

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 JUN -5 PM 4: 12

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

June 5, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of Chief Clerk, MC 105
P. O. Box 13087
Austin, Texas 78711-3087

RE: SOAH Docket No. 582-08-0990; TCEQ Docket No. 2007-1833-UCR;
Executive Director's Reply to the City of College Station's Exceptions to the Proposal for
Decision and Wellborn SUD's Brief in Support of the ALJ's Proposal for Decision

Dear Ms. Castañuela:

Enclosed please find the Executive Director's Response to Applicant's Exceptions to the Proposal
for Decision. Should you have any questions or concerns, please do not hesitate to contact me at
(512) 239-0750.

Sincerely,

A handwritten signature in black ink, appearing to read "B. D. MacLeod", with a long horizontal line extending to the right.

Brian D. MacLeod
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing list

SOAH DOCKET NO. 582-08-0990
TCEQ DOCKET NO. 2007-1833-UCR

2008 JUN -5 PM 4:12

APPLICATION OF THE CITY OF
COLLEGE STATION TO
DECERTIFY A PORTION OF
CERTIFICATE OF CONVENIENCE
AND NECESSITY NO. 11340 OF
WELLBORN SPECIAL UTILITY
DISTRICT IN BRAZOS COUNTY,
TEXAS (APPLICATION NO. 35717-
C)

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BEFORE THE TEXAS
CHIEF CLERKS OFFICE

COMMISSION ON

ENVIRONMENTAL QUALITY

**THE EXECUTIVE DIRECTOR'S REPLY TO THE CITY OF COLLEGE
STATION'S EXCEPTIONS TO THE PROPOSAL FOR DECISION AND
WELLBORN SUD'S BRIEF IN SUPPORT OF THE ALJ'S PROPOSAL FOR
DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW THE EXECUTIVE DIRECTOR (ED) OF THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ or Commission) and files
this reply to the City of College Station's (City's) Exceptions and Wellborn Special
Utility District's (Wellborn's) brief in support of the ALJ's proposal for decision (PFD)
pursuant to the Administrative Law Judge's (ALJ's) PFD.

PRELIMINARY STATEMENT

The ED supports the PFD as it is written and believes that the findings of fact and
conclusions of law are correct and do not need alteration. The ED understands that the
City was compelled to file their request for relief under section 13.255(a) with the TCEQ
because of an erroneous decision made by the Waco Court of Appeals after the City tried
to litigate the contract case in the proper state court forum. In fact, the City even argued
before the district court that the contract should be decided in District Court rather than
before the TCEQ. On page five of the City's exceptions, the City writes, "...the City
argued in those [state court] cases that decisions regarding the interpretations of the 1992
agreement should be made by the courts."

was faced with a Texas court of appeals opinion that had held that the TCEQ had exclusive jurisdiction over appeals of water rates charged by a city-owned (Galveston) utility for customers who lived in the city. The Court dismissed the state court action because it thought the TCEQ had exclusive appellate jurisdiction. Victoria Palms then brought an action appealing the city's decision to the TCEQ. ALJ William Newchurch stated in his PFD that, while great deference is given to the courts of appeals, the TCEQ is only bound to follow decisions of the Travis County District Court, the Austin Court of Appeals, and the Texas Supreme Court.⁵ The PFD further stated that when a non-binding court of appeals decision is clearly wrong, the Commission need not follow it.⁶ Because the law clearly provided that the TCEQ had no appellate jurisdiction in the *City of Donna* case, the Commission adopted the PFD and dismissed the appeal for lack of jurisdiction despite the courts of appeals decisions.⁷

The second *City of Donna* case was nearly identical to the first. The City of Donna and Victoria Palms had participated in a district court case on the same issue as in the first *City of Donna* case, and the Corpus Christi Court of Appeals had issued an opinion. This led to Victoria Palms making an argument that it had not made in the first case - that the TCEQ had jurisdiction under the "law of the case" doctrine, even though the TCEQ was not a party to the case and the decision was not made by the court of last resort, the Texas Supreme Court.⁸ In that case, the ALJ correctly held that the "law of the case" did not apply.⁹

It is clear that the Waco Court of Appeals decision is not binding on the Commission or the State Office of Administrative Hearings. With that background in mind, the ED will address the issues outlined the City's Exceptions to the PFD and Wellborn's brief in support of the PFD.

in the second *City of Donna* case (attachment 4). The second *City of Donna* case was settled before agenda, and hence, there is no final Commission Order in that case)

⁵ See attach. 2 at 12, 13-14 (stating the TCEQ is not bound by stare decisis because these three courts have never issued an opinion on the appellate jurisdiction issue).

⁶ See *id.* at 12 (stating the TCEQ should consider the Houston and Texarkana Courts of Appeal decisions but does not have to follow them).

⁷ Attach. 3 at 7-10.

⁸ Attach. 4 at 6, 8.

⁹ *Id.* at 8.

jurisdiction. The City's brief to the SOAH judge indicates that the TCEQ would have to resolve these common law issues in the following sentence excerpt: "[T]o the extent that there is a disagreement over whether there is a written executed contract ... the TCEQ must resolve those disputes before exercising its nondiscretionary authority under 13.255(a)." (Page 9 of the City's original jurisdictional brief). The resolution of those disputes is not simple because the whole case revolves around the validity of the ostensible "written executed contract." Therefore, the TCEQ cannot exercise its authority under section 13.255(a) without first exercising authority it does not have – namely, the authority to adjudicate common law contractual disputes.

While it is true that the city presented no common law claims or defenses, Wellborn did. Therefore, it would be inappropriate for the ED to assume that the writing is a valid agreement without first having to resolve those issues. The TCEQ does not have the authority to adjudicate common law contract claims and defenses, and a myriad of such claims and defenses exist in this case. To be a contract controlled by section 13.255(a), there can be no unsettled common law issues. Until those issues over which the TCEQ has no jurisdiction are decided, section 13.255(a) cannot come into play.

There are at least three ways that a contract could be considered under section 13.255(a): (1) the TCEQ can approve the contract under section 13.248 of the Texas Water Code¹⁰; (2) a court of competent jurisdiction can issue a final order, binding on the parties and no longer subject to appeal, clearly stating the contract's terms and validity; or (3) the parties can jointly present the contract and express no objections to the validity of the contract. All of these avenues would avoid the necessity of addressing common law claims and defenses to a contract – issues the TCEQ has no authority to decide.

¹⁰ Attach. 5.

failure of consideration, and more. These are issues on which the agency has no special expertise; they are common law contract issues. Additionally, to allow the TCEQ to determine the validity of the contract and not to determine whether attorney's fees should be awarded, whether damages should be awarded, whether an injunction could be issued, and the like would create issue preclusion problems for any subsequent district court case on those other issues that are involved in interpreting the contract. Such an approach is not only unauthorized but also very inefficient. The more efficient way to deal with a section 13.255(a) action would be to have all contractual issues either adjudicated or agreed to beforehand.

The San Antonio Court of Appeals has addressed this issue and explained its reasoning well in *City of San Antonio v. BSR Water Co.*¹² In that case, the parties had entered into a contract to resolve a dispute over San Antonio's application for a certificate of convenience and necessity (CCN).¹³ After the parties entered into their agreement, BSR withdrew its request for a hearing.¹⁴ A dispute later arose over the contract, and the parties went to court.¹⁵ The City of San Antonio asserted that the trial court lacked subject-matter jurisdiction because the TCEQ had exclusive jurisdiction over the underlying CCN dispute.¹⁶ The Court rejected this analysis and reasoned as follows:

Courts of general jurisdiction presumably have subject-matter jurisdiction unless a contrary showing is made. There is no presumption that administrative agencies are authorized to resolve disputes. Instead, an agency may exercise only those powers the law, in clear and express statutory language, confers upon it. "Courts will not divine

¹² Attach. 6.

¹³ *Id.* at 751.

¹⁴ *Id.*

¹⁵ *Id.* at 752.

¹⁶ *Id.* at 755.

A trial court should allow an administrative agency to initially decide an issue when: (1) the agency is typically staffed with experts trained in handling the complex problems in the agencies purview; and (2) great benefit is derived from the agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar factual situations. Here the merits of the pending CCN application are not at issue. Instead, the rights and obligations of SAWS and BSR under the Water Supply Contract and Service Area Agreement are at issue. We, therefore, hold the TCEQ does not have primary jurisdiction over BSR's contract claim.²⁰

The case at bar is similar. The validity of the contract is not an area in which the TCEQ has special expertise. It is a matter to be decided by courts of general jurisdiction. Once the validity of the contract has been adjudicated, then the TCEQ can do its job of incorporating the terms of the contract into the respective CCNs -- the area in which the TCEQ has special expertise.

The City also argues that "there is no evidence that shows the TCEQ must first decide those [contractual] issues before exercising its authority under section 13.255(a)." (Page 7 of the City's Exceptions to the PFD). However, this is not a question of fact, but instead a question of law. Evidence is not appropriate for a question of law. The law provides that the TCEQ doesn't have authority to adjudicate whether the written agreement is a binding contract or not. The law provides that a written agreement can be incorporated into the respective CCNs of parties under section 13.255(a). The TCEQ cannot simply assume a written document is a binding agreement when common law defenses are interposed. The City also argues that "There is no support, and none offered

²⁰ *Id.* at 757.

the issue of sovereign immunity as it applies to the jurisdiction of the TCEQ in this proceeding.” (Order No. 1, pp 1-2) (emphasis added). The ED’s brief tracked exactly what the ALJ asked for. Furthermore, even if using the exact words of the order in the title of the brief were a misnomer, the misnomer is to be ignored and the substance of the pleading accepted under the rules of procedure as the City itself points out.

The substance of the PFD makes it abundantly clear that the grounds for granting the motion to dismiss are those presented by the ED and not sovereign immunity or that a 13.255(a) agreement must be executed contemporaneously with an annexation. While any order could always be improved and made clearer, the findings of fact and conclusions of law in the PFD are not so unclear as to require rewriting.

To accept the City’s interpretation of 13.255(a) would be to give Cities great power in 13.255(a) situations and lead to inefficient litigation marathons. When a City and a Water Supply Corporation or Special Utility district had a disagreement over whether a contract were still binding, the City could come to the TCEQ and have it change the CCNs of the parties without regard to the disputed issues.²¹ Once the CCN transfer occurred, the City could start serving the area and building infrastructure. The party that lost CCN area to the City would then have to file suit in state court in an attempt to invalidate the contract. The City could argue res judicata because the other party had an opportunity to litigate the claims at the TCEQ. The Court would then have to grapple with whether the TCEQ could make those determinations. If the state court found that the agreement was invalid, the City would have to be brought before the

²¹ The reverse argument is that WSCs or SUDs could hamper a section 13.255(a) action by asserting frivolous contractual defenses. However, this argument carries little weight because the party asserting frivolous defenses would have little incentive to do so because state court would impose sanctions for such behavior.

of the annexation, and the agreement in this case was entered much earlier than the annexation.

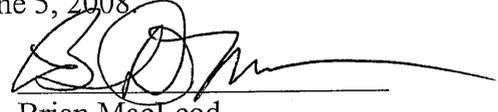
The ED doesn't express an opinion on the statutory analysis offered by the parties, because such is not necessary. The contract in question is not ripe for determination under section 13.255(a) because the contract is not established to be valid. The TCEQ is not a court of general jurisdiction and cannot litigate the common law contract claims that would have to be decided before the contract can even be considered as a possible section 13.255(a) contract. Wellborn's analysis swings on how the phrase "in the event that an area is incorporated or annexed by a municipality" relates to the remainder of section 13.255(a). Wellborn argues that this implies that the agreement should be executed at the time of the annexation or shortly thereafter, and that a prospective contract cannot qualify as a section 13.255(a) contract. The City argued at SOAH that the statute can include contracts that are prospective, and that the parties can contract that if future annexations occur, the parties agree as to what the compensation would be at the time such a transfer occurs. Both arguments have some merit, however, before these arguments can even be considered a valid contract must exist. The TCEQ is the incorrect forum for trying common law contract issues. Therefore, the case should be dismissed for lack of jurisdiction on the ground that the TCEQ cannot resolve common law contract claims.

CONCLUSION AND PRAYER

The TCEQ has never been given the authority to adjudicate common law contractual issues. The TCEQ has no special expertise over common law contractual determinations and the Waco Court of Appeals incorrectly held that the TCEQ could determine such common law issues.

CERTIFICATE OF SERVICE

This is to certify that all parties on the attached Mailing List have been sent a copy of the foregoing document in accordance with TCEQ rules on June 5, 2008.



Brian MacLeod
Staff Attorney
Environmental Law Division

CHIEF CLERKS OFFICE

2008 JUN -5 PM 4:12

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

ATTACHMENT 1

LEXSEE 2006 TEX. APP. LEXIS 6533

THE CITY OF COLLEGE STATION, TEXAS, Appellant v. THE
WELLBORN SPECIAL UTILITY DISTRICT, Appellee

No. 10-04-00306-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

2006 Tex. App. LEXIS 6533

July 26, 2006, Opinion Delivered

July 26, 2006, Opinion Filed

SUBSEQUENT HISTORY: Rehearing denied by *City of College Station v. Wellborn Special Util. Dist.*, 2006 Tex. App. LEXIS 9614 (Tex. App. Waco, Aug. 29, 2006)

Petition for review denied by *City of College Station v. Wellborn Special Util. Dist.*, 2007 Tex. LEXIS 243 (Tex., Mar. 9, 2007)

PRIOR HISTORY: [*1] From the 85th District Court, Brazos County, Texas. Trial Court No. 03-002098-CV-85.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant city sought review of a judgment from the 85th District Court, Brazos County (Texas), which granted appellee special utility district's plea to the jurisdiction in a dispute regarding water service.

OVERVIEW: The city raised claims of breach of contract, promissory estoppel, and specific performance in its lawsuit. It also requested a declaratory judgment, an injunction, and attorney fees. The district filed a plea to the jurisdiction

alleging that the Texas Commission on Environmental Quality had exclusive, original jurisdiction of the city's claims and that the suit was barred by sovereign immunity. The trial court granted the plea to the jurisdiction without stating upon which of the arguments it was relying. The court, in affirming, stated that the city's claims and requests were all predicated on a determination that the district allow the city to provide water utility service to a newly annexed area within the district's service area. That was a determination of a service that could be made only by the Commission, as provided in *Tex. Water Code Ann. §§ 13.042(e), 13.242(a), 13.255* (2000 & Supp. 2005). Because the Commission had exclusive, original jurisdiction over that question, the city had to exhaust its administrative remedies before filing suit.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: retail, annexed, certificate, sewer, exclusive original jurisdiction, public utilities, municipality, lawsuit, utility service, desist order, exclusive jurisdiction, administrative remedies, judicial review, injunction, exhaust, newly, cease, water services

tabb1

Attachment 1

13.255(e) (Supp. 2005). The Commission may assess administrative penalties, issue cease and desist orders, issue injunctions and bring suit for the failure to follow its orders. *Tex. Water Code Ann.* §§ 13.4151, 13.252, 13.411, 13.414 (2000).

JUDGES: Before Chief Justice Gray, Justice Vance, and Justice Reyna. (Justice Vance dissents from the judgment with a note). *

* (Note by Justice Vance: "I agree with the City of College Station that the City's claims include common law causes of action over which the trial court has jurisdiction. See *BCY Water Supply corp. v. Residential Inv., Inc.*, 170 S.W.3d 596, 601 (Tex. App.--Tyler 2005, pet. denied). Because the trial court has jurisdiction over the City's common law claims, the plea to the jurisdiction should have been denied. See *Aledo I.S.D. v. Choctaw Properties, LLC*, 17 S.W.3d 260, 262 (Tex. App.--Waco 2000, no pet.) ("If the district court has jurisdiction of any claim as alleged in a reasonable interpretation of the plaintiff's petition, then the trial court has jurisdiction of that claim and over that particular defendant . . .). I note that while this appeal has been pending the TCEQ dismissed an administrative action filed by Wellborn SUD which asserted the 1992 contract as a basis for relief. *Tex. Comm'n Environmental Quality, Request of Wellborn Special Utility District for a Tex. Water Code § 13.252 Cease and Desist Order against the City of College Station*, Docket No. 2003-1518-UCR, SOAH Docket No. 582-04-2840 (March 15, 2005) (Final Order Denying Request).")

[*2]

OPINION BY: TOM GRAY

OPINION

MEMORANDUM OPINION

The City of College Station annexed land within Wellborn Special Utility District's area to provide retail water services. Pursuant to an agreement made ten years earlier, the City began attempts to provide retail water services to the newly annexed area. Wellborn filed an application for a cease and desist order from the Texas Commission on Environmental Quality. While that application was pending, the City filed a lawsuit against Wellborn. Wellborn filed a plea to the jurisdiction which, after a hearing, was granted. The City appeals. Because the Commission has exclusive jurisdiction over the claims pled in the City's lawsuit, we affirm the trial court's judgment granting Wellborn's plea to the jurisdiction.

The City raised six claims in its lawsuit against Wellborn. Wellborn filed a plea to the jurisdiction alleging that the Commission had exclusive, original jurisdiction of the City's claims and that the suit was barred by sovereign immunity. The trial court granted the plea to the jurisdiction without stating upon which of Wellborn's arguments it was relying.

[HN1] If an agency has exclusive jurisdiction, a party must exhaust all administrative [*3] remedies before seeking judicial review. *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221, 45 *Tex. Sup. Ct. J.* 907 (Tex. 2002). Until then, a trial court lacks subject matter jurisdiction. *Id.* [HN2] Whether an agency has exclusive jurisdiction is a question of law we review *de novo*. *Id.* at 222.

There is no question that [HN3] under Chapter 13 of the Water Code, the Commission has exclusive, original jurisdiction over water and sewer utility rates, operations, and services as provided by that chapter. *TEX. WATER CODE ANN.* § 13.042(e) (Vernon 2000). The question becomes whether the City's claims fall

ATTACHMENT 2

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

CHIEF CLERK'S OFFICE

January 8, 2004

Duncan Norton
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-04-0252; TCEQ Docket No. 2003-0697-UCR; In Re:
Victoria Palms Resort, Inc v. City of Donna

Dear Mr. Norton:

The above-referenced matter is set to be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

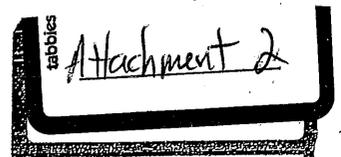
Enclosed are copies of the Proposal for Decision and Order which have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **January 28, 2004**. Any replies to exceptions or briefs must be filed in the same manner no later than **February 9, 2004**.

This matter has been designated TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and eleven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

William G. Newchurch
Administrative Law Judge

WGN:ml
Enclosures
cc: Mailing List



SOAH DOCKET NO. 582-04-0252
TCEQ DOCKET NO. 2003-0697-UCR

SERVICE LIST

PAGE 2

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permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.³ . . . If the judge grants a motion for summary disposition on all parts of an action, the judge shall close the hearing and prepare a proposal for decision.⁴

To determine that there is no genuine issue as to any material fact and dismiss Victoria's Petition, the Commission and the ALJ must accept each of Victoria's material allegations as true. Accordingly, for the sole purpose of ruling on Donna's Motion to Dismiss, the ALJ accepts as true all of the material facts alleged by Victoria or that it agreed were true at a preliminary hearing.

For the sole purpose of ruling on Donna's motion, the ALJ has or is admitting the following into evidence:

EXHIBIT	SHORT DESCRIPTION
ED Ex. 1	Victoria's Petition ⁵
ED Ex. 2	Notice of preliminary hearing ⁶
Victoria Ex. 1	Victoria's Response to Donna's Motion to Dismiss

Additionally, at the preliminary hearing, the ALJ took official notice of a Commission emergency order and an extension thereof, which are discussed in context below and which are related to this dispute. In the text below, the ALJ also takes official notice of certain related court activities, to which any objection should be filed as an exception to the proposal for decision (PFD).

³30 TAC § 80.137(c).

⁴30 TAC § 80.137(i).

⁵Admitted at the preliminary hearing only for jurisdictional purposes, which would include Donna's motion to dismiss alleging that the Commission has no jurisdiction.

In response to Victoria's nonpayment, Donna notified Victoria that its water services would be disconnected for its failure to pay.¹⁰ On June 11, 2003, Victoria filed a suit in Hidalgo County District Court, seeking a temporary injunction from the court ordering Donna not to terminate Victoria's water or sewer service and a declaration that Donna's charges to Victoria were unreasonable.¹¹ Donna filed a plea to the Hidalgo County District Court's jurisdiction, claiming that the Commission instead had jurisdiction.¹² After presenting oral argument to the Hidalgo County District Court, Victoria abandoned its effort to obtain a temporary injunction from that court.¹³ Despite that abandonment, Donna appealed the District Court's denial of the plea to the jurisdiction, asking the Thirteenth Court of Appeals (Corpus Christi Appeals Court) to reverse the District Court and render judgment dismissing Victoria's suit for lack of subject matter jurisdiction.¹⁴ On December 16, 2003, however, Donna moved to abate its appeal.¹⁵

On June 27, 2003, Donna terminated Victoria's water and sewer service.¹⁶ On that same day, Victoria filed its Petition,¹⁷ in which it asked the Commission to require Donna to reinstate and provide continuous and adequate water service for at least 30 days. On June 27, 2003, the Commission issued an emergency order granting the emergency relief that Victoria sought.

¹⁰Victoria Ex. 1, Ex. E, p. 4.

¹¹*Victoria Palms Resort, Inc. v. City of Donna*, No. C-1379-03-B (93rd Dist. Ct., Hidalgo County, Tex. Jun. 11, 2003). See Victoria Ex. 1, Ex. D.

¹²Victoria Ex. 1, Ex. B.

¹³Victoria Ex. 1, Ex. E, p. 4 *et seq.*

¹⁴*City of Donna v. Victoria Palms Resort, Inc.*, No. 13-03-375-CV (Tex. App.—Corpus Christi, filed Sept. 18, 2003.) See Victoria Ex. 1, Ex. E.

¹⁵TEXAS JUDICIARY ONLINE, WELCOME TO THE THIRTEENTH COURT OF APPEALS, <<http://www.13thcoa.courts.state.tx.us/opinions/event.asp?EventID=452918>> (Dec. 22, 2003). The ALJ is taking official notice of this fact in this PFD. Any objection should be filed as an exception to the PFD.

¹⁶Victoria Ex. 1, p. 2.

October 27, 2003, the ALJ granted Victoria's unopposed motion to refer this case to another SOAH ALJ who would act as a mediator and conduct a mediated settlement conference with the parties. The parties met with the mediator at least twice but were not able to resolve their core disputes.

On November 25, 2003, the ALJ held the noticed preliminary hearing, at which the following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro
ED	Todd Burkey
PIC	Anne Rowland ²³

The ALJ also held a second pre-hearing on December 11, 2003, to obtain a status report. By December 15, 2003, the parties filed their responses to Donna's Motion to Dismiss, which closed the record.

IV. THE COMMISSION HAS NO JURISDICTION OVER DONNA'S RATES WITHIN DONNA'S CORPORATE LIMITS

Victoria contends that Water Code²⁴ §§ 13.041, 13.042, and 13.250 give the Commission jurisdiction to consider and rule on the Billing and New Sewer Rate Disputes. For that reason, it urges denial of the Motion to Dismiss. Both the ED and the PIC maintain that the Commission has no such jurisdiction.

²³Scott Humphrey also represents the PIC.

terms are specifically defined in²⁶ and for Water Code Chapter 13, in which all of the relevant jurisdictional statutes are located. Words and phrases that have acquired a particular meaning by legislative definition must be construed accordingly.²⁷ The definitions of the key words and phrases are quite complex and some are not necessarily what one would expect. As a result, these key terms are sometimes used incorrectly, even occasionally by the ALJ. Below are the definitions:

- "Municipality"²⁸ means a city existing, created, or organized under the general, home-rule, or special laws of this state;²⁸
- "Municipally owned utility" means any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities;²⁹
- "Retail public utility" means any entity, including a municipality, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation;³⁰
- "Water and sewer utility," "public utility," or "utility" means any person, other than a municipal corporation and certain other entities, owning or operating for compensation in this state equipment or facilities for the sale of potable water to the public or disposal of sewage, or engaged in certain other activities;³¹
- "Service" means, among other things, any act performed or anything furnished or supplied by a retail public utility in the performance of its duties under Water Code Chapter 13;³² and

²⁶Water Code § 13.002.

²⁷TEX. GOV'T CODE ANN. (Gov't Code) § 311.011(b) (West 2003).

²⁸Water Code § 13.002(12).

²⁹Water Code § 13.002(13).

³⁰Water Code § 13.002(19).

³¹Water Code § 13.002(23).

appellate jurisdiction over a dispute between a municipally owned utility and its customer within that municipality's corporate limits concerning water service bills. If correct, those opinions would indicate that the Commission has jurisdiction over Victoria and Donna's Billing and New Sewer Rate Disputes.

In *City Of Galveston v. Flagship Hotel, Ltd.*³⁴ (*Flagship I*), a hotel sued a municipally owned utility, alleging that the city was making an improper demand for payment for water service provided in the past to the hotel. Prior to trial on the underlying dispute, the trial court issued a temporary restraining order enjoining the city from discontinuing water service to the hotel. The city appealed, arguing that the trial court had no jurisdiction to issue that order. The Houston Court of Appeals agreed, finding that the Commission had exclusive appellate jurisdiction to review a municipal utility's decision to shut off a customer's water.

*Flagship Hotel, Ltd. v. City Of Galveston*³⁵ (*Flagship II*) involved the same parties and underlying dispute as *Flagship I*. When it reached the underlying dispute, after the Houston Court of Appeals' decision in *Flagship I*, the trial court found that it had no jurisdiction and dismissed the hotel's underlying water-service billing complaint against the city. When the hotel appealed, the Texarkana Court of Appeals³⁶ agreed with the trial court. Relying without further analysis on the Houston Court of Appeals' reasoning in *Flagship I*, the Texarkana Court of Appeals concluded that the Commission had exclusive jurisdiction over such disputes.

³⁴73 S.W.3d 422 (Tex.App.-Houston [1stDist.] 2002, no petition).

³⁵117 S.W.3d 552 (Tex.App.-Texarkana 2003, no pet. h.) (issued on October 2, 2003). Alternately, see TEXAS JUDICIARY ONLINE, HTML OPINION, <<http://www.6thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=6881>> (Dec. 15, 2003).

³⁶The case was transferred from the Houston to the Texarkana Appeals Court on January 10, 2003. TEXAS JUDICIARY ONLINE, SIXTH COURT OF APPEALS CASE MANAGEMENT, <<http://www.6thcoa.courts.state.tx.us/opinions/case.asp?FilingID=5622>> (Dec. 15, 2003). The ATTORNEY GENERAL'S OFFICE has advised that the Commission's jurisdiction over such disputes is exclusive.

Commission exclusive appellate jurisdiction over a municipally owned utility's "rates."⁴¹ Because no "rate" jurisdiction dispute was before the court in *Flagship I*, that conclusion was dicta that would normally be accorded little or no precedential value.

However, in *Flagship II*, the underlying billing, i.e. "rate," dispute was finally before an appellate court. Without further analysis, the Texarkana Court of Appeals adopted the Houston Court of Appeals reasoning in *Flagship I* and held that the Commission had exclusive jurisdiction over that "rate" dispute.

The ALJ hesitantly, respectfully, but firmly disagrees with the Houston and Texarkana Courts of Appeal. As set out below, the ALJ believes that the Commission is not bound in any way by the *Flagship* decisions and that they were incorrectly decided.

C. The Commission Is Not Bound by the *Flagship I* or *II* Decisions

While the Commission should thoughtfully consider them, the ALJ believes that the Commission is not legally bound to follow the conclusion of the Houston and Texarkana Courts of Appeal in *Flagship I* and *II* that the Commission has jurisdiction over a municipally owned utility's rates within the municipality's limits. The Commission is free to reach a different conclusion.

First, the doctrine of *res judicata* does not bind either the parties in this case or the Commission to the jurisdictional decisions in *Flagship I* or *II*. Under the doctrine of *res judicata*, a court's judgment is final and cannot be further litigated in a subsequent suit between the same parties or their privies.⁴² Moreover, a judgment in favor of or against the state on a matter

⁴¹73 S.W.3d 422, 426 *et seq.*

It is important to note that any petition for judicial review of a Commission decision must be filed in the Travis County District Court⁴⁸ and any appeal from a decision of that district court must be filed in the Austin Appeals Court.⁴⁹ No Party suggests and the ALJ is unaware that the Texas Supreme Court, the Austin Court of Appeals, or the Travis County District Court has ever held that the Commission has appellate jurisdiction over a municipally owned utility's rates within the municipality's limits.

D. No Rate Jurisdiction under Water Code § 13.042

In *Flagship I*, the Houston Court of Appeals primarily relied on Water Code § 13.042(d) as giving the Commission jurisdiction over a municipally owned utility's rates within the municipality's corporate limits. That provision does give the Commission appellate jurisdiction to review orders and ordinances of certain municipalities regarding certain water and sewer rates and services. Water Code § 13.042(d) states:

The commission shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in [Water Code Chapter 13].

(Emphasis added).

Is Donna one of "those municipalities"? For several reasons, the ALJ thinks not.

Words and phrases in the Water Code must be read in context⁵⁰ and the entire statute is intended to be effective.⁵¹ In context, Water Codes § 13.042(d)'s reference to "those municipalities" logically refers to the municipalities discussed in the immediately preceding

⁴⁸Gov't Code § 2001.176(b)(1).

⁴⁹Gov't Code §§ 22.201(d) and 22.220(a).

⁵⁰Gov't Code § 311.011(a).

In that statutory context, Donna is not one of "those municipalities," as Water Code § 13.042(d) uses that phrase, when Donna's own rates and services are in dispute. Accordingly, Water Code § 13.042(d) does not give the Commission appellate jurisdiction over Donna's orders and ordinances concerning its own rates and services.

In *Flagship I*, the Houston Court of Appeals noted that a municipality has exclusive original jurisdiction under Water Code § 13.042(a) over all "water and sewer utility" "rates," operations, and "services" within the municipality's corporate limits.⁵³ However, the court did not examine the definition of "water and sewer utility" and erroneously assumed that the phrase included a "municipally owned utility," which it does not. Based on that error, the court mistakenly assumed that Water Code § 13.042 was speaking about jurisdiction over a municipality's own rates within its corporate limits⁵⁴ and that Water Code § 13.042(d) gave the Commission exclusive appellate jurisdiction to review any order by the municipality concerning that municipality's rates. That was incorrect.

Lest there be doubt, Water Code § 13.042(f) provides, absent a specific exception elsewhere in the Water Code, that the Commission has no jurisdiction of any kind over a municipally owned utility within its corporate limits. It states:

[Water Code, Chapter 13, Subchapter C, regarding jurisdiction over water rates and services,] does not give the commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned corporation, within its corporate limits . . . except as provided by [the Water Code].

Of course the *Flagship I* Court believed that it had found such an exception in Water Code § 13.042(d), in fact a very broad one, giving the Commission appellate jurisdiction over a municipally owned utility's rates. That led the *Flagship I* Court to construe Water Code

⁵³73 SW3d 426.

The commission may issue emergency orders . . . to compel a water or sewer service provider that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the service provider's actions or failure to act . . .

(Emphasis added.)

Under this continuous-service statute, it does not matter whether the certificated provider is a municipality or the customer resides in or outside the city's limits. "Water or sewer service provider" is not defined in the Water Code, and no party suggests that it has a technical meaning. Accordingly, it is to be construed in context and according to common usage,⁵⁶ as one that provides, supplies, or makes available⁵⁷ water or sewer service. That would include a municipally owned utility like Donna.

The Commission relied on Water Code § 13.041(d)(1) to issue the Emergency and Extended Emergency Orders requiring Donna to provide continuous and adequate service to Victoria.⁵⁸ As the Commission noted in the Emergency Order, Donna has a CCN from the Commission.⁵⁹ Thus, the Commission had jurisdiction to issue the Emergency Order to Donna under Water Code § 13.041(d)(1). However, nothing in Water Code § 13.041(d)(1) or any other portion of that section authorizes the Commission to regulate a municipally owned utility's "rates."

The ALJ concludes that Water Code § 13.041 does not give the Commission jurisdiction over disputes concerning Donna's rates within Donna's corporate limits.

⁵⁶Gov't Code § 311.011(a).

⁵⁷Merriam-Webster OnLine, Merriam-Webster Dictionary, <<http://www.m-w.com/cgi-bin/dictionary>>, (2003).

⁵⁸Emergency Order, pp. 1 and 2; Extended Emergency Order, p. 1.

Similarly, Water Code § 13.250 provides:

(a) [With certain exceptions], any retail public utility that possesses . . . a certificate of public convenience and necessity shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas.

* * *

(c) Any discontinuance, reduction, or impairment of service, whether with or without approval of the commission, shall be in conformity with and subject to conditions, restrictions, and limitations that the commission prescribes.

(Emphasis added.)

As previously indicated, a "municipally owned utility" is, by definition, a "retail public utility."⁶⁰ However, a municipality need not obtain a CCN from the Commission to provide water or sewer service.⁶¹ The Local Government Code authorizes a municipality to purchase, construct, or operate a utility system inside or outside its municipal boundaries and to regulate the system in a manner that protects the interests of the municipality.⁶² However, nothing bars a municipality from obtaining a CCN if it wishes one, generally to inhibit encroachment on its service territory by another provider.

If it chooses to obtain a CCN though, a municipally owned utility is subject to some regulation by the Commission. Water Code § 13.250 is an example of that. Victoria points to Water Code § 13.250(c) and argues under it that Donna, by obtaining a CCN, has subjected itself to full regulation by the Commission, include regulation of Donna's water and sewer rates. Of course, Water Code § 13.250(c) says no such thing.

⁶⁰Water Code § 13.002(19).

⁶¹See Water Code § 13.242(a) and (b), which require "a utility, a utility operated by an affected county, or a water supply or sewer service corporation" to obtain a CCN, which by definitions would not include a "municipally owned utility."

believes it has jurisdiction over rate disputes involving municipally owned utilities within their corporate limits.

The Commission's appeal-of-ratemaking rule,⁶⁷ which implements Water Code § 13.043, specifically provides that it does not apply to a municipally owned utility,⁶⁸ unless the ratepayers reside outside the municipality's corporate limits.⁶⁹ Similarly, the Commission's customer-service-and-protection rules⁷⁰ are generally applicable only to "water and sewer utilities,"⁷¹ which under both the Commission's rules⁷² and the Water Code⁷³ does not include "municipally owned utilities" like Donna. Moreover, the Commission's billing rule,⁷⁴ which addresses billing disputes,⁷⁵ does not include language that would make it applicable to a municipally owned utility.

The ALJ concludes that the Commission's rules do not suggest that the Commission has interpreted the Water Code as giving it jurisdiction over the rates of a municipally owned utility within the municipality's corporate limits.

⁶⁷30 TAC § 291.41.

⁶⁸30 TAC § 291.41(a).

⁶⁹30 TAC § 291.41(c)(3).

⁷⁰30 TAC Chapter 291, Subchapter E.

⁷¹30 TAC § 219.80.

⁷²30 TAC § 291.3(50).

⁷³Water Code § 13.002(23).

⁷⁴30 TAC § 291.87.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER denying the petition of Victoria Palms Resort, Inc. for review of the rates that it has been and is being charged by the City of Donna; TCEQ DOCKET NO. 2003-0697-UCR; SOAH DOCKET NO. 582-04-0252

On _____ the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered the petition of Victoria Palms Resort, Inc., (Victoria) for review of the rates that it has been and is being charged by the City of Donna (Donna). The Petition was presented to the Commission with a Proposal for Decision by William G. Newchurch, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Victoria was represented by J.W. Dyer, Donna was represented by Ricardo J. Navarro, the Executive Director (ED) was represented by Todd Burkey, and the Public Interest Counsel (PIC) was represented by Anne Rowland.

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Victoria is a Texas corporation.
2. Victoria owns a mobile home park, recreation and convention facilities, a hotel, and a conference center located at 602 N. Victoria Road, Donna, Texas.

12. On June 27, 2003, Donna terminated Victoria's water and sewer service.
13. On June 27, 2003, Victoria filed with the Commission and served on Donna a petition for review in which it asked the Commission to require Donna to reinstate and provide continuous and adequate water service for at least 30 days to Victoria (Petition).
14. On Jun. 27, 2003, the Commission issued an emergency order granting the emergency relief that Victoria sought (Emergency Order).
15. On July 28, 2003, the Commission affirmed and extended that emergency order until December 24, 2004 (Extended Emergency Order).
16. In its Petition, Victoria also asked the Commission to review the Billing and the New Sewer Rate Disputes and to declare that both the charges stemming from the Billing Dispute and the New Sewer Rates Dispute are unreasonable and in violation of Donna's Tariff.
17. On September 22, 2003, the Commission's Chief Clerk (Chief Clerk), at the request of the ED, referred the Billing and New Service Rate Disputes to SOAH for hearing.
18. On September 26, 2003, the Chief Clerk mailed notice of a preliminary hearing in this case to Victoria, Donna, the ED, and the PIC.
19. On November 20, 2003, Donna filed with the Commission and served on Victoria, the ED, and the PIC a motion asking the Commission to dismiss the Billing and New Sewer Rate Dispute portions of Victoria's Petition.
20. In its motion to dismiss, Donna claimed that the Commission has no jurisdiction to review either the Billing or New Sewer Rate Dispute.

- 2003,047 (West 2003), the SOAH ALJ had jurisdiction to prepare a proposal for decision (PFD) in this case.
2. After the preliminary hearing and up to 21 days before the evidentiary hearing, a party may file a motion for a summary disposition of all or any part of an action. The motion shall state the specific issues upon which summary disposition is sought, and the specific grounds justifying the summary disposition. 30 TAC § 80.137(a).
 3. Based on the above Findings of Fact and Conclusions of Law, Donna properly filed its motion to dismiss, which was a motion for summary disposition.
 4. Except upon leave of the ALJ, a party may file and serve a written response, any supporting affidavits, and any other relevant documentary evidence at least seven days before the date set for ruling on a motion for summary disposition. 30 TAC § 80.137(b).
 5. Based on the above Findings of Fact and Conclusions of Law, Victoria, the ED, and the PIC had a sufficient opportunity to file and did file responses to Donna's motion for summary disposition more than seven days before the ALJ ruled on it via his PFD.
 6. ~~The Commission, like any state agency, only has the specific powers conferred on it by statute in clear and precise language. *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App. - Austin 1986, writ ref'd n.r.e.)~~
 7. Words and phrases in the Water Code that have acquired a particular meaning by legislative definition must be construed accordingly. Gov't Code § 311.011(b).
 8. A "municipality" means a city existing, created, or organized under the general, home-rule, or special laws of this state. Water Code § 13.002(12).

and the sewage disposal that Donna has provided and will provide to Victoria under the New Sewer Rates are services.

16. Based on the above Findings of Fact and Conclusions of Law, both the compensation that Donna collected from Victoria in the past for the water and sewer services that led to the Billing Dispute and the amounts that Donna has demanded or will demand from Victoria for sewage service under the New Sewer Rates are rates.
17. Based on the above Findings of Fact and Conclusions of Law, both the Billing and New Sewer Rate Disputes are disputes over Victoria's rates.
18. Absent a specific exception in the Water Code, the Commission has no jurisdiction of any kind over a municipally owned utility's rates or services within the municipality's corporate limits. Water Code § 13.042(f).
19. Water Code §§ 13.043(a) and (b) authorize a ratepayer that was a party to a rate proceeding before the governing body of a municipally owned utility to appeal that governing body's decision to the Commission only if the ratepayer resides outside the corporate limits of the municipality.
20. Water Code §§ 13.043(a) and (b) do not authorize Victoria, which is a resident of and receives service within Donna, to appeal Donna's decisions concerning the Billing and New Sewer Rate Disputes to the Commission.
21. Water Code § 13.042(a) gives a municipality exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within the municipality's corporate limits.
22. Words and phrases in the Water Code must be read in context, the entire statute is

30. Water Code § 13.041(d)(1) does not authorize the Commission to review the Billing or New Sewer Rate Dispute, which are disputes concerning Donna's rates.
31. Water Code §§ 13.250(a) and (c) require a retail public utility that has obtained a CCN to comply with the Commission's conditions, restrictions, and limitations when discontinuing, reducing, or impairing service.
32. Water Code §§ 13.250(a) and (c) do not authorize the Commission to review the rates of a retail public utility that has obtained a CCN from the Commission.
33. Water Code §§ 13.250(a) and (c) do not authorize the Commission to review the Billing or New Sewer Rate Dispute, which are disputes concerning Donna's rates.
34. Based on the above Findings of Fact and Conclusions of Law, the Commission has no jurisdiction to review either the Billing or New Sewer Rate Dispute.
35. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response. 30 TAC § 80.137(c).
36. Based on the above Findings of Fact and Conclusions of Law, there is no genuine issue as to any material fact and Donna is entitled as a matter of law to summary disposition in its favor with respect to of the portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes.

ATTACHMENT 3

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*



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pdr/s
CCN/12790/10
10/01

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

RECEIVED

May 20, 2004

MAY 28

TO: Persons on the attached mailing list.

RE: Petition of Victoria Palms Resort, Inc. For Review of Rates
TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252

TCEQ
CENTRAL FILE ROOM

Decision of the Commission on Petition

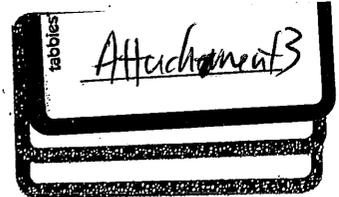
The Texas Commission on Environmental Quality ("TCEQ" or "Commission") has made a decision to grant the above-referenced matter. Enclosed with this letter is a copy of the Commission's order. Unless a Motion for Rehearing ("MFR" or "motion") is timely filed with the chief clerk, as described below, this action of the Commission will become final and only appealable in district court. A MFR is a request for the Commission to review its decision on the matter. Any motion must explain why the Commission should review the decision.

Deadline for Filing Motion for Rehearing.

A MFR must be received by the chief clerk's office no later than 20 days after the date a person is notified of the Commission's order on this matter. A person is presumed to have been notified on the third day after the date that this order is mailed.

An original and 11 copies of the motion must be sent to the chief clerk at the following address:

LaDonna Castañuela, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087



In addition, a copy of the motion must be sent on the same day to each of the individuals on the attached mailing list. A certificate of service stating that copies of the motion was sent to those on the mailing list must also be sent to the chief clerk.

The written motion must contain (1) the name and representative capacity of the person filing the motion; (2) the style and official docket number assigned by SOAH or official docket number assigned by the Commission; (3) the date of the order; and (4) a concise statement of each allegation of error.

RECEIVED

MAILING LIST

Petition of Victoria Palms Resort, Inc. For Review of Rates
TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252

John R. Moore
604 West 12th Street
Austin, Texas 78701
Representing: Victoria Palms Resort, Inc.

J. W. Dyer
Dyer & Associates
3700 North 10th Street, Suite 105
McAllen, Texas 78501
Representing: Victoria Palms Resort, Inc.

Ricardo J. Navarro
Denton, Navarro, Rocha & Bernal
Bank of America Building
222 East Van Buren, Suite 405
Harlingen, Texas 78550
Representing: City of Donna

FOR THE EXECUTIVE DIRECTOR:

Todd Burkey, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

Prabin Basnet, Staff Engineer
Texas Commission on Environmental Quality
Water Supply Division MC-153
P.O. Box 13087
Austin, Texas 78711-3087

FOR OFFICE OF PUBLIC ASSISTANCE:

Jodena Henneke, Director
Texas Commission on Environmental Quality
Office of Public Assistance MC-108
P.O. Box 13087
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Anne Rowland, Attorney
Texas Commission on Environmental Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087

FOR THE CHIEF CLERK:

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087

* The Honorable William G. Newchurch
Administrative Law Judge
State Office of Administrative Hearings
P. O. Box 13025
Austin, Texas 78711-3025

* Courtesy Copy

TCEQ
Adm
Palm
Donna
R

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS
COUNTY OF TRAVIS



I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission, given under my hand and the seal of office on

MAY 20 2004

[Signature]
LaDonna Cobianuela, Chief Clerk
Texas Commission on Environmental Quality

AN ORDER denying the petition of Victoria Palms Resort, Inc. for review of the rates that it has been and is being charged by the City of Donna; TCEQ DOCKET NO. 2003-0697-UCR; SOAH DOCKET NO. 582-04-0252

On April 28, 2004, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered the petition of Victoria Palms Resort, Inc., (Victoria) for review of the rates that it has been and is being charged by the City of Donna (Donna). The Petition was presented to the Commission with a Proposal for Decision by William G. Newchurch, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Victoria was represented by J.W. Dyer, Donna was represented by Ricardo J. Navarro, the Executive Director (ED) was represented by Todd Burkey, and the Public Interest Counsel (PIC) was represented by Anne Rowland.

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

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13. On June 27, 2003, Victoria filed with the Commission and served on Donna a petition for review in which it asked the Commission to require Donna to reinstate and provide continuous and adequate water service for at least 30 days to Victoria (Petition).
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2003,047 (West 2003), the SOAH ALJ had jurisdiction to prepare a proposal for decision (PFD) in this case.

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3. Based on the above Findings of Fact and Conclusions of Law, Donna properly filed its motion to dismiss, which was a motion for summary disposition.
4. Except upon leave of the ALJ, a party may file and serve a written response, any supporting affidavits, and any other relevant documentary evidence at least seven days before the date set for ruling on a motion for summary disposition. 30 TAC § 80.137(b).
5. Based on the above Findings of Fact and Conclusions of Law, Victoria, the ED, and the PIC had a sufficient opportunity to file and did file responses to Donna's motion for summary disposition more than seven days before the ALJ ruled on it via his PFD.
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7. Words and phrases in the Water Code that have acquired a particular meaning by legislative definition must be construed accordingly. Gov't Code § 311.011(b).
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- and the sewage disposal that Donna has provided and will provide to Victoria under the New Sewer Rates are services.
16. Based on the above Findings of Fact and Conclusions of Law, both the compensation that Donna collected from Victoria in the past for the water and sewer services that led to the Billing Dispute and the amounts that Donna has demanded or will demand from Victoria for sewage service under the New Sewer Rates are rates.
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 19. Water Code §§ 13.043(a) and (b) authorize a ratepayer that was a party to a rate proceeding before the governing body of a municipally owned utility to appeal that governing body's decision to the Commission only if the ratepayer resides outside the corporate limits of the municipality.
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 21. Water Code § 13.042(a) gives a municipality exclusive original jurisdiction over all water and sewer utility rates, operations, and services provided by a water and sewer utility within the municipality's corporate limits.
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36. Based on the above Findings of Fact and Conclusions of Law, there is no genuine issue as to any material fact and Donna is entitled as a matter of law to summary disposition in its favor with respect to of the portions of Victoria's Petition asking the Commission to review the Billing and the New Sewer Rate Disputes.

ATTACHMENT 4

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

October 12, 2006

Derek Seal
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-06-1766; TCEQ Docket No. 2005-2091-UCR; In Re: Victoria Palms Resort, Inc. v. City of Donna, Texas

Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 1, 2006. Any replies to exceptions or briefs must be filed in the same manner no later than November 11, 2006.

This matter has been designated TCEQ Docket No. 2005-2091-UCR; SOAH Docket No. 582-06-1766. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and eleven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary W. Elkins".

Gary W. Elkins
Administrative Law Judge

GWE/Ls
Enclosures
cc: Mailing List



ROBERT DRINKARD
DENTON, NAVARRO, ROCHA & BERNAL
BANK OF AMERICA BUILDING
701 EAST HARRISON, STE. 100
HARLINGEN, TX 78550
(956) 421-4904 (PH)
(956) 421-3621 (FAX)

CITY OF DONNA

xc: Docket Clerk, State Office of Administrative Hearings

II. PROCEDURAL HISTORY

In response to Victoria's Petition filed with the Commission on November 22, 2005, Donna filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, which was received by the State Office of Administrative Hearings (SOAH) on May 31, 2006.² On June 6, 2006, PIC filed its Response to Donna's Motion to Dismiss. PIC stated that it agreed with Donna's position that TCEQ did not have jurisdiction over Donna's rates or utility service because Donna is a municipally owned utility providing service to a customer wholly within its corporate limits.

A preliminary hearing was held before SOAH ALJ Gary W. Elkins on June 13, 2006. The following entities appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro Robert Drinkard
ED	Paul Tough Todd Galiga
PIC	Mary Alice McKaughan

At the preliminary hearing, the parties presented oral argument on the motion to dismiss and offered their positions on the best procedural approach to addressing the motion in the context of Victoria's Petition. All of the parties agreed that a Commission ruling on the motion to dismiss should first be obtained. Should the ALJ recommend granting the motion and the Commission adopt the recommendation, the case would be ripe for appeal following a required motion for rehearing. Should the ALJ recommend denying the motion, the ruling could be challenged before the Commission via certified question. The Commission's ruling then would determine whether the case would proceed to a hearing on the merits.

²The full title of Donna's request for relief was "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Objection to and Conditional Answer to Applicant's Complaint."

IV. HISTORY OF DISPUTE BETWEEN VICTORIA AND DONNA

The following is a background summary of the dispute that led to Victoria's petition in this case.

In 2003, Victoria filed a lawsuit in Hidalgo County District Court against Donna, alleging that Donna was operating a faulty water meter that resulted in overcharges to Victoria for both water and sewer services provided by the city. The suit also challenged an increase in Donna's water rates. In response, Donna filed a plea to the jurisdiction, arguing that jurisdiction lay not with the court but with the Commission. The Hidalgo County District Court took the jurisdictional challenge under advisement. Victoria then filed a complaint with the Commission to challenge the same rates. The district court denied Donna's plea to the jurisdiction and ruled that the case should proceed to trial. Donna appealed the ruling to the Thirteenth Court of Appeals.

Meanwhile, Donna joined the Commission's Executive Director in challenging the complaint Victoria had filed with the Commission. In a plea to the jurisdiction, Donna argued that the Commission had no jurisdiction over a rate and billing dispute between Victoria and Donna. The Commission referred the case to SOAH, where it was assigned to ALJ William Newchurch. As a result, the billing and rate dispute was pending simultaneously before both SOAH, via the Commission, and the Hidalgo County District Court.⁵

In a final order issued by the Commission in May 2004, it agreed with ALJ Newchurch's conclusion that it did not have jurisdiction over the dispute between Victoria and Donna. Victoria sent a copy of the decision to the Thirteenth Court of Appeals in Corpus Christi, which disagreed with the Commission. The Court found that the Commission had exclusive appellate

⁵ Victoria explains that even though it believed jurisdiction was actually in the district court rather than with the Commission, it felt it had to "cover its bases" by filing the complaint with the Commission following Donna's challenge to the district court's jurisdiction.

V. PARTIES' ARGUMENTS

A. Victoria's Position

In its brief, Victoria remained steadfast in its position that the Commission has jurisdiction to review Donna's orders and ordinances. It reiterated the jurisdictional arguments considered in the 2003 case and added that no appellate court had issued a ruling consistent with Donna's position.

Regarding the issue framed by the ALJ in his request for additional briefing—the extent to which the Thirteenth Court's decision is binding on the Commission—Victoria argues that under the “law of the case” doctrine the Thirteenth Court's decision is controlling. In support of this position, Victoria cited the Texas Supreme Court's conclusion in *Hudson v. Wakefield*⁶ that a ruling by an appellate court on a question of law will ordinarily be regarded as the law of that case in all subsequent proceedings in that case. The Court noted that the doctrine applies as long as the facts of the case on remand are substantially the same as they were in the prior proceeding.⁷

Victoria also points out that four separate appellate courts have concluded the Commission has exclusive appellate jurisdiction over water service disputes between a municipality and its customers, pursuant to TEX. WATER CODE ANN. § 13.042(d).⁸ It added that the law of the case doctrine lends additional support to the conclusion that the decision of the Thirteenth Court is

⁶ *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).

⁷ *Id.*

⁸ Victoria cited the following four cases in support of this assertion: *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422, 427 (Tex. App.—Houston [1st Dist.] 2002, no pet); *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 562-563 (Tex. App.—Texarkana, 2003, reh'g overruled 2003, pet. denied); *City of Donna v. Victoria Palms Resort, Inc.* 2005 WL 1831593 (Tex. App.—Corpus Christi 2005, reh'g overruled, pet. filed 2005, pet. abated 2006); and *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336 (Tex. App.—Ft. Worth 2005, no pet.).

VI. ANALYSIS

Just as the ALJ concluded in the 2003 case before the Commission—that the Commission is not bound by the decisions of the Houston or Texarkana Courts of Appeal—the ALJ in this case concludes that the Commission likewise is not bound by the decision of the Thirteenth Court of Appeals. It is free to reach a different conclusion.

The “law of the case” doctrine cited by Victoria does not apply. The doctrine states,

Questions of law that are decided on appeal to the court of last resort will govern the case throughout its subsequent stages, including a retrial and a subsequent appeal.¹⁰ (Emphasis added.)

Victoria mis-states the doctrine by seemingly expanding its application to the courts of appeal. Because the Texas Supreme Court—the Court of last resort—has not ruled on the Commission’s jurisdiction in this case, the doctrine does not act to bar Commission action on the dispute between Victoria and Donna. Furthermore, the Thirteenth Court has no jurisdiction over Commission decisions under the APA. Instead, as argued by Donna and the ED, such decisions are appealable to Travis County District Court and the Third Court of Appeals. This has not occurred.¹¹

Likewise, *res judicata* does not bind the Commission to the decision of the Thirteenth Court. Although *res judicata* prohibits the re-litigation of a court’s judgment in a subsequent suit between the same parties or their privies, the Commission was not a party to the case at the Thirteenth Court of Appeals and, thus, did not have the opportunity to present argument on the issue of jurisdiction.¹²

¹⁰ 3 TEX. JUR. 3D *Appellate Review* § 850 (1999).

¹¹ At the preliminary hearing, Victoria represented that it appealed the Commission’s 2004 order to Travis County District Court but dismissed the appeal before it could be taken up by the court.

¹² *Hammonds v. Holmes*, 559 S.W.2d 345 (Tex. 1977).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER dismissing the complaint and petition of Victoria Palms Resort, Inc. challenging water and sewer rates that it has been and is being charged by the City of Donna, Texas; TCEQ DOCKET NO. 2005-2091-UCR; SOAH DOCKET NO. 582-06-1766

On _____ the Texas Commission on Environmental Quality (Commission or TCEQ) considered a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Objection to and Conditional Answer to Applicant's Complaint, filed by the City of Donna, Texas (Donna). The motion was filed in response to the Original Complaint of Victoria Palms Resort, Inc. (Victoria), seeking a declaration from the Commission that rates being charged by Donna for water and sewer service are unfair, unjust, unreasonable, and a violation of Donna's tariff and the Texas Water Code. Donna's motion to dismiss was presented to the Commission with a Proposal for Decision by Gary W. Elkins, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Victoria was represented by J. W. Dyer, Donna was represented by Ricardo J. Navarro, the Executive Director (ED) was represented by Paul Tough, and the Public Interest Counsel (PIC) was represented by Mary Alice McKaughan.

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

PARTY	REPRESENTATIVE
Victoria	J.W. Dyer
Donna	Ricardo J. Navarro Robert Drinkard
ED	Paul Tough Todd Galiga
PIC	Mary Alice McKaughan

7. At the June 13, 2006 hearing, all parties were given the opportunity to present oral argument on Donna's motion to dismiss. The hearing closed that day.
8. On August 10, 2006, the ALJ issued an order reopening the hearing and asking the parties to file briefs by August 25, 2006 on a limited issue. Victoria, Donna, and the ED submitted briefs.
9. In TCEQ Docket No. 2003-0697-UCR [SOAH Docket No. 582-04-0252], the Commission issued an order granted summary disposition on a claim by Victoria involving the same issues and the same parties that are before it in this case. The order was dated May 14, 2004.
10. In the May 14, 2004 order granting summary disposition, the Commission concluded it had no jurisdiction to review either a billing or a sewer rate dispute between Victoria and Donna.
11. The May 14, 2004 order granting summary disposition dismissed, with prejudice to refile, the portions of Victoria's petition asking the Commission to review the billing and sewer rate dispute between Victoria and Donna.
12. Based on the conclusion that TCEQ Docket No. 2003-0697-UCR (2003 case) involved the very same issues and the same parties that are before the Commission in this case, and

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. Victoria Palms Resort, Inc.'s First Amended Complaint and Petition for Review is dismissed with prejudice to refileing.
2. All motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
3. The Chief Clerk of the TCEQ shall forward a copy of this Order to all parties.
4. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of that portion shall not affect the validity of the remaining portions of the Order. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman

ATTACHMENT 5

§ 13.255. SINGLE CERTIFICATION IN INCORPORATED OR ANNEXED AREAS. (a) 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 or sewer 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, by a franchised utility, or by the retail public utility. In this section, the phrase "franchised utility" shall mean a retail public utility that has been granted a franchise by a municipality to provide water or sewer service inside municipal boundaries. 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. If a franchised utility is to serve the area, the franchised utility shall also be a party to the agreement. 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 certificates of convenience and necessity of the parties to the agreement.

(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 and 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 or sewer utility or to a franchised 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 franchised utility, if any, and notice of the application and hearing to the retail public utility.

(c) The commission shall grant single certification to the municipality. The commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility, and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. If the municipality in its application has requested the transfer of specified property of the retail public utility to the municipality or to a franchised utility, the commission shall also determine in its order the adequate and just compensation to be paid for such property pursuant to the provisions of this section, including an award for damages to property remaining in the ownership of the retail public utility after single certification. The order of the commission shall not be effective to transfer property. A transfer of property may only be obtained under this section by a court judgment rendered pursuant to Subsection (d) or (e) of this section. The grant of single certification by the commission shall go into effect on the date the municipality or franchised utility, as the case may be, pays adequate and just compensation pursuant to court order, or pays an amount into the registry of the court or to the retail public utility under Subsection (f). If the court judgment provides that the retail public utility is not entitled to any compensation, the grant of single certification shall go into effect when the court judgment becomes final. The municipality or

account, and that interest accruing prior to withdrawal of the award by the retail public utility be paid to the municipality or to the franchised utility. In the event the municipally owned utility or franchised utility takes possession of property or provides utility service in the singly certificated area pending appeal, and a court in a final judgment in an appeal under this section holds that the grant of single certification was in error, the retail public utility is entitled to seek compensation for any damages sustained by it in accordance with Subsection (g) of this section.

(g) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate, shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt, the value of the service facilities of the retail public utility located within the area in question, the amount of any expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are allocable to service to the area in question, the amount of the retail public utility's contractual obligations allocable to the area in question, any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification, the impact on future revenues lost from existing customers, necessary and reasonable legal expenses and professional fees, factors relevant to maintaining the current financial integrity of the retail public utility, and other relevant factors.

(g-1) The commission shall adopt rules governing the evaluation of the factors to be considered in determining the monetary compensation under Subsection (g). The commission by rule shall adopt procedures to ensure that the total compensation to be paid to a retail public utility under Subsection (g) is determined not later than the 90th calendar day after the date on which the commission determines that the municipality's application is administratively complete.

(h) A municipality or a franchised utility may dismiss an application for single certification without prejudice at any time before a judgment becomes final provided the municipality or the franchised public utility has not taken physical possession of property of the retail public utility or made payment for such right pursuant to Subsection (f) of this section.

(i) In the event that a municipality files an application for single certification on behalf of a franchised utility, the municipality shall be joined in such application by such franchised utility, and the franchised utility shall make all payments required in the court's judgment to adequately and justly compensate the retail public utility for any taking or damaging of property and for the transfer of property to such franchised utility.

(j) This section shall apply only in a case where:

(1) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a nonprofit water supply or sewer service

drinking water systems.

Added by Acts 1987, 70th Leg., ch. 583, § 1, eff. Aug. 31, 1987.
Amended by Acts 1989, 71st Leg., ch. 567, § 32, eff. Sept. 1,
1989; Acts 1989, 71st Leg., ch. 926, § 1, eff. Aug. 28, 1989;
Acts 1995, 74th Leg., ch. 814, § 1 to 4, eff. Aug. 28, 1995; Acts
1999, 76th Leg., ch. 1374, § 1, eff. Aug. 30, 1999; Acts 1999,
76th Leg., ch. 1375, § 1, eff. Sept. 1, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 1145, § 10, eff. September 1,
2005.

ATTACHMENT 6

LEXSEE 190 S.W.3D 747

THE CITY OF SAN ANTONIO, as Owner of the San Antonio Water System, Appellant v. BSR WATER COMPANY; Sneckner Partners, Ltd.; Debra Sneckner Kennedy; Sherri Martineau Sneckner; William Kendrick Sneckner; Lova Catherine Sneckner Buckner, Appellees

No. 04-05-00495-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

190 S.W.3d 747; 2005 Tex. App. LEXIS 10859

December 28, 2005, Delivered

December 28, 2005, Filed

SUBSEQUENT HISTORY: Released for Publication May 24, 2006. Appeal dismissed by *City of San Antonio v. BSR Water Co.*, 2006 Tex. App. LEXIS 1760 (Tex. App. San Antonio, Mar. 8, 2006)

PRIOR HISTORY: **[**1]** From the 225th Judicial District Court, Bexar County, Texas. Trial Court No. 2004-CI-02288. Honorable Michael P. Peden, Judge Presiding.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant city challenged an order of the 225th Judicial District Court, Bexar County, Texas, which denied its plea to the jurisdiction in appellee ranch owners' action for breach of contract, fraud, fraudulent inducement, and conversion.

OVERVIEW: The owners held a certificate of convenience and necessity (CCN) from the

State that allowed them to operate a potable water system on the ranch. They wanted to expand the area covered by the CCN (expansion area), but the area they sought fell within the land covered by the city water system's application for a CCN. The court found that the owners' claims arose from the water system's decisions regarding the drilling of wells, the purchase of water, and an application for a CCN over the expansion area. Those decisions could not be distinguished from the city's governmental function to provide water and sewer service under *Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(32)* (2005). Accordingly, the city was entitled to immunity on the owners' tort claims. The owners asserted a common law breach of contract claim against the water system, and *Tex. Water Code Ann. ch. 13* did not specify a procedure for resolving such disputes. Although the Texas Commission for Environmental Quality (TCEQ) had the authority to levy penalties, it did not have the authority to award damages. The TCEQ did not have either exclusive or primary jurisdiction over the owners' contract claim.

tabbles
Attachment 6

Furthermore, all activities associated with the operation of one of the government functions listed in § 101.0215(a) are governmental and cannot be considered proprietary, regardless of the municipality's motive for engaging in the activity.

Governments > Local Governments > Duties & Powers

[HN5] A city has discretion to perform or not perform many activities in connection with its government functions. That discretion does not reclassify one aspect of a government function into a proprietary function.

Civil Procedure > Justiciability > Ripeness > Tests

[HN6] For a claim to be justiciable, the claim must be ripe, and the concept of ripeness emphasizes the need for a concrete injury and focuses on when an action may be brought. Under the ripeness doctrine, a reviewing court considers whether, at the time a lawsuit is filed, the facts are sufficiently developed and show that an injury has or is likely to occur. A case is not ripe if determining whether a plaintiff has a concrete injury depends on events that have not come to pass or that are based on hypothetical or contingent facts.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

[HN7] Courts of general jurisdiction presumably have subject-matter jurisdiction unless a contrary showing is made.

Administrative Law > Separation of Powers > Jurisdiction

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

[HN8] There is no presumption that administrative agencies are authorized to resolve disputes. Instead, an agency may exercise only those powers the law, in clear and express statutory language, confers upon it. Courts will not divine by implication additional authority to agencies, nor may agencies create for themselves any excess powers. Under the exclusive jurisdiction doctrine, the legislature grants an administrative agency the sole authority to make an initial determination in a dispute. An agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that the legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. Whether an agency has exclusive jurisdiction depends on statutory interpretation. Typically, if an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review of the agency's action. Until then, a trial court lacks subject-matter jurisdiction and must dismiss without prejudice the claims within the agency's exclusive jurisdiction.

Administrative Law > Judicial Review > Standards of Review > De Novo Review

Administrative Law > Separation of Powers > Jurisdiction

Governments > Legislation > Interpretation

[HN9] Determining if an agency has exclusive jurisdiction requires statutory construction and raises jurisdictional issues. Thus, whether an agency has exclusive jurisdiction is a question of law that an appellate court reviews de novo. The court's objective when construing a statute is to determine and give effect to the legislature's intent. To ascertain that intent, the court looks first to the statute's plain language and gives words their ordinary meaning. The court must view the statute's terms in context and give them full effect. Further, the court presumes that the legislature acted with knowledge of the common law and court decisions.

Eubanks, Akin Gump Strauss Hauer & Feld
L.L.P., San Antonio, TX.

For Appellee: Seagal V. Wheatley, Jenkins &
Gilchrist, P.C., San Antonio, TX.

JUDGES: Opinion by: Sandee Bryan Marion,
Justice. Sitting: Catherine Stone, Justice, San-
dee Bryan Marion, Justice, Rebecca Simmons,
Justice.

OPINION BY: Sandee Bryan Marion

OPINION

[*750] This is an accelerated appeal from the trial court's denial of the City's plea to the jurisdiction. In the underlying suit, BSR Water Company and others (collectively "BSR") sued the City on claims of breach of contract, fraud, fraudulent inducement, and conversion. In this appeal, we determine whether (1) the City is immune from suit on BSR's tort claims, (2) BSR's contract claim is ripe, and (3) the Texas Commission for Environmental Quality ("TCEQ") has either exclusive or primary jurisdiction over BSR's contract claim. We affirm in part and reverse in part.

BACKGROUND

BSR owns a 442-acre ranch in northwest San Antonio, Texas, and holds a Certificate of Convenience and Necessity ("CCN") from the State that allows it to [*751] operate a potable water system on the ranch. The San Antonio Water System ("SAWS") is a public utility that provides [**2] services in Bexar County, Texas through service areas established by its CCNs. The TCEQ is the state agency that grants CCNs and ensures that all CCN applicants possess the financial, managerial, and technical capability to provide continuous and adequate water utility service. See *TEX. WATER CODE ANN.* §§ 13.241, 13.242 (Vernon 2000).

1. A CCN allows an entity to provide retail water service if it is for the public's convenience and necessity. *TEX. WATER CODE ANN.* § 13.242(a) (Vernon 2000).

In 1998, SAWS filed an application with the TCEQ for a CCN covering several thousand acres west of Highway 281 in northern Bexar County. BSR owns 412 acres west of Highway 281. BSR has the CCN to provide retail water service within its 412 acres, although it has never provided such service to any customer. BSR wanted to expand the area covered by its CCN to include 800 acres of neighboring land surrounding its property (the "Expansion Area"). BSR's Expansion Area fell [**3] within the land covered by SAWS's application for a CCN. BSR also filed a protest to SAWS's application with the TCEQ because BSR wanted to expand its CCN to cover the Expansion Area. The Bexar County Metropolitan Water District ("Bexar Met") filed a similar protest with TCEQ.

On February 15, 2000, representatives of BSR and SAWS engaged in contract negotiations to resolve their differences, eventually entering into a Water Supply Contract and Service Area Settlement Agreement. Among the obligations assumed by the parties under the agreement are the following: (1) BSR agreed to withdraw its request for a contested hearing on its protest to SAWS's CCN application and agreed to submit a letter supporting SAWS's application for an expansion of its CCN in those areas surrounding BSR's CCN; (2) SAWS agreed to not oppose, and to support any attempt by BSR to expand the area of its CCN provided such expansion is within the limits of the Expansion Area; (3) SAWS agreed not to oppose, and to support, the transfer to BSR of any portion of SAWS's CCN located within the Expansion Area; (4) BSR agreed to sell to SAWS water on a wholesale basis; and (5) BSR granted SAWS the right to produce up [**4] to 1,500 acre feet per year of groundwater from wells SAWS agreed to drill on BSR's

sovereign immunity unless immunity has been waived under the Texas Tort Claims Act. *See id.* §§ 101.001-109.

Proprietary functions are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality. *See id.* § 101.0215(b). Proprietary functions are not integral to a municipality's function as an arm of the state. *Southwest Concrete Constr.*, 835 S.W.2d at 731. "The sovereign immunity of the state does not protect a municipality from liability for actions taken in a proprietary capacity because such are undertaken for the benefit of private enterprise or the residents of the municipality rather than for the benefit of the general public." *Id.*

Relying on the "arising from" language of *Texas Civil Practice and Remedies Code section 101.0215* [**8], BSR asserts courts must first determine the specific function from which a plaintiff's damages arise, before determining whether the municipality is immune. *See TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)* ("[HN2] A municipality is liable ... for damages arising from its governmental functions"); § 101.0215(b) ("[HN3] This chapter does not apply to the liability of a municipality for damages arising [*753] from its proprietary functions"). BSR argues there must be a nexus between the asserted claims and the alleged governmental function. BSR contends its claims do not arise from SAWS's providing water and sewer services, and instead, its claims arise from SAWS's refusal to maintain its application for a CCN covering the Expansion Area so that BSR could later provide water and sewer service. According to BSR, (1) its fraud claim rests on SAWS's never actually intending to continue its application for a CCN for the Expansion Area, and (2) its conversion claim rests on BSR being deprived of the right to capture the water under its property because SAWS failed to drill wells on the property, which resulted in surrounding landowners capturing the water [*9] and selling it

to SAWS. Therefore, BSR concludes that because its claims arise from the operation of a public utility, and not the providing of "water and sewer service," the City is not immune from suit.

[HN4] A municipality does not enjoy immunity from suit for the performance of its proprietary functions, such as "the operation and maintenance of a public utility." *TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(b)(1)*. There is no dispute that SAWS is a public utility. The provision of water services, waterworks, and irrigation were considered proprietary functions under the common law. *City of Texarkana v. Cities of New Boston*, 141 S.W.3d 778, 783 (Tex. App.--Texarkana 2004, no pet.); *Reata Constr. Corp.*, 83 S.W.3d 392 at 397. However, the Legislature did not adopt the same classifications the common law employed when it classified municipal functions in *section 101.0215*. *Reata Constr. Corp.*, 83 S.W.3d at 397. And, plaintiffs may not "split various aspects of [a municipality's] operation into discrete functions and recharacterize certain of those functions as proprietary." *See City of San Antonio v. Butler*, 131 S.W.3d 170, 178 [**10] (Tex. App.--San Antonio 2004, pet. filed Apr. 15, 2004). Although the operation of a public utility is a proprietary function, a municipality's proprietary functions do not include those activities listed as governmental in *section 101.0215(a)*. *TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(c)*; *Butler*, 131 S.W.3d at 177; *see Southwest Concrete Constr.*, 835 S.W.2d at 731 (referencing *section 101.0215(c)* and noting "the legislature included a caveat in addition to the language which indicated that the list of proprietary functions was not exclusive."). Among the governmental functions listed in *section 101.0215(a)* for which a municipality enjoys immunity from suit is the provision of "water and sewer service." *TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(32)*. Furthermore, "all activities associated with the operation of one of the government functions listed in *section 101.0215(a)*

must be ripe, and the concept of ripeness emphasizes the need for a concrete injury and focuses on when an action may be brought. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851, 43 Tex. Sup. Ct. J. 731 (Tex. 2000). Under the ripeness doctrine, we consider whether, at the time a lawsuit is filed, the facts are sufficiently developed and show that an injury has or is likely to occur. *Id.* at 851-52. A case is not ripe if determining whether a plaintiff has a concrete injury depends on events that have not come to pass or that are based on hypothetical or contingent facts. *Id.* at 852.

The City asserts BSR does not have a concrete injury because BSR's claims are based on a future event: whether [*755] the TCEQ would grant or deny BSR a CCN in the Expansion Area. On the other hand, BSR asserts SAWS's actions denied BSR "any expansion rights and the valuable right to receive payments of several millions of dollars from SAWS or other water purchasers for water to be purchased [***15] in [BSR's] new agreed expanded area." BSR also asserts that SAWS has directly caused it "to lose extremely valuable rights to sell its own water to other land developers." Further, BSR contends it lost the benefit to expand its water area because it "simply does not have the ability to compete with a huge utility like Bexar Met for a certificate to serve the same area." BSR claims to have suffered injury regardless of the TCEQ's future decision. Taking the facts stated in BSR's petition as true, if SAWS breached its agreement with BSR, then BSR suffered an injury by losing its expansion rights and rights to sell its water to other developers. Therefore, it is not determinative that the TCEQ has not issued a final ruling regarding the CCN application and we hold that BSR's breach of contract claim is ripe.

TCEQ'S JURISDICTION

In its third issue, the City asserts the trial court lacks subject-matter jurisdiction because

the TCEQ has exclusive jurisdiction over the underlying CCN dispute. Alternatively, the City asserts the TCEQ has primary jurisdiction. The City insists the Legislature gave the TCEQ exclusive jurisdiction to decide the issues raised in this case and that BSR [***16] must exhaust all administrative remedies available to it before seeking judicial review. The City contends that because BSR has not exhausted all administrative remedies available, the trial court does not have subject-matter jurisdiction to hear this case.

A. Exclusive Jurisdiction

[HN7] Courts of general jurisdiction presumably have subject-matter jurisdiction unless a contrary showing is made. *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220, 45 Tex. Sup. Ct. J. 907 (Tex. 2002). [HN8] There is no presumption that administrative agencies are authorized to resolve disputes. *Id.* Instead, an agency may exercise only those powers the law, in clear and express statutory language, confers upon it. *Id.* "Courts will not divine by implication additional authority to agencies, nor may agencies create for themselves any excess powers." *BCY Water Supply Corp. v. Residential Investments, Inc.*, 170 S.W.3d 596, 600 (Tex. App.--Tyler 2005, *pet. denied*).

Under the exclusive jurisdiction doctrine, the Legislature grants an administrative agency the sole authority to make an initial determination in a dispute. *See Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 15, 43 Tex. Sup. Ct. J. 1047 (Tex. 2000). [***17] An agency has exclusive jurisdiction when a pervasive regulatory scheme indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. *Subaru*, 84 S.W.3d at 221. Whether an agency has exclusive jurisdiction depends on statutory interpretation. *Id.* Typically, if an agency has exclusive jurisdiction, a party must exhaust all administrative

fore, the trial court had subject-matter jurisdiction over BSR's contract claim. *See BCY Water Supply*, 170 S.W.3d at 601 (holding that common law claims for negligent misrepresentation [**21] and promissory estoppel [*757] did not fall within TCEQ's exclusive jurisdiction); *see also City of Donna v. Victoria Palms Resort, Inc.*, No. 13-03-375-CV, 2005 Tex. App. LEXIS 6131, 2005 WL 1831593, *5 (Tex. App.-Corpus Christi Aug. 04, 2005, pet. filed) (holding that TCEQ does not have jurisdiction over claims for deceptive trade practices and breach of contract).

B. Primary Jurisdiction³

3 BSR asserts this court does not have jurisdiction to address the City's primary jurisdiction claim because the doctrine of primary jurisdiction does not deprive a trial court of subject-matter jurisdiction. According to BSR, because this is an interlocutory appeal from the trial court's denial of a plea to the jurisdiction, our review is limited to only jurisdictional arguments. We disagree, and conclude this court has jurisdiction to consider whether the TCEQ has primary jurisdiction over BSR's contract claim. *See Butnaru*, 84 S.W.3d at 208 (Supreme Court considered both exclusive and primary jurisdiction arguments); *Cash America International v. Bennett*, 35 S.W.3d 12, 43 Tex. Sup. Ct. J. 1047 (Tex. 2000) (same).

[**22] [HN12] Primary jurisdiction is a judicially created doctrine in which a court may dismiss or stay an action pending resolution of some portion of the case by an administrative agency. *Harris County Mun. Util. Dist. v. Mitchell*, 915 S.W.2d 859, 863-64 (Tex. App.--Houston [1st Dist.] 1995, writ denied). Under the doctrine of primary jurisdiction, a matter delegated by statute to an administrative

agency for initial action must be determined by that agency before the matter may be reviewed by a court. *Id.* at 864; *see also Subaru*, 84 S.W.3d at 221.

"[P]rimary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional." *Subaru*, 84 S.W.3d at 220. Thus, to the extent the TCEQ has primary jurisdiction over BSR's claims, the trial court did not lack subject-matter jurisdiction. If an agency has primary jurisdiction, rather than dismiss the case, a trial court should abate the lawsuit and suspend final adjudication of the claims until after the agency has an opportunity to act on the matter. *Id.* at 221.

A trial court should allow an administrative agency to initially decide an issue when: (1) [**23] the agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from the agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations. *Subaru*, 84 S.W.3d at 221. Here, the merits of the pending CCN application are not at issue. Instead, the rights and obligations of SAWS and BSR under the Water Supply Contract and Service Area Settlement Agreement are at issue. We, therefore, hold the TCEQ does not have primary jurisdiction over BSR's contract claim.

CONCLUSION

We reverse the trial court's order to the extent it denies the City's plea to the jurisdiction on BSR's tort claims and we render judgment dismissing BSR's tort claims against the City for lack of subject-matter jurisdiction. We affirm the trial court's order in all other respects, and remand for further proceedings consistent with this opinion.

Sandee Bryan Marion, Justice