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Interim Executive Director

Public Utility Commission of Texas

TO: Shelah Cisneros
Commission Counsel

All Parties of Record

FROM: Hunter Burkhalter 
Chief Administrative Law Judge

RE: **Docket No. 55623** – *Application of the City of McLendon-Chisholm for a Certificate of Convenience and Necessity in Rockwall County*

DATE: April 29, 2024

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this memo, the parties to this proceeding are being served with the PFD.

Please place this docket on an open meeting agenda for the Commissioners' consideration. Please notify me and the parties of the open meeting date, as well as the deadline for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

/scc
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DOCKET NO. 55623

APPLICATION OF THE CITY OF	§	PUBLIC UTILITY COMMISSION
MCLENDON-CHISHOLM FOR A	§	
CERTIFICATE OF CONVENIENCE	§	OF TEXAS
AND NECESSITY IN ROCKWALL	§	
COUNTY	§	

PROPOSAL FOR DECISION

In this proceeding, the City of McLendon-Chisholm seeks to obtain a water certificate of convenience and necessity (CCN) under Texas Water Code (TWC) § 13.255. In this Proposal for Decision (PFD), the administrative law judge (ALJ) recommends that the Commission dismiss the application under 16 Texas Administrative Code (TAC) § 22.181(d)(11), for other good cause shown. The ALJ recommends the dismissal be without prejudice.

I. Applicable Law

The city filed the application under TWC § 13.255 and 16 Texas Administrative Code (TAC) § 24.259. Under these provisions, if a CCN holder has certificated service area that a city incorporates or annexes into its city limits, then the city can replace the CCN holder as the provider of water or sewer service in that area.

The statute and rule set out two methods by which the city can oust the CCN holder. First, the city can replace the CCN holder by written agreement. TWC § 13.255(a) provides:

In the event that an area is incorporated or annexed by a municipality, . . . the municipality and a retail public utility that provides water . . . service to all or a part of the area pursuant to a [CCN] 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 The executed agreement shall be filed with the [Commission], and the [Commission], on receipt of the agreement, shall incorporate the terms of the agreement into the respective [CCNs] of the parties to the agreement.

Second, if the city and the CCN holder cannot come to an agreement, then the city can unilaterally oust and supplant the CCN holder, but then a hearing must be held to determine the amount of compensation that is owed to the CCN holder. The city cannot proceed to the unilateral method, however, unless it has first engaged in a 180-day negotiating period with the CCN holder to determine whether they can come to a written agreement. Under TWC § 13.255(b):

If an agreement is not executed within 180 days after the municipality, in writing, notifies the retail public utility of its intent to provide service to the incorporated or annexed area, and if the municipality desires or intends to provide retail utility service to the area, the municipality, prior to providing service to the area, shall file an application with the [Commission] to grant single certification to the municipally owned water . . . utility If an application for single certification is filed, the [Commission] shall fix a time and place for a hearing and give notice of the hearing to the municipality, . . . and notice of the application and hearing to the retail public utility.

Thus, before proceeding to the unilateral method, the city must first provide to the CCN holder a “notice of its intent to provide service in incorporated or annexed area” (Notice of Intent) which is then followed by a 180-day period intended to give the parties time to, hopefully, negotiate an agreement. Under 16 TAC § 24.259(c), the Notice of Intent must be in writing and must include the following information:

- (1) the municipality’s requested area;
- (2) any transferred property;
- (3) the municipal ordinance or other action that annexed or incorporated the municipality’s requested area;
- (4) what kind of service will be provided;
- (5) whether a municipally owned utility or franchised utility will provide the service; and
- (6) the municipally owned utility’s or the franchised utility’s identity and contact information.

II. Discussion

RCH Water Supply Corporation holds CCN number 10087, which authorizes it to provide retail water service in Rockwall County. The city contends that it has annexed portions of RCH WSC’s certificated service area into the municipal limits of the city. On September 29, 2023, the city filed the application at issue in this proceeding, in which it seeks: (1) to unilaterally have RCH WSC’s CCN number 10087 amended to remove those portions of its service area that have been annexed by the city; and (2) for the city’s municipally owned utility to obtain a new CCN to serve the portions removed from RCH WSC’s certificated service area.

The city claims that it provided a Notice of Intent to RCH WSC on September 28, 2022.¹ What the city claims is its Notice of Intent consists of an email from Konrad Hildebrandt, the city’s

¹ Application at PDF part 1, p. 3 and Attachment B (Sept. 29, 2023).

city administrator, to Jack Pullen, RCH WSC's board president at that time. The email states, in relevant part, "per our telephone call, I am sending you a resolution passed by our City Council last night with an attached 'Asset Transfer Agreement.' Our hope is that you can include this on your next RCH Board meeting agenda, as well as schedule an election of your members whenever is possible based on your bylaws."² Attached to the email is a resolution passed by the city council on September 27, 2022, authorizing the city administrator to negotiate with RCH WSC and a draft, incomplete, and unsigned Water System Asset Transfer Agreement. None of the documents references TWC § 13.255 or 16 TAC § 24.259 or states that the documents constitute a Notice of Intent to provide service to incorporated or annexed areas.

The city filed its application to unilaterally oust and supplant the CCN holder (the second method authorized by TWC § 13.255) on September 29, 2023, a year and a day after the city's email to Mr. Pullen.

In Order No. 8 filed on February 23, 2024, the ALJ concluded that the documents provided to RCH WSC on September 28, 2022, were deficient as a Notice of Intent because they lack the necessary components of a Notice of Intent required by TWC § 13.255 and 16 TAC § 24.259(c). Moreover, because the application in this case could not have been filed until 180 days after the city had provided a legally sufficient Notice of Intent to RCH WSC, the ALJ concluded that the deficiencies in the September 28, 2022 documents could not be cured in this proceeding. Therefore, in Order No. 8, the ALJ moved to have this case dismissed.

On March 15, 2024, Commission Staff filed a response in support of the motion to dismiss. The city did not respond to the motion to dismiss, although in a prior filing made on November 11, 2023, it responded to the allegations that its Notice of Intent was deficient.

No hearing was held on the motion to dismiss. However, under 16 TAC § 22.181(c), the Commission may dismiss a matter without a hearing if the facts necessary to support the dismissal are established as a matter of law.

² Application at Attachment B (PDF part 2, p. 58).

For the reasons discussed below, the email and attachments sent to RCH WSC by the city on September 28, 2022 are deficient because they lack the necessary components of a Notice of Intent required by TWC § 13.255 and 16 TAC § 24.259(c).

A. The city's September 28, 2022 email and attachments do not constitute a Notice of Intent under TWC § 13.255 and 16 TAC § 24.259.

The substance of the September 28, 2022 email and attachments indicate that the city wished to purchase entirety of RCH WSC's service area, both inside and outside the city's limits.³ Such an offer is not a Notice of Intent as contemplated in TWC § 13.255 and 16 TAC § 24.259. This is because an offer by a city to purchase the entirety of a CCN holder's service area, both inside and outside of the city's limits, has different legal ramifications than an offer to purchase only the portion of a CCN holder's service area that has been annexed or incorporated into the city limits under TWC § 13.255 and 16 TAC § 24.259. The CCN holder has the legal right to refuse the former type of offer; the CCN holder cannot refuse the latter type, it can only negotiate or seek a hearing as to the amount of compensation the city must pay.

There is nothing in the September 28, 2022 email and attachments that would reasonably make RCH WSC aware that the email and attachments constituted a Notice of Intent made under TWC § 13.255 and 16 TAC § 24.259 or that the documents started the 180-day countdown for a written agreement before proceeding to a hearing.

B. The city's September 28, 2022 email and attachments failed to "specify" "the municipality's requested area" as required by 16 TAC § 24.259(c)(1).

The September 28, 2022 email and attachments generically indicate that the city wished to purchase entirety of RCH WSC's service area, both inside and outside the city's limits. The city argues that this sufficiently describes the area to be transferred and, therefore, satisfies the requirements of 16 TAC § 24.259(c)(1), which requires that the Notice of Intent must "specify" the "municipality's requested area." The ALJ disagrees.

The email and attachments do not in any way describe the portions of RCH WSC's service area that have been annexed or incorporated by the city and which the city seeks to serve.

³ See also, City's Response to RCH WSC's Response to the City's Application, at 2, 4-5 (Nov. 9, 2023).

C. The city's September 28, 2022 email and attachments failed to "specify" "the transferred property" as required by 16 TAC § 24.259(c)(2).

The city argues that Article 1 of the draft contract sufficiently describes the property to be transferred and, therefore, satisfies the requirements of 16 TAC § 24.259(c)(2), which requires that the Notice of Intent must "specify" "any transferred property." The ALJ disagrees.

The draft contract never describes what property of RCH WSC would have to be transferred *in order for the city to serve those areas that have been annexed or incorporated by the city*. Rather, the draft contract, in an incomplete way, describes what property RCH WSC would transfer to the city *if the city took over the entirety of RCH WSC's service area, both inside and outside the city limits*. Even then, the draft contract leaves the specifics unstated.

Article 1 of the draft contract is entitled "Assets to be Conveyed." The article begins: "RCH, in accordance with this Agreement, shall convey and McLendon-Chisholm shall acquire the following assets, hereafter collectively referred to as the 'Assets'". Section 1.1 of Article 1 then provides that RCH's entire retail public utility and water system and certificated service area defined by CCN number 10087 would be transferred. But, for the reasons described in Section II.A. of this PFD, above, such a transfer would occur only in the event of a deal reached that is outside the scope of TWC § 13.255 and 16 TAC § 24.259.

Next, Section 1.2 of Article 1 purports to identify the land being transferred by the contract by reference to "the real property listed in Exhibit 'A' attached hereto," but Exhibit A is blank. Section 1.3 of Article 1 purports to identify the improvements being transferred by the contract and is said to include to "all those items specifically listed on Exhibit 'B' attached hereto," but Exhibit B is blank. Section 1.7 of Article 1 purports to identify the tangible personal property being transferred by the contract and is said to include "those items identified on Exhibit 'C' attached hereto," but Exhibit C is blank. Section 1.10 of Article 1 purports to identify RCH WSC's contractual rights being transferred by the contract by reference to "Exhibit 'D'," but Exhibit D is blank.⁴

Simply put, the documents that the city claim constitute its Notice of Intent do not describe the property that would be transferred in order for the city to serve those portions of RCH WSC's

⁴ Application at Attachment B (PDF part 2)(emphases in original).

service area that have been annexed or incorporated by the city, in violation of 16 TAC § 24.259(c)(2).

D. The city's September 28, 2022 email and attachments failed to "specify" "the municipal ordinance or other action that annexed or incorporated the municipality's requested area," as required by 16 TAC § 24.259(c)(3).

The city argues that Resolution No. 2022-13, which was attached to the September 28, 2022 email, is sufficient to satisfy the requirement of 16 TAC § 24.259(c)(3), which requires that the Notice of Intent must "specify" "the municipal ordinance or other action that annexed or incorporated the municipality's requested area." The city states: "Other than Resolution 2022-13, there is no other specific City order or other action necessary to identify the area to be transferred, as the Resolution and the attached Agreement make it clear what areas will be transferred."⁵

Again, the ALJ disagrees. It is not sufficient for the city to have simply told RCH WSC that it wished to serve all of RCH WSC's service area. For purposes of enabling RCH WSC to knowledgeably engage in negotiations under TWC § 13.255 and 16 TAC § 24.259, it was necessary for the utility to specifically understand which portions of its service area lay within city limits. But there is no reason to believe that RCH WSC, or any CCN holder, can or should be expected to be familiar with every ordinance or other action a city takes that has the effect of annexing or incorporating the CCN holder's service area into the city's limits. Thus, even a generic statement that the city wishes to serve the portions of RCH WSC's service area that lie within the city's boundaries would not be terribly informative. In order to be helpful for purposes of TWC § 13.255 and 16 TAC § 24.259, it would be necessary for the CCN holder to be informed specifically where those areas are located so that the CCN holder could knowledgeably engage in contract negotiations. This is the reason why the city was required, by 16 TAC § 24.259(c)(3), to disclose to RCH WSC the specific ordinances or other actions that caused RCH WSC's service area to lie within the city's boundaries.

Indeed, the complexity of determining which portions of RCH WSC's service area lie within city limits is demonstrated by the fact that, when the city ultimately filed its application in this case, it identified, by the ALJ's rough count, 25 ordinances, which were adopted over a period

⁵ City's Response to RCH WSC's Response to the City's Application, at 4-5.

from 1970 forward, and provided 150 pages of ordinances, metes and bounds descriptions, maps, and surveys to demonstrate the location of the lands at issue.

It is apparent from the text of TWC § 13.255 and 16 TAC § 24.259, that the purpose of requiring a Notice of Intent is to allow the affected city and CCN holder to engage in an educated and meaningful negotiation to enter into an agreement, potentially eliminating altogether the need for the type application that is now at issue in this case. By failing to provide all of the required information to RCH WSC, including specifically identifying the property and land to be transferred and the ordinances by which the city annexed RCH WSC's service area, it seems likely that the city inhibited the ability of RCH WSC to meaningfully engage in the negotiations contemplated by TWC § 13.255 and 16 TAC § 24.259.

Because the deficiencies in the Notice of Intent cannot be cured at this stage of this proceeding, the ALJ concludes that dismissal is appropriate, under 16 TAC § 22.181(d)(11), for other good cause shown.

III. Findings of Fact

The ALJ makes the following findings of fact.

Parties

1. The city is municipality in Rockwall County.
2. RCH WSC is a Texas nonprofit corporation registered with the Texas secretary of state under filing number 17642701.
3. RCH WSC operates, maintains, and controls in Texas facilities for providing potable water service for compensation.
4. RCH WSC holds CCN number 10087 which obligates it to provide retail water service in its certificated service area in Rockwall County.

Background

5. The city contends that, through a series of ordinances enacted over several decades, it has annexed portions of RCH WSC's service area under CCN number 10087 into the city's municipal limits.

6. On September 28, 2022, the city's administrator, Konrad Hildebrandt, sent an email to RCH WSC's then board president. Attached to the email was a resolution passed by the city council on September 27, 2022, authorizing the city administrator to negotiate with RCH WSC, and a draft and incomplete Water System Asset Transfer Agreement.
7. The September 28, 2022 email states, in relevant part, "I am sending you a resolution passed by our City Council last night with an attached 'Asset Transfer Agreement.' Our hope is that you can include this on your next RCH Board meeting agenda, as well as schedule an election of your members whenever is possible based on your bylaws."
8. Neither the September 28, 2022 email nor the attachments reference TWC § 13.255 or 16 TAC § 24.259 or state that the documents constitute a notice of intent to provide service to incorporated or annexed areas.
9. The substance of the September 28, 2022 email and attachments is that the city wished to purchase the entirety of RCH WSC's service area, both inside and outside the city's limits.
10. The September 28, 2022 email and attachments did not indicate that the city wished to replace RCH WSC as the provider of water service in the portions of RCH WSC's service area that had been annexed by the city and did not suggest that a 180-day term had commenced for the negotiating of such an agreement.
11. The September 28, 2022 email and attachments did not specify the portions of RCH WSC's service area that had been annexed or incorporated by the city which the city sought to serve.
12. The September 28, 2022 email and attachments did not specify what property of RCH WSC would have to be transferred in order for the city to serve those areas that have been annexed or incorporated by the city. Rather, the documents, in an incomplete and nonspecific way, described what property RCH WSC would have to transfer to the city if the city took over the entirety of RCH WSC's service area, both inside and outside the city limits.
13. The September 28, 2022 email and attachments did not specify the municipal ordinances or other actions that caused portions of RCH WSC's service area to lie within the city's boundaries.

Application

14. On September 29, 2023, the city filed the application at issue in this proceeding under TWC § 13.255 and 16 TAC § 24.259.
15. In the application, the city it seeks:
 - a. to unilaterally have RCH WSC's CCN number 10087 amended to remove those portions of its service area that have been annexed by the city; and
 - b. for the city's municipally owned utility to obtain a new CCN to serve the portions removed from RCH WSC's certificated service area.

Motion to Dismiss

16. In Order No. 8 filed on February 23, 2024, the ALJ concluded that the documents provided to RCH WSC on September 28, 2022 lacked the necessary components of a notice of intent to provide service to incorporated or annexed areas. Moreover, because the application in this case could not have been filed until 180 days after the city had provided to RCH WSC a legally sufficient notice of intent to provide service to incorporated or annexed areas, the ALJ concluded that the deficiencies in the September 28, 2022 documents could not be cured in this proceeding. Therefore, in Order No. 8, the ALJ moved to have this case dismissed, for other good cause shown.
17. On March 15, 2024, Commission Staff filed a response in support of the motion to dismiss.
18. The city did not respond to the motion to dismiss, although in a prior filing made on November 11, 2023, it responded to the allegations that the September 28, 2022 documents lacked the necessary components of a notice of intent to provide service to incorporated or annexed areas.
19. No hearing was held on the motion to dismiss, and none is necessary because the facts necessary to support the dismissal are established as a matter of law.

IV. Conclusions of Law

The ALJ makes the following conclusions of law.

1. The Commission has authority over this matter under TWC § 13.255.
2. RCHWSC is a retail public utility as that term is defined in TWC § 13.002(19) and 16 TAC § 24.3(31).
3. The Commission may dismiss a proceeding, with or without prejudice, upon the motion of the presiding officer or any party for other good cause shown, under 16 TAC § 22.181(d)(11).
4. Under 16 TAC § 22.181(c), this proceeding may be dismissed without a hearing because the facts necessary to support the dismissal are uncontested or are established as a matter of law.
5. Under TWC § 13.255 and 16 TAC § 24.259, if a CCN holder has certificated service area that a city incorporates or annexes into its city limits, then the city can replace the CCN holder as the provider of water or sewer service in that area.
6. Under TWC § 13.255(a), the city can replace the CCN holder by written agreement, but only if the city first provides to the CCN holder a Notice of Intent and the city and CCN holder have at least 180 days to negotiate the terms of the agreement.
7. Under 16 TAC § 24.259(c), the Notice of Intent must be in writing and must “specify,” among other things:
 - a. “the municipality’s requested area;”
 - b. “any transferred property;” and
 - c. “the municipal ordinance or other action that annexed or incorporated the municipality’s requested area.”
8. Under TWC § 13.255(b), if, after having sent a sufficient Notice of Intent and waiting the requisite 180 days, the city and the CCN holder cannot come to a written agreement, then the city can unilaterally oust and supplant the CCN holder, but then a hearing must be held to determine the amount of compensation that is owed to the CCN holder.

9. The September 28, 2022 email and attachments sent by the city to RCH WSC did not constitute a Notice of Intent as contemplated in TWC § 13.255 and 16 TAC § 24.259.
10. The September 28, 2022 email and attachments sent by the city to RCH WSC did not specify the municipality's requested area, as required by 16 TAC § 24.259(c)(1).
11. The September 28, 2022 email and attachments sent by the city to RCH WSC did not specify any transferred property, as required by 16 TAC § 24.259(c)(2).
12. The September 28, 2022 email and attachments sent by the city to RCH WSC did not specify the municipal ordinances or other actions that annexed or incorporated the municipality's requested area, as required by 16 TAC § 24.259(c)(3).
13. Because a legally sufficient Notice of Intent must have been provided to RCH WSC at least 180 days before the application in this case was filed, the legal defects in the September 28, 2022 email and attachments sent by the city to RCH WSC cannot now be cured in this proceeding, and this matter should be dismissed, under 16 TAC § 22.181(d)(11), for other good cause shown.
14. Under 16 TAC § 22.181(f)(2), dismissal of a case for reasons other than those specified in 16 TAC § 22.181(g)(1) or (2) requires preparation of a PFD.
15. This PFD was issued in accordance with Texas Government Code § 2001.062 and 16 TAC § 22.261(a).

V. Ordering Paragraphs

In light of the above findings of fact and conclusions of law, the ALJ recommends the following ordering paragraphs.

1. The Commission dismisses, without prejudice, the city's application, for other good cause shown.
2. The Commission denies all other motions, and any other requests for general or specific relief that have not been expressly granted.

Signed at Austin, Texas on the 29th day of April 2024.

PUBLIC UTILITY COMMISSION OF TEXAS



HUNTER BURKHALTER
CHIEF ADMINISTRATIVE LAW JUDGE

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