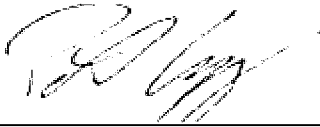
III. CONCLUSION

The interest CSWR seeks to protect by its request to intervene remains one that cannot confer standing on CSWR in an STM application matter. By its renewed request to intervene, CSWR is necessarily continuing to seek Commission adjudication on an alleged private party dispute now pending in the courts. It seeks to have the Commission adjudicate that dispute when there is no conflicting STM application before the Commission and even though CSWR has sought damages as a remedy in court. 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 the ALJ deny CSWR's Renewed Motion to intervene, including its request for a good cause exception to allow late

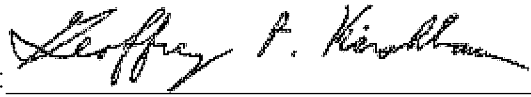
²³ Renewed Motion at 9.

intervention and motion to abate, and further that the ALJ deny CSWR's alternative "amicus" request for abatement.

Respectfully submitted,

By: 
Peter T. Gregg
State Bar No. 00784174
Gregg Law PC
910 West Ave, Suite No. 3
Austin, Texas 78701
(512) 522-0702
(512) 727-6070 (fax)
pgregg@gregglawpc.com


ATTORNEY FOR UNDINE DEVELOPMENT, LLC

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

ATTORNEY FOR TERRA SOUTHWEST, INC.

CERTIFICATE OF SERVICE

I certify pursuant to the above signature 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 May 10, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.


Geoffrey P. Kirshbaum

EXHIBIT

A

CAUSE NO. 21-10909-431

CENTRAL STATES WATER
RESOURCES, INC.

Plaintiff,

v.

TERRA SOUTHWEST, INC., UNDINE
DEVELOPMENT, LLC, and UNDINE
TEXAS, LLC,

Defendants.

§
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§
§

IN THE DISTRICT COURT OF

DENTON COUNTY, TEXAS

431ST JUDICIAL DISTRICT

**TERRA SOUTHWEST, INC.'S FIRST AMENDED PLEA TO THE JURISDICTION
AND FIRST AMENDED ANSWER**

TO THE HONORABLE DENTON COUNTY DISTRICT JUDGE:

Defendant Terra Southwest, Inc. ("Terra") files this First Amended Plea to the Jurisdiction and, subject thereto, First Amended Answer to the Original Petition of Plaintiff Central States Water Resources, Inc. ("Plaintiff").

1. This court lacks jurisdiction to hear Plaintiff's suit, in whole or in part, because Plaintiff's requested relief falls within the original and/or exclusive jurisdiction of the Public Utility Commission of Texas (the "PUC"). *See, e.g.*, TEX. WATER CODE §§ 13.001, .042(e), .301. In particular, Plaintiff cannot obtain declaratory or injunctive relief that would determine to whom Terra requests approval of a sale of the subject utility by the PUC or to whom the PUC approves such a sale of the subject utility. In support of this plea to the jurisdiction, the relevant pleadings before the PUC are attached at Exhibits 1 through 8.

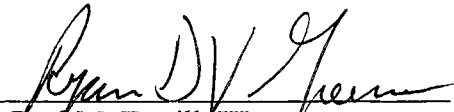
2. Pursuant to Texas Rule of Civil Procedure 92, Terra generally denies each and every, all and singular, the allegations in the Original Petition, and demands strict proof thereof.

3. Plaintiff fails to state a claim for which relief may be granted.

4. Plaintiff's claims are barred by waiver, equitable estoppel, laches, and/or ratification.
5. Plaintiff's claims are barred for failure to perform a condition precedent.
6. Plaintiff's claims are barred by prior material breach of contract.
7. Plaintiff's claims are barred by unclean hands.
8. Plaintiff's claims for declaratory and injunctive relief are barred by freedom of speech and the right to petition.
9. Plaintiff's claims are barred by unconscionability of contract.
10. Plaintiff's damages, if any, are unrecoverable due to failure to mitigate.
11. Plaintiff's claims are barred by the statute of frauds.
12. Plaintiff's claims are barred by the failure to exhaust administrative remedies.
13. Terra is entitled to recover its reasonable attorneys' fees and costs pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code.

WHEREFORE, PREMISES CONSIDERED, Defendant Terra Southwest, Inc. respectfully requests that this Court dismiss Plaintiff Central States Water Resources, Inc.'s claims for want of jurisdiction, or render judgment that Plaintiff Central States Water Resources, Inc. take nothing by its claims, that Defendant Terra Southwest, Inc. recover its attorneys' fees and costs, and that Defendant Terra Southwest, Inc. have all other relief, at law or in equity, to which it is entitled.

Respectfully submitted,

By: 

Paul M. Terrill, III
State Bar No. 20685700
Ryan D. V. Greene
State Bar No. 24012730
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (Facsimile)
pterrill@terrillwaldrop.com
rgreene@terrillwaldrop.com


ATTORNEYS FOR DEFENDANT TERRA
SOUTHWEST, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served as indicated on this 11th day of March, 2022, to the following:

VIA E-SERVICE

Lindy D. Jones
Ty J. Jones
JONES, ALLEN & FUQUAY, L.L.P.
8828 Greenville Avenue
Dallas, Texas. 75243-7143
ljones@jonesallen.com
tjones@jonesallen.com


Ryan D. V. Greene

B

REPORTER'S RECORD
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COURT OF APPEALS CAUSE NO. 02-22-00134-CV&02-22-00135-CV
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DEBRA SPISAK
Clerk

CENTRAL STATES WATER) (IN THE DISTRICT COURT
RESOURCES, INC.) (
V.) (
TERRA SOUTHWEST, INC.,) (
UNDINE DEVELOPMENT, LLC,) (
AND UNDINE TEXAS, LLC) (DENTON COUNTY, TEXAS

MOTION TO DISMISS

PLEA TO THE JURISDICTION

On the 16th day of March, 2022, the following
proceedings came on to be held in the above-titled and numbered
cause before the Honorable James Johnson, Presiding Judge, held
in Denton, Denton County, Texas.

Proceedings reported by realtime transcription.

A P P E A R A N C E S

JONES, ALLEN & FUQUAY, LLP

BY: LINDY D. JONES

SBOT NO: 10925500

AND

LYNN W. SCHLEINAT

SBOT NO: 20888625

8828 Greenville Avenue

Dallas, Texas 75243

Telephone No. (214) 343-7400

Appearing on behalf of Plaintiff;

FOLEY & LARDNER, LLP

BY: JAMES G. MUNISTERI

SBOT NO: 14667380

AND

ABIGAIL K. DRAKE

SBOT NO: 24105817

1000 Louisiana Street, Suite 200

Houston, Texas 77002

Telephone No. (713) 276-5500

Appearing on behalf of Defendant Undine Development, LLC
and Undine Texas, LLC;

TERRILL & WALDROP

BY: RYAN D.V. GREENE

SBOT NO: 24012730

810 West 10th Street

Austin, Texas 78701

Telephone No. (512) 474-9100

Appearing on behalf of Defendant Terra Southwest, Inc.

I N D E X
VOLUME 1 OF 1 VOLUMES
MOTION TO DISMISS
PLEA TO THE JURISDICTION
MARCH 16, 2022

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WITNESSES

(NONE)

EXHIBITS

(NONE)

1 Terra Southwest, together went to the PUC, the Public Utility
2 Commission of Texas, in order to accomplish that sale. You
3 have to go to the PUC in order to accomplish the sale of a
4 utility. It is a public utility serving residents.

5 The Plaintiff has sued in this case with two
6 competing remedies that they are seeking. One is forcing us to
7 sell the utility to them. Terra Southwest, you can't sell the
8 utility to who you want. You have to sell it to us.

9 THE COURT: And the premise for that is specific
10 performance under an alleged specific provision of a purported
11 contract, right? That's the basis to force?

12 MR. GREENE: Yes, in part. Yes, specific
13 performance. And they have also -- they are also seeking
14 declaratory relief, some of which would, in essence, accomplish
15 that. And they are also asking for permanent injunctive relief
16 along with temporary injunctive. So injunction, specific
17 performance, declaratory relief. Any of those sorts of
18 remedies that are trying to tell us who we have to sell to,
19 that's what our plea to the jurisdiction is directed towards.

20 THE COURT: And walk me through that. When I look
21 at the statute, and this is the first of these that I have had
22 while I have been on the bench, but when I look at the statute
23 it seems to be an approval statute, not a -- not something that
24 would decide respective rights or adjudicate a case. Talk to
25 me about that.

1 MR. GREENE: Yes, that's exactly right. The key
2 is Texas Water Code section 13.042. And that's the section
3 that says what the Utility Commission has exclusive
4 jurisdiction over. And the specific phrase that the Utility
5 Commission, and I am looking at subsection E of 13.042,
6 (Reading) The Utility Commission shall have exclusive original
7 jurisdiction over water and sewer utility rates, operations,
8 and services. So when we are talking operations, that includes
9 who is the operator, who is running this utility. The company
10 running the utility has to qualify to do so. So the PUC is
11 saying the types of services you are providing, whom you are
12 providing them to, and who is providing those, the operator.
13 Those are all within our PUC's exclusive jurisdiction.

14 Now you are correct that what the PUC actually
15 looks at is just does this buyer have the capability to do it,
16 will that serve the public interest, and that is on purpose.
17 The Texas legislature is saying to the PUC you govern those
18 things, but we don't want you to get into all these fights over
19 should someone else be the buyer. When a seller and a
20 prospective buyer show up before the PUC, the Texas legislature
21 has said all you need to ask is is that buyer qualified. Now
22 if someone else wants to come in and buy it, they don't have
23 that right. The seller has come in, the buyer has come in, the
24 legislature has said look at those things, and that's it.

25 So what remedy do they have? Damages. They can't

1 force us to go to the PUC and ask for something we don't want.
2 They can't force the PUC to look at something else that the
3 statute -- other than what the statute has required.

4 THE COURT: So how does that guide me on plea to
5 the jurisdiction? It sounds like -- are you conceding I have
6 jurisdiction to hear whether there are damages, I just don't
7 have authority to enforce specific performance?

8 MR. GREENE: Yes, absolutely. This Court has
9 jurisdiction over their damage claim under their breach of
10 contract allegations. The Court does not have jurisdiction
11 over this area that the statute says the PUC has exclusive
12 jurisdiction, rates, operations, services. And as evidence of
13 that, I would point the Court to the actual order that the PUC
14 entered. Central States attempted to intervene into the PUC
15 proceedings. And as Your Honor recognized, the PUC said, wait,
16 no, we don't look at those sorts of questions. And in entering
17 the order, the PUC is saying that Central States could not
18 intervene. The specific ruling that they made was Central
19 States' interest is limited to the effect the proceeding may
20 have on its agreement to acquire Terra Southwest, which is
21 outside the purview of the Commission in the context of
22 evaluating whether Undine Development is able to demonstrate
23 adequate financial managerial technical capability as set forth
24 above. And you can also decide what effect your contract has
25 on these proceedings. It didn't say they could do that. All

1 it said was Central States' interest is limited to the effect
2 that these proceedings have on its contract claim, in other
3 words, its damages claim.

4 And I will give the Court a cite to two cases that
5 support that distinction between damages and injunctive relief.
6 One is the City of College Station case which is 2006 Texas --
7 do you prefer Lexis or Westlaw, Your Honor?

8 THE COURT: I'll pull up either one. But my
9 subscription is Lexis.

10 MR. GREENE: So it is 2006 Tex. App. Lexis 6533.
11 And that was a case where the party was seeking to compel
12 something related to who is given service. And the court held
13 no exclusive jurisdiction on that. Plea to the jurisdiction
14 granted in its entirety. And then the contrast --

15 THE COURT: And I mistyped that. Let me catch up
16 with you.

17 MR. GREENE: 2006, and then it's 6533.

18 THE COURT: Okay. And I have got that in front of
19 me. What proposition of law are you bringing to my attention
20 from this case?

21 MR. GREENE: It is a very short opinion.

22 THE COURT: Right.

23 MR. GREENE: And what I would show Your Honor is
24 in that first paragraph, when we are looking at what the party
25 is asking for, they are asking for a cease and desist order.

1 They are trying to compel who can give service where. And when
2 you get to the last few paragraphs --

3 THE COURT: So -- and I am on paragraph 3. The
4 court holds that if an agency has exclusive jurisdiction, a
5 party must exhaust all administrative remedies before seeking
6 judicial review. Until then, a trial court lacks subject
7 matter jurisdiction. So does this stand for the proposition
8 that I achieve jurisdiction after? Because that's what it
9 seems to say.

10 MR. GREENE: No, absolutely not.

11 THE COURT: Okay. So what is this case telling
12 me?

13 MR. GREENE: What exhaustion of administrative
14 remedies includes is not only going through the process at the
15 agency, but then a judicial appeal to the Travis County
16 District Court. This is not the Travis County District Court.
17 If you want to challenge something that's within the exclusive
18 jurisdiction of the PUC, you have to go to the Travis County
19 District Court as part of an administrative appeal, and the
20 opinion goes on to describe that.

21 THE COURT: And where is that in the opinion?

22 MR. GREENE: That would be --

23 THE COURT: So this case is out of Waco. It
24 references that Chapter 13, which we have covered, of the water
25 code, provides exclusive original jurisdiction over water and

1 sewer utility rates, operations, and services. We have
2 established that.

3 MR. GREENE: That's right. And if you go to
4 headnote 6, the paragraph starts that the code also provides.

5 THE COURT: Um-hmm.

6 MR. GREENE: (Reading) Any party to a proceeding
7 before the Commission is entitled to judicial review under the
8 substantial evidence rule. And any party that is aggrieved by
9 a final order pertaining to certification, and that's the
10 context of that case, may appeal to the District Court of
11 Travis County.

12 THE COURT: Okay. So how would you, you know, I
13 always ask people to tell me what they want and how I can give
14 it to them. We have covered how I can give something to you.
15 What do you want? Are you wanting -- what would be the form of
16 order you are asking for?

17 MR. GREENE: Yes, the form of the order would be
18 granting the plea to the jurisdiction, dismissing their claims
19 for injunctive relief, specific performance, and two specific
20 declarations that are accomplishing the same thing, dismissing
21 those for want of jurisdiction, and the rest of the case
22 remains, which is essentially the damages claims and the
23 declaratory relief that's basically just supporting their
24 damage claims.

25 THE COURT: Okay. I understand all that.

1 Anything else?

2 MR. GREENE: The other case I would refer you to,
3 although I don't know if it is worth walking through, but it is
4 190 S.W. 3d 747. Just as a contrast, because that's a case
5 where the party was seeking damages, and the court held that
6 the PUC did not have exclusive jurisdiction.

7 THE COURT: Let me get that in so it is in my
8 history. What was the pen cite on that one, or the page cite?
9 190 S.W. 3d --

10 MR. GREENE: 747. And the discussion, it goes
11 through tort immunity as well, but the relevant discussion is
12 on exclusive jurisdiction, which begins at page 755 and goes
13 through page 757.

14 THE COURT: Very good. Thank you, Mr. Greene.

15 Mr. Jones, could you address those issues for me?

16 MR. JONES: Yes, I'll try to in that order. But I
17 think I need a little bit of background before. This is the
18 transfer, as they have talked about, and what we have is we
19 have a signed contract that has a provision for specific
20 performance. We paid the earnest money in 2020 right after
21 this was done. We have talked to Mr. Presley, Mr. Greene's
22 client, repeatedly. He has cancelled appointment after
23 appointment. We send him e-mails, we send him letters, trying
24 to do the due diligence. You are right in the Water Commission
25 procedure is for approval basically of the buyer. It is not to

1 do anything else. So, consequently, yes, we may appeal if we
2 are a party. But we weren't a party, they wouldn't let us
3 intervene. Number two, whether we are an approved party or not
4 has no effect that in that more than one person, more than one
5 entity could be approved. But if you look back at the actual
6 facts, what Undine and Terra both said in the administrative
7 procedure before the PUC is that this was not within the
8 purview, this dispute about whether their letter of intent
9 controls or our contract controls, that's not within the
10 purview of the PUC.

11 Now they are taking an exact opposite position.
12 We have briefed this. If you look on page 9, 10 and 11 of our
13 response about why this is a quasi estoppel, that it is
14 elevated to a judicial estoppel, and it's really collateral
15 estoppel, too, because in the administrative law judge's ruling
16 he says that this isn't within the purview to decide private
17 third party disputes about ownership.

18 So you have got to remember, what we're doing here
19 is we're asking the Court for construction between our
20 contract, as signed by Mr. Presley, and their letter of intent
21 that specifically says it is not enforceable. I mean, we can
22 go through it page after page, provision after provision,
23 saying it is nonenforceable.

24 THE COURT: I understand all that. But just on
25 the jurisdiction issue, let's say that, you know, my son, who

1 owns a bowling alley and is an entrepreneur but has no
2 experience in utilities, signed a binding contract calling for
3 specific performance that clearly had priority. Now there is
4 no way he could survive review at the PUC. So how could a
5 court, forget that he is my son because I wouldn't be the
6 judge, but how can I order specific performance when I don't
7 have -- it seems from what I have been presented I don't have
8 authority to make that decision.

9 MR. JONES: You don't make the decision. You make
10 the decision, and what we have asked for, is the decision does
11 our contract control or their letter of intent. Once we have a
12 ruling our contract controls, then we go to the PUC. So you're
13 not -- we are not ordering you to do anything. Our declaratory
14 actions are really to basically set out which one controls, a
15 signed contract with earnest money or a letter of intent that
16 on its face expressly states it is unenforceable.

17 So that's what our declaratory action is saying.
18 We have exhausted our administrative remedies, by the way,
19 because they say it may appeal. That is one way. But that is
20 in the process of their approval. It doesn't say anything
21 about whether or not they have priority for that approval over
22 us. But we have got to have construction, because the
23 administrative law judge and their own arguments, both Mr.
24 Greene's arguments, and Mr. Munisteri's arguments, their firms
25 have said for their clients that this is outside the purview of

1 the PUC. If it is outside the purview as we know in the cases
2 we have cited, you have to presume you have jurisdiction and
3 you basically work out from there. So once you have presumed
4 you have got jurisdiction, you look at the pleadings.

5 THE COURT: Let me go to Mr. Greene before I --
6 and I have not kept time equal, although I am keeping time here
7 so we will, but before I lose that train of thought, Mr.
8 Greene, what's your response to, although I don't have
9 jurisdiction to order specific performance because I can't step
10 into the shoes of PUC, that, as Mr. Jones argues, I could
11 declare superior rights to the order in which these approvals
12 were presented. In other words, could I grant plea to the
13 jurisdiction on specific performance remedy, but deny it on
14 declaratory judgment? Or do those have to tie together?

15 MR. GREENE: Well, that's a more difficult
16 question for certain. Is the intent of that declaration to
17 force us to sell to them? If that's where that declaration is
18 pointed, then the Court can't go down that path. If the
19 declaration is simply supporting their damage claim that they
20 want to prove that they did have the right to purchase the
21 utility, that's part of a declaration, and then therefore we
22 breached that right and therefore we owe them damages, well,
23 then they can go forward. I would argue on that, though, that
24 that would just make the declaration a redundant remedy, which
25 you can't use the UDJA for anyway. That's one of those things

1 where I think we would cross that bridge when we came to it.

2 And if this Court was hesitant to grant the plea
3 to the jurisdiction on declaratory relief because of the
4 uncertainty of where it would lead, we would understand that.
5 That certainly is a different case for the injunctive relief
6 and the specific performance where it's clearly pointing to
7 relief that's in the exclusive jurisdiction before the PUC.

8 THE COURT: Okay. Let me go back to you, Mr.
9 Jones.

10 MR. JONES: It is not exclusive jurisdiction of
11 the PUC. We can have a contract, to use your example about
12 your son that has the bowling alley, I can still get an order
13 from a court saying he has to sell, he has to perform under
14 this contract to allow us access so we can do our due
15 diligence. Now whether or not I can get approval from the PUC,
16 that's something totally different. So whether I get it from
17 the PUC or not, that's different. We're not asking that.

18 THE COURT: What's the specific performance you
19 are asking for? It seemed to be to deliver the utility.

20 MR. JONES: That Mr. Presley for Terra, he owns
21 Terra, so I'm sorry if I sort of waffle back between those two,
22 but Mr. Presley allow us access so we can go ahead and get the
23 information that we can fill in on this standard contract. If
24 you read the contract, and I am sure you have, knowing you, you
25 see the exhibits. And the exhibits are flagged with

1 parentheticals as to each bit of information supplied during
2 each stage of the process. Well, we have to have access,
3 because what happens is Mr. Presley has this water district,
4 who knows how long. It has, let's say, a thousand users. He
5 doesn't even know what assets are there a lot of times. The
6 standard is when you have a contract like this, they go in once
7 they do the due diligence and figure out what equipment, it may
8 be under ground, it may not be something that Mr. Presley
9 actually has knowledge of. But we do that due diligence so
10 that we can then make our application for the PUC. But the PUC
11 has said, and they specifically told the PUC, it's not within
12 the purview to decide this third party dispute. And the
13 administrative law judge said it's not within the purview to
14 decide this third party dispute.

15 So we're not appealing whether or not Undine is
16 qualified. What we are doing is trying to get a construction
17 of our contract versus their unenforceable letter of intent.
18 It says that specifically.

19 THE COURT: Remind me the wording of the specific
20 performance clause, if you have it there. I don't remember
21 exactly what it said.

22 MR. JONES: It just says, this is on page 36, and
23 it is our buyers' remedy of the contract, which is attached.
24 And this is paragraph 502 B, as in boy, little i 2. And it
25 says, (Reading) Enforce specific performance of this agreement

1 against the seller, Mr. Presley, Terra. So that's before
2 asking the Court.

3 THE COURT: Just that simple phrase.

4 MR. JONES: I'm sorry?

5 THE COURT: Just that simple phrase, enforce the
6 specific performance, that's one of the remedy clauses.

7 MR. JONES: Yes, sir.

8 THE COURT: Okay, I understand.

9 MR. JONES: Do you want me to sit down or keep
10 going?

11 THE COURT: No, I think I understand everything.
12 I'm going to need to think about it. I'm going to need to read
13 and study on the jurisdiction issue.

14 MR. JONES: We filed a proposed order.

15 THE COURT: And if both of you would supply a
16 proposed order, if you haven't already. I prefer by -- and I
17 decide quickly. I am not one of those that would take it for
18 weeks or days even. I will be done by tomorrow but -- or
19 Friday. If you would submit a Microsoft Word version just in
20 case. A lot of times I like to put my reason or a citation in
21 my order, and so I can add that easily if you will e-mail
22 Denise.Spalding@dentoncounty.gov a Microsoft Word version, then
23 I can take it from there.

24 MR. JONES: How do we get that to you?

25 THE COURT: By e-mail to Denise.

1 MR. JONES: That we can do.

2 MR. GREENE: And, Your Honor, the proposed order
3 that I will send in will identify specifically the two
4 declarations that we think would be granted by the plea, but
5 obviously it is a Word document, so you can do as you wish.

6 THE COURT: All right. Thank you very much. Very
7 helpful presentation. I appreciate it.

8 Now let's go on to TCPA. And I will reset the
9 clock. And, oddly enough, I had within 30 seconds 11 minutes
10 on each side but I'm not sure, I bounced back and forth, but
11 that seemed very fair. I will reset the clock here. I use a
12 chess clock.

13 MR. JONES: How long do we have?

14 THE COURT: 20 minutes. And we have flexibility
15 to go longer if we need to because there is a lot on the TCPA.
16 I will say again, I have read what's been filed, everything, as
17 is my custom. I'm familiar with the Texas two step, or three
18 step, depending on your perspective, so you don't need to
19 rehash all of that. But I don't want to stifle your
20 presentation. So, Mr. Munisteri, you may walk me through
21 everything.

22 MR. MUNISTERI: Thank you, Your Honor. Generally,
23 just it hasn't been said, this is what I understand is the
24 Hilltown Addition where there is, you know, a reasonably good
25 number of members of the public that are served by this water

1 STATE OF TEXAS)

2 COUNTY OF DENTON)

3
4
5 I, Patricia Gandy, Official Court Reporter in and for
6 the 431st District Court of Denton County, State of Texas, do
7 hereby certify that the above and foregoing contains a true and
8 correct transcription of all portions of evidence and other
9 proceedings requested in writing by counsel for the parties to
10 be included in this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred in open
12 court or in chambers and were reported by me.

13 I further certify that the total cost for the
14 preparation of this Reporter's Record is \$160.00 and was paid
15 by Plaintiff.

16 WITNESS MY OFFICIAL HAND this 20th day of April, 2022.
17
18

19 /s/Patricia Gandy

20 PATRICIA GANDY, CRR, TCRR, RPR, CSR #8184
21 Exp. 7-31-22
22 Official Court Reporter
23 431st District Court
24 1450 East McKinney Street
25 Denton, Texas 76209 (940) 349-4372

CAUSE NO. 21-10909-431

CENTRAL STATES WATER
RESOURCES, INC.*Plaintiff,*

v.

TERRA SOUTHWEST, INC., UNDINE
DEVELOPMENT, LLC, and UNDINE
TEXAS, LLC,*Defendants.*§
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IN THE DISTRICT COURT OF

DENTON COUNTY, TEXAS

431ST JUDICIAL DISTRICT**ORDER GRANTING PLEA TO THE JURISDICTION**

Came on to be considered Defendant Terra Southwest, Inc.'s Plea to the Jurisdiction. After careful consideration, the Court, having read and examined the pleadings, evidence, and arguments of counsel, is of the opinion that the Plea to the Jurisdiction should be granted.

THEREFORE, IT IS ORDERED that Defendant Terra Southwest, Inc.'s Plea to the Jurisdiction be and is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Central States Water Resources, Inc.'s claims for temporary and permanent injunction in this Cause be and hereby are DISMISSED with prejudice for want of jurisdiction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Central States Water Resources, Inc.'s claims for specific performance in this Cause be and hereby are DISMISSED with prejudice for want of jurisdiction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Central States Water Resources, Inc.'s claim for declaratory judgment that it is the proper recipient of the utility assets of Defendant Terra Southwest, Inc. be and hereby is DISMISSED with prejudice for want of jurisdiction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Central States Water Resources, Inc.'s claims for declaratory judgment that Defendant Undine Development, LLC has no standing or right to file its November 2021 Application with the Public Utility Commission of Texas and that such Application should be withdrawn be and hereby are DISMISSED with prejudice for want of jurisdiction.

The Court finds that it has jurisdiction over Plaintiff Central States Water Resources, Inc.'s claim for breach of contract against Defendant Terra Southwest, Inc., and that breach of contract claim remains to be litigated in this case.

SIGNED on March 25, 2022.


DENTON COUNTY DISTRICT JUDGE