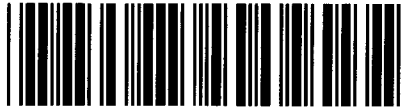


Control Number: 43551



Item Number: 24

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014.

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PUBLIC UTILITY COMMISSION
FILING CLERK

December 21, 2001

Kenneth Ramirez
Partner

111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043
Phone: 512.494.3611
Fax: 512.472.9123
kramirez@bracepatt.com

Via Hand Delivery

LaDonna Castañeula, Chief Clerk
Office the Chief Clerk
Texas Natural Resource Conservation
Commission
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

024
DEC 28 2001
RL

Re: City of Austin's Water and Sewer CCN Applications (33562-C and 33563-C)

Dear Ms. Castañeula:

Enclosed please find an original and one copy of a letter to Doug Holcomb in response to AquaSource Development Company, Inc.'s Request for Contested Case Hearing on the City of Austin's Water and Sewer CCN Applications (33562-C and 33563-C). Please date-stamp the copy and return it to my messenger.

If you have any questions, please contact me at 512/494-3611.

Very truly yours,

Bracewell & Patterson, L.L.P.

Kenneth Ramirez

KR/jcb
Enclosure

cc: Mr. Doug Holcomb
Mr. Mark Zeppa
Mr. Ronnie Jones
Mr. Bart Jennings

CHIEF CLERKS OFFICE

DEC 21 PM 3:03

TEXAS NATURAL
RESOURCE CONSERVATION
COMMISSION

24



Kenneth Ramirez
Partner

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December 21, 2001

By Hand Delivery

Mr. Doug Holcomb, P.E.
Utilities & Districts Section
Texas Natural Resource Conservation Commission
P. O. Box 13087, MC 153
Austin, TX 78711-3087

OPA
DEC 28 2001
CHIEF CLERKS OFFICE
DEC 21 PM 3:03
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Re: Response to AquaSource Development Company, Inc.'s and AquaSource Utility, Inc.'s Request for Contested Case Hearing on the City of Austin's Water and Sewer CCN Applications (33562-C and 33563-C)

Dear Mr. Holcomb:

On August 31, 2001, Mr. Mark H. Zeppa filed a request for contested case hearing on behalf of his client, AquaSource Utility, Inc. ("AquaSource Utility") and its affiliate, AquaSource Development Company, Inc. ("AquaSource Development") regarding the City of Austin's ("City") water and sewer Certificate of Convenience and Necessity ("CCN") applications (33562-C and 33563-C) ("Application(s)"). The City filed its Applications on August 13, 2001. The Applications were declared administratively complete on August 20, 2001. The City issued individual and published notices under 30 TAC § 291.106; the last date of publication was October 3, 2001.

A request for a contested hearing may be granted if made by an "affected person." See 30 TAC § 55.27(b)(2); see also 30 TAC §§ 291.107(d) and 55.101(g)(5). An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. See 30 TAC § 55.29(a). An interest that is common to members of the general public does not qualify as a personal justiciable interest. See *id.* This standard requires AquaSource Utility and AquaSource Development to show that it will potentially suffer harm or has a justiciable interest that will be affected. See United Copper Industries, Inc. v. Grissom, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. denied).

Relevant factors to be considered in evaluating whether a person is an affected person include:

- (1) Whether the interest claimed is one protected by the law under which the application will be considered;



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- (2) Whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (3) The likely impact of the regulated activity on the health, safety, and use of property of the person; and,
- (4) The likely impact of the regulated activity on use of the impacted natural resource by the person.

30 TAC § 55.29 (c).

In addition, a request for hearing must also be reasonable and supported by competent evidence. *See* 30 TAC § 55.27(b)(2).

The City objects to AquaSource Utility and AquaSource Development being granted a hearing on the City's Water and Sewer Applications. As is explained below, AquaSource Utility and AquaSource Development do not qualify as affected persons, and their requests for hearing are not reasonable and supported by competent evidence.

**AQUASOURCE DEVELOPMENT AND AQUASOURCE
UTILITY'S REQUESTS FOR HEARING SHOULD BE
DENIED FOR CITY'S WATER CCN APPLICATION**

AquaSource Development Is Not An Affected Person and Its Request For Hearing on the
City's Water CCN Application Is Unreasonable and Not Supported By Competent Evidence

AquaSource Development claims that it is "uniquely affected" by the City's Water Application because the City's proposed water service area will prevent AquaSource Development's expansion of its water service area and take away portions of its "statutory ¼-mile service area buffer zone." Neither of these claims provide the basis for AquaSource Development being an affected person. AquaSource Development, to the City's knowledge, is not a retail public utility and does not own, operate, maintain or control any facilities for the provision of potable water service for compensation. The City's water CCN application does not affect proposed development by AquaSource Development within the City's proposed water service area. The City's water CCN application only affects the provision of retail potable water service within the proposed area.

To the City's knowledge, AquaSource Development has not filed a competing application to provide water utility service to any area within the proposed water service area. The



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City's provision of service will thus have no impact upon AquaSource Development greater than that which is common to members of the general public. Specifically, AquaSource Development has no economic interest protected by the law under which the Application will be considered, and there will be no impact on the use of its property or natural resources. As such, AquaSource Development meets none of the relevant factors to be considered in evaluating affected person status for the City's water CCN application.

In addition, AquaSource Development's request is unreasonable because it fails to acknowledge the State of Texas' mandate for regionalization of water utility service. *See* Texas Water Code Sections 13.241(d), 13.183(c), and 16.053; and Texas Constitution Art. 3, § 49-d. The City is prepared to meet this mandate. Aside from asserting that AquaSource Utility is a "regional utility service," AquaSource Development has presented no evidence that it is authorized or will do so. Finally, overall, AquaSource Development has provided no evidence to support any part of its claim that it is entitled to a hearing on the City's water CCN application. Consequently, AquaSource Development's request for hearing should be denied.

AquaSource Utility Is Not An Affected Person and Its Request For Hearing on the City's Water CCN Application Is Unreasonable and Not Supported By Competent Evidence

AquaSource Utility claims that it is "uniquely affected" by the City's water CCN application because the City's proposed water service area will prevent expansion of its water service area and take away portions of its "statutory ¼-mile service area buffer zone." Neither of these claims provide the basis for AquaSource Utility being an affected person. The City's proposed service area expressly excludes any areas that lie within the boundary of a TNRCC-issued water CCN (such as AquaSource Utility's) that was valid and in effect as of the date the City's Application was filed and any connections currently being served by such water provider. Thus, no reasonable relationship exists between granting the City's water CCN application and AquaSource Utility's economic interest in its existing water CCN. Furthermore, AquaSource Utility has no inherent right or privilege to expand its water service area in the future. Similarly, while a utility is permitted to serve without a CCN within one quarter mile of its certificated area, it does not have a blanket right to do so. A utility may serve under 30 TAC § 291.103(a)(1)(A) only if the area is not receiving similar service from another utility and is not certificated to another utility.

To the City's knowledge, AquaSource Utility has not filed a competing application to provide water utility service to any area within the City's proposed water service area. The City's provision of service will thus have no impact upon AquaSource Utility greater



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than that which is common to members of the general public. Specifically, AquaSource Utility has no economic interest protected by the law under which the Application will be considered, and there will be no impact on the use of its property or natural resources. As such, AquaSource Utility meets none of the relevant factors to be considered in evaluating affected person status for the City's water CCN application.

In addition, AquaSource Utility's request is unreasonable because it fails to acknowledge the State of Texas' mandate for regionalization of water utility service. *See* Texas Water Code Sections 13.241(d), 13.183(c), and 16.053; and Texas Constitution Art. 3, § 49-d. The City is prepared to meet this mandate. Aside from asserting that it is a "regional utility," AquaSource Utility has presented no evidence that it can or will do so. Finally, overall, AquaSource Utility has provided no evidence to support any part of its claim that it is entitled to a hearing on the City's water CCN application. Consequently, AquaSource Utility's request for hearing should be denied.

**AQUASOURCE DEVELOPMENT AND AQUASOURCE
UTILITY'S REQUESTS FOR HEARING SHOULD BE
DENIED FOR CITY'S SEWER CCN APPLICATION**

AquaSource Development Is Not An Affected Person and Its Request for Hearing on the
City's Sewer CCN Application Is Unreasonable and Not Supported By Competent Evidence

As previously stated, an "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.29(a). An interest that is common to members of the general public does not qualify as a personal justiciable interest. *See id.* In addition to being made by an affected person, requests for hearing must be reasonable and supported by competent evidence. *See* 30 TAC § 55.27(b)(2).

AquaSource Development has not raised any specific concerns or provided any evidence that shows that it will potentially suffer harm or has a justiciable interest that will be affected by the City's sewer CCN application. To the City's knowledge, AquaSource Development is not a retail public utility and does not own, operate, maintain or control any facilities for the provision of wastewater service for compensation. The City's sewer CCN application does not affect proposed development by AquaSource Development within the City's proposed sewer service area. The City's sewer CCN application only affects the provision of retail wastewater service within the proposed area. Additionally, AquaSource Development, to the City's knowledge, has not filed or indicated an interest in filing a competing sewer application for any tract in the City's proposed sewer service area.



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Finally, as with the City's water CCN application, AquaSource Development's request is unreasonable because it fails to acknowledge the State of Texas' mandate for regionalization of sewer utility service. *See* Texas Water Code Sections 13.241(d), 13.183(c), and 16.053; and Texas Constitution Art. 3, § 49-d. The City is prepared to meet this mandate; once again, AquaSource Development has presented no evidence that it can or will do so.

AquaSource Utility Is Not An Affected Person and Its Request for Hearing on the City's Sewer CCN Application Is Unreasonable and Not Supported By Competent Evidence

As previously stated, an "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.29(a). An interest that is common to members of the general public does not qualify as a personal justiciable interest. *See id.* In addition to being made by an affected person, requests for hearing must be reasonable and supported by competent evidence. *See* 30 TAC § 55.27(b)(2).

AquaSource Utility has not raised any specific concerns or provided any evidence that shows that it will potentially suffer harm or has a justiciable interest that will be affected by the City's sewer CCN application. AquaSource Utility, to the City's knowledge, has not filed or indicated an interest in filing a competing sewer CCN application for any tract in the City's proposed sewer service area. In addition, it is our understanding from TNRCC staff that TNRCC has not received any documentation that AquaSource Utility's wastewater treatment plant has been activated. If the plant is not in operation, then AquaSource Utility's contention that its ability to serve customers is adversely affected is without any basis. Nevertheless, AquaSource Utility incorrectly claims that it is affected by the City's sewer CCN application because (1) "it is a neighboring sewer utility that has the ability to expand its service facilities and meets the known immediate service needs of these areas;" and (2) the City's operation and maintenance of its sewer facilities may adversely affect the groundwater supply and environmental integrity of AquaSource Utility's service area.

Once again, AquaSource Utility does not meet the section 55.29(c) criteria for designation as an affected person. Those criteria include whether the interest claimed is one protected by the law under which the application will be considered, whether a reasonable relationship exists between the interest claimed and the activity regulated, the likely impact of the regulated activity on the health, safety, and use of property of the person, and the likely impact of the regulated activity on use of the impacted natural resource by the person. First, AquaSource Utility's interest in wastewater discharges is not one protected by the law under which the Application will be considered and is an



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interest shared by all members of the general public that rely on a groundwater supply. Second, AquaSource Utility has not provided any evidence showing that a reasonable relationship exists between its concern regarding wastewater discharges and the granting of a sewer CCN to the City. Third, AquaSource Utility has not provided any evidence showing that it is likely that the granting of the requested sewer CCN to the City will result in adverse impacts on the health, safety, or use of property by AquaSource Utility within the proposed sewer service area. Finally, AquaSource Utility has failed to provide any evidence showing that it is likely that the granting of the sewer CCN to the City will adversely impact the groundwater supply within its water utility service area. In short, AquaSource Utility has not shown or provided any competent evidence that it is more likely than other members of the general public to be adversely affected by the City's sewer CCN application, or that it will potentially suffer harm or has a justiciable interest that will be affected.

Finally, as with the Water Application, AquaSource Utility's request is unreasonable because it fails to acknowledge the State of Texas' mandate for regionalization of sewer utility service. See Texas Water Code Sections 13.241(d), 13.183(c), and 16.053; and Texas Constitution Art. 3, § 49-d. The City is prepared to meet this mandate; once again, AquaSource Utility has presented no evidence that it can or will do so.

AquaSource Utility's request is also unreasonable because (1) its request is based on concerns related to other media (wastewater discharge permits and enforcement) that cannot be addressed by the pending City's sewer CCN application, even though within the jurisdiction of the Commission; and (2) AquaSource Utility has not presented any evidence to show that it is likely to be impacted by the City's provision of wastewater service. See 30 TAC § 55.31(a),(2),(4),(8). In contrast, the City's sewer CCN application shows the need for centralized sewer service and the City's ability to provide wastewater service to customers in the proposed area without adverse impacts to AquaSource Utility.

The City is Best Able to Meet Needs of Customers In the Proposed Area

AquaSource Utility and AquaSource Development argue that granting the City's Applications could preclude another more qualified utility from providing water and/or sewer service to the City's proposed service area. They have not presented any competent evidence to show that another utility could provide better service than the City.

AquaSource Utility and AquaSource Development further argue that granting the City's Application could deter "legitimate" development and growth in AquaSource Utility's certificated water service area. Putting aside the unclear distinction between legitimate and illegitimate development, AquaSource Utility and AquaSource Development again



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have not shown how any interest they may have in the character of development in the City's proposed water service area is at issue under the laws under which the Application will be considered. As AquaSource Utility and AquaSource Development admit, land development control is not the function of a CCN, and it is not an issue in determining whether a CCN should be granted.

In fact, contrary to AquaSource Utility and AquaSource Development's assertions, a desire to control development was not the City's motivation for filing its Application. Rather, it was a combination of factors including the State's mandate for regionalization of water and sewer utility service (Texas Water Code §§ 13.241(d), 13.183(c), and 16.053; Texas Constitution, art. 3, 849-d) and growth activity and growth projections in the proposed service area that prompted the City to develop and submit its Applications at this time. More specifically, the City has already received a total of 81 wastewater and 56 water service extension requests ("SERs"), covering approximately 5,964 acres and 7,715 acres respectively, for tracts in the proposed water and wastewater service area. Recent growth projections confirm that significant urban and suburban growth will occur in the proposed water and wastewater service area in the future. One of these studies, which uses a 40-year planning horizon and focuses on growth trends in the City and its extraterritorial jurisdiction ("ETJ"), predicts an increase of approximately 880,386 new residents in the City and its ETJ and population growth in the proposed water and wastewater service area of 4.5 to over 6 times the current population. According to information provided to the City, many of the proposed developments in the proposed water and wastewater service area are projects of a suburban nature, *i.e.*, single family residential areas with gross densities of more than two units per acre, extensive multi-family tracts, and large amounts of commercial and other non-residential uses. These proposed developments require urban level water and wastewater utility service.

It is in reaction to these types of factors—*e.g.*, the State's regionalization mandate and projections of strong urban and suburban growth in the proposed water and wastewater service area—that the Applications were developed; the Applications were not created to somehow direct or control land development. Indeed, as AquaSource Utility and AquaSource Development again admit, a CCN is not required for a municipality to engage in this activity.

CONCLUSION

Overall, the City's provision of water and sewer service will have no impact upon AquaSource Development and AquaSource Utility greater than that which is common to members of the general public. As such, AquaSource Development and AquaSource Development are not affected persons with respect to the City's water and sewer CCN



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applications. In addition, AquaSource Development and AquaSource Utility have provided no competent evidence to support their requests for hearing. Consequently, the City requests that AquaSource Development and AquaSource Utility's requests for a contested case hearing be denied.

If you have any questions, please contact me at 512/494-3611.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kenneth Ramirez'.

Kenneth Ramirez

KR/jcb

cc: Mr. Mark Zeppa
Mr. Ronnie Jones
Mr. Bart Jennings