

NO. CV30781

IN RE	§	IN THE DISTRICT COURT OF
	§	
THE CITY OF MONT BELVIEU	§	CHAMBERS COUNTY, TEXAS
	§	
AND CERTAIN PUBLIC SECURITIES	§	
	§	<u>344th</u> JUDICIAL DISTRICT

**ORIGINAL PETITION FOR EXPEDITED DECLARATORY
AND INJUNCTIVE RELIEF**

The City of Mont Belvieu, Texas (“the City”) files this original petition pursuant to Chapter 1205 of the Texas Government Code (the Expedited Declaratory Judgment Act), which provides an efficient method to adjudicate the validity of public securities and their associated contracts and obligations. A copy of Chapter 1205 is attached as Exhibit A. *Chapter 1205 requires the Court, upon receipt of this original petition, to “immediately issue an order” that, among other things, sets this matter for trial “at 10:00 a.m. on the first Monday after the 20th day after the date of the order.”* For the Court’s convenience, a proposed order under TEX. GOV’T CODE § 1205.041 is attached as Exhibit B.

VII. Discovery Level

1. TEX. R. CIV. P. 190.1 requires the first numbered paragraph of petitions to state the pertinent level of discovery; however, this rule does not apply to an action brought under the Expedited Declaratory Judgment Act. See TEX. GOV’T CODE § 1205.002(a). Instead, pursuant to TEX. GOV’T CODE § 1205.064, the City’s records relating to the public securities at issue will be open to inspection at reasonable times to any person or entity that becomes a named party to this action.

VIII. Jurisdiction & Venue

2. The Court has jurisdiction over this matter. TEX. GOV'T CODE ANN. § 22.007; TEX. CONST. art. V, § 8. Chapter 1205 specifically vests the Court with authority to enter a declaratory judgment with respect to:

(1) the City's authority to issue public securities;

...

(3) the legality and validity of each expenditure or proposed expenditure of money relating to the public securities; and

(4) the legality and validity of the public securities.

TEX. GOV'T CODE § 1205.021.

3. Chambers County is an appropriate venue pursuant to TEX. GOV'T CODE § 1205.022. This action may be maintained "regardless of whether another proceeding is pending in any court relating to a matter to be adjudicated" in this lawsuit. *Id.* § 1205.025(4). There are no such matters pending at this time.

4. The time for bringing this action is also appropriate. As Chapter 1205 specifically authorizes an issuer like the City to bring an action before the public securities are authorized, issued, or delivered. *Id.* § 1205.025(2).

IX. Parties & Service

A. Petitioner

5. The City is an incorporated "home-rule" city that derives its power from the Texas Constitution. CITY OF MONT BELVIEU HOME RULE CHARTER § 1.02; TEX. CONST. art. XI, § 5; *see also* TEX. LOCAL GOV'T CODE § 54.004 (home-rule cities may "enforce ordinances necessary to protect health, life, and property . . . of municipality and its inhabitants"). Thus, the City is an "issuer" of public securities within the meaning of TEX. GOV'T CODE § 1205.001(1).

6. Additionally, the certificates of obligation the City intends to issue and deliver are “public securities” as defined by TEX. GOV’T CODE § 1205.001(2) (defining “public security” to mean interest-bearing obligation, including a bond, bond anticipation note, certificate, note, warrant, or other evidence of indebtedness). The City is the proper party to bring this action.

B. Respondents

7. **Interested Parties:** Pursuant to TEX. GOV’T CODE § 1205.023, this action is an *in rem* proceeding and mandatory class action. All persons who reside within the territory of the City, who own property located within the boundaries of the City, who are taxpayers of the City, or who have or claim a right, title, or interest in any property or money to be affected by the authorization or the issuance of the public securities at issue are “Interested Parties.” *Id.* § 1205.041(a). Any Interested Party may become a named party to this action by filing an answer to this original petition on or before the time set for trial, or thereafter by intervention with leave of court. *Id.* § 1205.062.

8. **Notice to Interested Parties:** According to TEX. GOV’T CODE § 1205.03, the Clerk of the Court must give notice of this action to all Interested Parties by publishing a substantial copy of the order attached as Exhibit B in a newspaper of general circulation in Chambers County, Liberty County, and Travis County, Texas. The notice must be published once a week for two consecutive weeks, and the first publication date must be at least 14 days before the date set for hearing and trial. This publication is requested at this time, as reflected in the proposed order attached as Exhibit B. Because Chapter 1205 requires expedited action, the undersigned’s office will assist the Clerk with the necessary publication by making arrangements with the newspapers upon receipt of the signed order.

9. **Texas Attorney General:** Under TEX. GOV’T CODE § 1205.042, the Attorney General of Texas must be served at least 20 days before trial with a copy of this original petition

(together with attached exhibits), and a copy of the Court's order (executed copy of Exhibit B).

Expedited issuance of citation is requested at this time for:

Attorney General, State of Texas
Attention: Jim Davis, Deputy Attorney General for Civil Litigation
209 W. 14th Street
Austin, Texas 78701

As soon as possible, the citation should be emailed to Mr. Norm Wiley of Associated Litigation Services at *norm.wiley@gmail.com*. This private process server will serve the citation at the Attorney General's physical address. The Attorney General's Bond Department will be provided a courtesy copy of the applicable documents upon filing of this petition.

X. Factual Allegations

The City makes the following allegations in accordance with the requirements of TEX. GOV'T CODE § 1205.024.

A. Factual Background

10. The City seeks to install fiber optic cable to provide broadband internet services for its citizens. Because of its size, private companies have been unwilling to provide broadband internet services in the City commercially.

11. In a 2016 study of Mont Belvieu residents, 69% of residents and 79% of businesses stated that the current internet environment was not meeting their current and future internet needs. *See* City of Mont Belvieu Broadband Options Study at 14-15, attached as Exhibit C. 90% of residents and 100% of business responded that reliable, high-speed internet is an essential service on the same level as electricity or water. *Id.*

12. The study found "Mont Belvieu has a multitude of providers, but their coverage areas are limited in area creating a patchwork of serviceable areas. There is currently no one provider who covers all of Mont Belvieu with high speed broadband." *Id.* at 10. And some

addresses in Mont Belvieu could not obtain service from any provider due to saturated equipment infrastructure. *Id.* Even when Mont Belvieu residents and businesses are located within internet provider coverage areas, they report slow speeds with regular service disruptions. *Id.* at 14-15.

13. Because reliable, high-speed internet is essential for the Mont Belvieu community, the Mont Belvieu City Council plans to issue certificates of obligation so that the City can build and operate a fiber optic network to make gigabit internet service available to all residences and businesses within the City of Mont Belvieu. The City wishes to eliminate the current inequities in reliable, high-speed internet service. The Mont Belvieu City Council views gigabit internet service as a powerful economic development tool to retain existing businesses and attract new businesses to the City.

14. On December 12, 2016, the Mont Belvieu City Council adopted a resolution, authorizing the publication of notice of intention to issue certificates of obligation. *See* Resolution Authorizing Publication of Notice of Intention to Issue C.O.'s, attached as Exhibit D. The City Council subsequently published notices of intent to issue the certificates of obligation not to exceed \$14,000,000 on December 16, 2016 and December 23, 2016 in *The Baytown Sun*. *See* Publications of Notice of Intention to Issue C.O.'s, attached as Exhibit E. On January 23, 2017, the Mont Belvieu City Council adopted an ordinance authorizing the issuance of the certificates of obligation. *See* Certificate of Adoption of Ordinance, attached as Exhibit F; Ordinance Authorizing the Issuance of C.O.'s, attached as Exhibit G.

B. Legislative Framework

15. While cities may provide certain utilities, including internet, they are not allowed to provide others. For example, the Texas Utilities Code regulates telecommunications services. Under Section 54.001, any entity providing "local exchange telephone service, basic

telecommunications service, or switched access to service” must obtain a certificate. TEX. UTIL. CODE § 54.001. Municipalities are prohibited from obtaining the required certificates for these statutorily defined telephone services. *Id.* §§ 54.201, 54.202(1). More particularly:

- A “local exchange telephone services” explicitly excludes “non-voice data transmission service offered as a separate service and not as a component of basic local telecommunications service.” *Id.* § 54.002(5).
- A “basic local telecommunications service” provides core telephone functionalities such as: access to 911 services, tone dialing service, and flat rate telephone service. *Id.* § 54.002(1).
- A “switched access” is an “[a]ccess service that is provided by CTUs [Certified Telecommunications Utilities] to access customers and that requires the use of CTU network switching or common line facilities . . . for the origination or termination of interexchange calls.” Texas Public Utilities Rules § 26.5 (236).

Thus, providing a broadband internet service via fiber optic cable does not fall under these definitions.

16. Municipalities also are prohibited from offering “nonswitched telecommunications services used to connect a customer’s premises with: (a) another customer’s premises within the exchange; or (b) a long distance provider that serves the exchange.” TEX. UTIL. CODE § 54.202. The Texas Public Utility Commission’s Rules define “long distance services” as those “furnished between customers in different local calling areas.” Texas Public Utilities Rules § 26.5 (139). Providing broadband internet services will not directly connect customers’ premises, nor will it connect a customer to a long-distance provider; instead, it will connect customers to the internet.

17. Finally, the Texas Utilities Code prohibits providing local exchange telephone service, basic local telecommunications service, switched access service, or nonswitched telecommunications service directly or indirectly through a telecommunications provider. TEX. UTIL. CODE § 54.202(b). The internet is not a “telecommunications provider.” *See id.* § 51.002(10). Thus, a broadband internet service does not provide a prohibited service indirectly through a telecommunications provider.

C. Authority to Issue Public Securities

18. As noted above, the City is a home-rule city, duly created, organized, and existing under the laws of the State of Texas. As such, the City is vested with the authority pursuant to Subchapter (c) of Chapter 271 of the Texas Local Government Code to issue, sell, and deliver certificates of obligation for public works, including municipal utilities.

D. Purpose of the Public Securities

19. The Texas Government Code permits municipalities to “issue public securities and incur obligations under contracts” in connection with acquiring, purchasing, constructing, improving, renovating, or equipping infrastructure for a utility system. TEX. GOV’T CODE § 1502.051. Likewise, the City may issue certificates of obligation for “public works.” TEX. LOCAL GOV’T CODE § 271.045. Fiber optic cable is a permanent public improvement similar to public works and utilities. *See Simpson v. City of Nacogdoches*, 152 S.W. 858, 862 (Tex. Civ. App.—Galveston 1913, no writ) (recognizing electric light plants as municipal utilities and public improvements although not listed in the statute); *Bass v. City of Clifton*, 261 S.W. 795 (Tex. Civ. App.—Waco 1924, no writ) (same).

20. The Texas Legislature noted broadband internet is “important to this state” and that providing wireless services to all residents is “the policy of the state.” TEX. UTIL. CODE § 43.001(b). Accordingly, the City will issue certificates of obligation and enter into associated

contracts for the purpose of providing proceeds to finance laying fiber optic cable to provide broadband internet services to the citizens of the City.

E. Certificates of Obligation

21. As noted above, this proceeding may be brought before the City issues certificates of obligation for the purpose of providing broadband internet service via fiber optic cable. TEX. GOV'T CODE § 1205.024(1). The Expedited Declaratory Judgment Act thus allows the City to avoid the public expense of actions that may become moot.

22. For the same reason, it is not necessary to append to this petition a copy of each public security authorization; the proposed public securities have not yet been authorized by the City. *Id.* § 1205.024(4).

F. Amount of Public Securities and Interest Rate

23. Upon entry of the declaratory judgment sought by this lawsuit, the City will take the necessary steps to authorize and to issue certificates of obligation for the purpose of providing broadband internet service as explained in this petition.

24. At this time, the proposed maximum amount of the public securities is \$14,000,000. *See* TEX. GOV'T CODE § 1205.024(5). The maximum net effective interest rate of the public securities cannot be estimated at this time but will not exceed 15%, as calculated pursuant to the provisions of Chapter 1204 of the Texas Government Code. *Id.* § 1205.024(6).

XI. Request for Declaratory Judgment

25. The preceding paragraphs establish the existence of a justiciable controversy appropriately resolved by declaratory judgment.

26. Pursuant to TEX. GOV'T CODE § 1205.021, the City seeks a declaratory judgment that:

- a. The City is an “issuer” that intends to make a valid “public securities authorization” for the issuance of “public securities,” as those terms are defined in TEX. GOV’T CODE § 1205.001;
- b. Each expenditure or proposed expenditure of money related to the public securities is legal and valid;
- c. The proposed public securities are legal and valid;
- d. The City may enter into all contracts, including but not limited to those necessary to issue and deliver broadband internet services.

27. The declaratory judgment will terminate for all time any claim or controversy with respect to the issuance of the public securities. In accordance with TEX. GOV’T CODE § 1205.151(b), the judgment will be binding and conclusive against the City, the Attorney General, the Comptroller of Public Accounts for the State of Texas, and any party to the action named and served with notice of the proceedings or described by TEX. GOV’T CODE § 1205.041(a), including Interested Parties described above.

28. In accordance with TEX. GOV’T CODE § 1205.151(c), the above requested declaratory judgment would constitute a permanent injunction against the filing by any person of any proceeding contesting the validity of: (a) the public securities, a public security authorization, or an expenditure of money relating to the public securities described in this petition; (b) each provision made for the payment of the public securities or of any interest on the public securities; and (c) any adjudicated matter and any matter that could have been raised in this action. The City respectfully requests that a permanent injunction be entered as described herein.

XII. Request for Bond

29. Before entry of a final judgment, the City requests, pursuant to TEX. GOV’T CODE § 1205.101, that the Court require that any opposing parties and intervenors (other than the Attorney General), whether named or unnamed, post a bond with a sufficient surety, approved by

the Court, and payable to the City for all damages and costs due to delay caused by the continued participation of those parties or intervenors.

30. Likewise, after entry of a final judgment, the City requests, pursuant to TEX. GOV. CODE § 1205.101 and TEX. R. APP. P. 24, that the Court require that any opposing parties and intervenors (other than the Attorney General), whether named or unnamed, post a bond with a sufficient surety, approved by the Court, and payable to the City for all damages and costs due to delay caused by the continued participation of those parties or intervenors.

XIII. Conclusion & Prayer

For the reasons set forth above, the City requests that the Court grant it the declaratory judgment and other relief requested in this original petition. The City also requests that the Court give all proceedings, hearings, and trial priority over all other cases, causes, or matters pending in the Court. The City prays for all other relief to which it may be entitled.

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