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DOCKET NO. 53262

PETITION OF BLACKLAND WATER	§	PUBLIC UTILITY COMMISSION
SUPPLY CORPORATION AND THE	§	
CITY OF ROCKWALL FOR	§	OF TEXAS
APPROVAL TO AMEND	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY UNDER TEXAS	§	
WATER CODE § 13.255(a) IN	§	
ROCKWALL COUNTY	§	

ORDER NO. 6
WITHDRAWING PRIOR FINDING OF ADMINISTRATIVE COMPLETENESS,
FINDING APPLICATION NOT ADMINISTRATIVELY COMPLETE, AND
PROVIDING OPPORTUNITY TO CURE

In Order No. 2 filed on April 18, 2022, the administrative law judge (ALJ) found the petition in this matter to be administratively complete. On July 27, 2022, the parties submitted a proposed Notice of Approval. In working on a Proposed Order¹ for this matter, the ALJ has carefully reviewed the applicable law and concluded that certain elements are missing from the petition which render it incomplete and make it impossible for final action to be taken on the petition at this time.

I. Background

The City of Rockwall is a home rule city that operates, maintains, and controls facilities for providing retail water service within its corporate limits. Rockwall does not hold, and does not wish to hold, a certificate of convenience and necessity (CCN). Blackland Water Supply Corporation operates, maintains, and controls facilities for providing retail water service in Rockwall County under CCN number 11305.

Over recent decades, Rockwall has repeatedly expanded its municipal boundaries through annexations. A number of those annexations have expanded the boundaries into areas of Blackland WSC's certificated service area under its CCN. To address those expansions, Blackland WSC and Rockwall have entered into three separate agreements that are at issue in this proceeding—the first in 1989, the second in 2007, and the third in 2012. In each agreement,

¹ Given the lengthy time frame which is spanned by the petitioners' multiple contracts, the unique facts, and the complexity of the issues, the ALJ has concluded that this matter must be decided via the issuance of an Order by the Commission, rather than by a Notice of Approval from the ALJ.

Blackland WSC essentially ceded to Rockwall the portions of its service area that were annexed into the city's municipal boundaries. That is, the petitioners agreed between themselves² that Blackland WSC would no longer be responsible for providing water service in those areas, Rockwall would be responsible for providing water service in those areas, and ownership of any water distribution facilities within the areas was transferred from Blackland WSC to Rockwall. Thus, since each agreement was executed:

- With the apparent exception of one customer, Blackland WSC has not been providing water service to the areas covered by the agreement (even though those areas remain within the certificated service area of Blackland WSC's CCN number 11305), and
- Rockwall has been providing water service to the areas covered by the agreement, without possessing a CCN for those areas.

In this proceeding, the petitioners are now "seeking to remedy any deficiencies" by obtaining the "requisite Commission approvals"³ of the three agreements. Specifically, the petitioners ask the Commission to "approve" the three agreements under Texas Water Code (TWC) § 13.255(a) and remove the areas covered by the agreements from the service area of Blackland WSC's CCN number 11305. The petition makes it clear that Rockwall does not wish to obtain a CCN to serve the areas covered by the agreements.

II. Discussion

In this proceeding, the petitioners ask that Blackland WSC's CCN boundaries be revised to exclude the agreed upon areas, and that Rockwall be allowed to provide water service to the agreed upon areas without Rockwall having obtained a CCN to serve those areas. The ALJ concludes that such an arrangement is not allowed by the applicable law. Specifically, the ALJ concludes that, because Rockwall wishes to be the provider of water service to the annexed areas, it must apply for and obtain from the Commission a CCN authorizing it to provide such service.

² The petitioners did not, at the time of the agreements, request or receive approval of the agreements from the administrative agency then responsible for regulating retail water service in Texas, such as the Texas Water Commission, the Texas Commission on Environmental Quality, or the Commission.

³ Petition filed on March 25, 2022, at 3.

The petition is brought under TWC § 13.255(a) and 16 Texas Administrative Code (TAC) § 24.259. Both the statute and the rule are entitled “*Single Certification* in Incorporated or Annexed Areas.”⁴ “Certification” means the issuance of a CCN. Further, if an area is “certificated,” this means that only the CCN holder for the area may provide service in it. The statute, TWC § 13.255(a), reads as follows.

In the event that an area is incorporated or annexed by a municipality, either before or after the effective date of this section, the municipality and a retail public utility that provides water . . . service to all or part of the area pursuant to a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipally owned utility . . . or by the retail public utility. . . . The agreement may provide for *single or dual certification* of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on. . . .⁵

In other words, if a municipality and another retail public utility choose to enter into an agreement under TWC § 13.255(a), the agreement may provide that the annexed areas will be: (1) singly-certificated to the municipality; (2) singly-certificated to the retail public utility; or (3) dually-certificated to the municipality and retail public utility. There is no fourth option—the statute does not enable the parties to the agreement to agree that the annexed areas will be *uncertificated*.

This conclusion is buttressed by the remaining text of TWC § 13.255(a), which reads as follows:

The executed agreement shall be filed with the utility commission, and the utility commission, on receipt of the agreement, shall incorporate the terms of the agreement into *the respective certificates of convenience and necessity of the parties to the agreement*.⁶

In other words, the way in which the Commission “approves” an agreement under TWC § 13.255(a) is to incorporate the agreed-to changes into the CCNs of the retail public utility *and* the municipality.

The remainder of TWC § 13.255 and 16 TAC § 24.259 further reinforces the conclusion that the municipality must obtain a CCN if it wishes to serve the annexed areas. The statute and

⁴ Emphasis added.

⁵ Emphasis added. The Commission rule, 16 TAC § 24.259, is essentially identical.

⁶ Emphasis added. The Commission rule, 16 TAC § 24.259, is essentially identical.

the rule create two methods by which a municipality that expands its boundaries into the certificated service area of a retail public utility may effectively replace the retail public utility as the entity responsible for providing service in those areas. The first method is by written agreement (as is the case in this proceeding) and the second method is by the unilateral action of the municipality. Under TWC § 13.255(b) and 16 TAC § 24.259(c), the process for the unilateral method commences when the municipality provides to the retail public utility written notice that it intends to provide service to the annexed areas. The municipality must then, “prior to providing service to the area, . . . file an application with the utility commission to *grant single certification to the municipally owned water or sewer utility*.”⁷ At the end of the process, the Commission grants single certification to the municipality.⁸ In other words, if a municipality expands its boundaries into the certificated service area of a retail public utility and wishes to replace the retail public utility as the provider of service in those areas, then it must obtain a CCN from the Commission to do so, regardless of whether the retail public utility agrees to the change.

This conclusion is also consistent with the remainder of TWC chapter 13. For example, TWC § 13.242(a) prohibits a “utility” from providing retail water or sewer service without first obtaining a CCN from the Commission. This general requirement does not apply to a municipality because municipalities do not fall within the definition of a utility.⁹ Thus, as a general rule, Rockwall is not obligated to possess a CCN in order to provide retail water or sewer service. However, TWC § 13.242(a) goes on to specify that a municipality must obtain a CCN in narrow circumstances that are applicable to this case:

[A] retail public utility may not furnish, make available, render, or extend retail water or sewer utility service to any area to which retail water or sewer utility service is being lawfully furnished by another retail public utility without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

Rockwall is a retail public utility,¹⁰ and the petitioners admit as much.¹¹ In the agreements at issue in this case, Rockwall began furnishing retail water service to areas that were already

⁷ TWC § 13.255(b)(emphasis added); *see also*, 16 TAC § 24.259(e).

⁸ TWC § 13.255(c); 16 TAC § 24.259(o)(3)(C).

⁹ *See* TWC § 13.002(23).

¹⁰ *See* TWC § 13.002(19).

¹¹ Petition filed on March 25, 2022, at 1.

within the certificated service area of, and being served by, Blackland WSC. As such, Rockwall was obligated to obtain a CCN in order to do so.

There is also a second reason why the application is not administratively complete. As noted above, the petitioners are asking the Commission to approve their agreements under TWC § 13.255, which requires the Commission to “incorporate the terms of the agreement[s] into the respective [CCNs] of the parties to the agreement[s].” And yet, at least with respect to one customer, the petitioners themselves have apparently not abided by the terms of the agreements they entered into. The petitioners explain that Blackland WSC has one customer, Big Tex Trailer World, whose tract of land lies within the area transferred from Blackland WSC to Rockwall by the 1989 agreement, but that Blackland WSC, not Rockwall, has been and continues to be the provider of water service to Big Tex. The petitioners “would consent to a service area exception (or regulatory equivalent) that would allow Blackland [WSC] to continue to serve [Big Tex] . . . so that no customers would be transferred at this time.”¹² In other words, the petitioners are asking the Commission to carve out of Blackland WSC’s certificated service area those areas covered by the agreements, but to carve out of the carve-out the area inhabited by Big Tex. The petitioners have not identified any legal provision which empowers the Commission to, under TWC § 13.255, only partially incorporate the terms of an agreement into the respective CCNs of the parties to the agreement, nor have they formally requested in their petition any mechanism by which the Commission could authorize Big Tex’s tract of land to remain within Blackland WSC’s service area while simultaneously approving the agreements.

For these reasons, the ALJ withdraws the finding of administrative completeness in Order No. 2, and finds that petition in this proceeding is administratively incomplete. The petition must be amended to include an application of Rockwall to obtain a CCN authorizing it to provide service to all areas covered by the three agreements at issue in this proceeding. Additionally, the petition must be amended to either withdraw any request for special treatment related to Big Tex, or to include a cogent and legally supportable process by which the issue of Big Tex can be resolved.

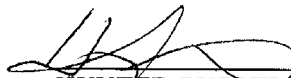
By September 6, 2022, the petitioners must amend the petition to cure the deficiencies identified above. By October 6, 2022, Commission Staff must file comments on the administrative

¹² Petition at 5.

completeness of the amended petition and sufficiency of notice, and propose a procedural schedule, if appropriate.

Signed at Austin, Texas the 5th day of August 2022.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE