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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' SUPPLEMENT TO 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 Supplement to Response to Central States Water Resources, Inc.'s ("CSWR") Notice of District Court Judgment, Renewed Motion to Intervene and Motion to Abate ("Renewed Motion").

On May 10, 2022, Applicants' filed their Response to CSWR's Notice of District Court Judgment, Renewed Motion to Intervene and Motion to Abate ("Response"). Attached as Exhibit B to the Response was an excerpt from the Reporter's Record of the hearing on Terra's Plea to the Jurisdiction. Applicants' hereby supplement Exhibit B to the Response with the entirety of the discussion and argument on Terra's Plea to the Jurisdiction. Applicants believe having the complete document in the record will be helpful to the presiding Administrative Law Judge and Commission.

Respectfully submitted,

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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 11, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.


Geoffrey P. Kirshbaum

REPORTER'S RECORD
TRIAL COURT CAUSE NO. 21-10909-431
COURT OF APPEALS CAUSE NO. 02-22-00134-CV&02-22-00135-CV
VOLUME 1 OF 1 VOLUMES

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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.

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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)

P R O C E E D I N G S

THE COURT: Welcome, everyone, again. I will call Case 21-10909-431, Central States Water Resources, Incorporated versus Terra Southwest, Incorporated, Undine Development, LLC and Undine Texas, LLC. We're set today for, as I understand it, both the TCPA motion to dismiss and a plea to the jurisdiction. Let me get announcements for the record, and then we will decide what order we go in. Let's start with today's Movants.

MR. MUNISTERI: Your Honor, Jay Munisteri with Foley Lardner and I am here with Abigail Drake. We represent the two Undine Entities, Undine Texas, Undine Development.

MR. GREENE: Good morning. Ryan Greene with Terrill Waldrop representing Defendant Terra Southwest. And we are the Movant on the plea to the jurisdiction.

THE COURT: All right.

MR. JONES: Lindy Jones and Lynn Schleinat. We represent Central States Water Resources, the Plaintiff in the case.

THE COURT: Okay. And, Mr. Greene, I don't know if you need to take up residence at the table or you have got it all in your head, but I think it is logical to take up the plea to the jurisdiction first, if you want to proceed with that.

MR. GREENE: That would be fine, Your Honor. I'll

1 just take up a corner here.

2 THE COURT: All right.

3 MR. GREENE: And it is mostly in my head. I'd
4 like to hand the Court some authority on it.

5 THE COURT: All right. And I, as a matter of
6 practice, I prefer not to receive paper anything. But I do
7 have a LexisNexis subscription at my fingertips, and if there
8 are citations I need to look up on legal points that are
9 relevant, I can do that.

10 MR. GREENE: Okay. That's great. I appreciate
11 that, Your Honor, and I can just dive into the plea.

12 THE COURT: Okay.

13 MR. GREENE: The essence of the plea to the
14 jurisdiction is this distinction between breach of contract
15 damages, a damage claim, versus the operations of the utility.
16 And so to give the background of what the dispute is about, my
17 client, Terra Southwest, is currently operating a water utility
18 in the area. Entered into negotiations with two different
19 potential buyers. And one of those buyers was the Plaintiff,
20 Central States, and the other buyer was Undine, the
21 Co-Defendant.

22 The Plaintiff's claim, breach of contract claim,
23 they are saying that we have to sell the utility to them. My
24 client does not want to sell the utility to them. My client
25 wants to sell the utility to Undine. Undine and my client,

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
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