



Control Number: 43990



Item Number: 37

Addendum StartPage: 0

SOAH DOCKET NO. 582-06-0425
TCEQ DOCKET NO. 2005-1516-UCR

2014 DEC 19 AM 8:20

APPLICATION OF TAPATIO
SPRINGS SERVICE COMPANY, INC.
TO AMEND CERTIFICATES OF
CONVENIENCE AND NECESSITY
NOS. 12122 AND 20698 IN KENDALL
COUNTY, TEXAS

§ BEFORE THE UTILITY
§ SINGLE OFFICE
§ OF
§ ADMINISTRATIVE HEARINGS
§

THE EXECUTIVE DIRECTOR'S RESPONSE TO CLOSING ARGUMENTS

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), by and through a representative of the Commission's Environmental Law Division, and files this Closing Argument, as follows:

INTRODUCTION

The ratepayers and the Office of Public Interest Counsel ("OPIC") focus solely on determining whether Tapatio Springs Service Company, Inc.'s ("TSSC") certificate of convenience and necessity ("CCN") amendment application conclusively meets individual criteria, thereby, failing to consider the whole of the evidence presented to the TCEQ and to SOAH. In accordance with the TCEQ's legislative mandate, the Executive Director considered the whole of the evidence and recommends approval of TSSC's CCN amendment application.

REPLY

I. TCEQ Authority to Issue CCN Amendments

The TEXAS WATER CODE ("TWC") and 30 TEXAS ADMINISTRATIVE CODE ("TAC") Chapter 291, Subchapter G provide that the TCEQ may issue CCN amendments under broad circumstances. The ratepayers assert that the TCEQ may only issue CCN amendments in

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TEXAS
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“limited circumstances.”¹ Their assertion is incorrect.

Prior to enactment of House Bill No. 2876, TWC § 13.254(a) stated that, “The commission [TCEQ] at any time after notice and hearing may revoke or amend any certificate of public convenience and necessity with the written consent of the certificate holder **or** if it finds that . . .”² TSSC met this requirement by requesting amendment to its certificate numbers 12122 and 20698. The TCEQ, therefore, has the authority to grant TSSC’s CCN amendment application provided, as discussed below, that the CCN amendment is “necessary for the service, accommodation, convenience, or safety of the public.”

II. Applicable Legal Standards

TSSC submitted its amendment application on April 20, 2005. Therefore, HB 2876 does not apply. Prior to enactment of HB 2876, the legislature required that the TCEQ find that a certificate is “necessary for the service, accommodation, convenience, or safety of the public” before issuing a CCN.³ The legislature also specified eight criteria that the TCEQ must consider in deciding whether to grant CCN applications.⁴

The TCEQ formulated rules to implement these legislative requirements. 30 TAC § 291.102(c) clearly stated that the TCEQ may issue a CCN amendment only upon finding that it is “necessary for the service, accommodation, convenience, or safety of the public.”⁵ The rule also made clear that the TCEQ must consider the eight criteria enumerated by the legislature in

¹ Ratepayers’ Closing Arguments at 4 and 7.

² TEXAS [WATER] CODE ANN. § 13.254(a) (Vernons 1997).

³ § 13.246(b) (Vernons 1999).

⁴ § 13.246(c) (Vernons 1999). The criteria are: (1) the adequacy of service currently provided to the requested area, (2) the need for additional service in the requested area, (3) the effect of the granting of the certificate on the recipient and on any retail public utility of the same kind already serving the proximate area, (4) the ability of the applicant to provide adequate service, (5) the feasibility of obtaining service from an adjacent retail public utility, (6) the financial stability of the applicant, (7) the environmental integrity, and (8) the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate.

⁵ 30 TEX. ADMIN. CODE § 291.102(c) (West 2000).

both granting and amending certificates.⁶ Accordingly, the TCEQ is not aiding TSSC in evading legislative standards for granting CCNs as suggested by the ratepayers.⁷

III. Statutory Interpretation

Before and after enactment of HB 2876, TWC § 13.246(c) states that TCEQ shall grant CCNs upon the “consideration” of eight criteria.⁸ The common meaning of the word “consideration” is a matter weighed or taken into account when formulating an opinion.⁹ The legislature’s use of the word “consideration” indicates that the TCEQ must weigh the strengths and weaknesses of each criteria listed in § 13.246(c). Nothing in the language of the Code implies that failure to demonstrate one of the requirements by a preponderance of the evidence should result in absolute denial of a CCN amendment. Rather, the TCEQ must duly weigh and consider each of the criteria, but not necessarily employ a yes/no standard.

IV. TSSC’s Ability to Provide Continuous and Adequate Service

a. Adequate Supply of Water

TSSC demonstrated that it has an adequate supply of water to serve current customers as well as future customers in the requested area. To help meet the water demands of current customers, TSSC purchased 500 acre-feet of water from Guadalupe Blanco River Authority (“GBRA”).¹⁰ CDS International Holdings, Inc. (“CDS”) also purchased an additional 250 acre-feet of water from GBRA to serve the proposed area.¹¹ While 250 acre-feet of water is

⁶ § 291.102(d) (West 2000); § 291.102(d) (West 2006).

⁷ Ratepayers’ Closing Arguments at 8.

⁸ § 13.246(c) (Vernon 1999); § 13.246(c) (Vernon 2005).

⁹ Merriam-Webster OnLine, www.merriam-webster.com (Merriam-Webster 2006).

¹⁰ Exhibit A-3 at exhibit 2, Agreement Between Kendall County Utility Co. Tapatio Springs Service Co., Inc. and GBRA.

¹¹ Exhibit A-3 at exhibit 3, First Amendment to Agreement Between Kendall County Utility Co. and Tapatio Springs Service Co., Inc. and GBRA.

insufficient to serve all of the 1,400 to 1,700 units proposed to comprise the development upon its completion,¹² neither the TWC nor TCEQ rules require an applicant to possess the actual ability to serve customers that may exist in the future when they submit a CCN or CCN amendment application. Such a rule would require applicants to expend resources to purchase water or drill wells to obtain water not yet needed.

Instead, TSSC provided evidence in the form of Mr. Parker's testimony stating that GBRA and TSSC have a verbal agreement for TSSC to purchase additional water from GBRA if needed.¹³ Additionally, the TCEQ considers other water sources that TSSC may use to continuously and adequately supply current customers, as well as future customers in the proposed area, when determining whether an applicant possesses an adequate supply of water. Such sources may include wells, stored water, and the purchase of additional surface water. Mr. Matkin even indicated that such water sources will be used in the proposed area.¹⁴ Accordingly, TSSC met its burden of demonstrating that an adequate supply of water does and will continue to exist for both current customers and the proposed development.

b. Adequate Sewer Service

Neither the Code nor TCEQ rules require an applicant to provide a centralized sewer system for the entire area requested in their CCN or CCN amendment application. While the TCEQ prefers centralized sewer systems, septic systems are acceptable as no rule prohibits the use of such systems.

In the case at hand, Mr. Adhikari testified that according to the map presented at the hearing, TSSC will service 313 acres in the requested area with a centralized system. He also

¹² Hearing Transcripts at 71, lines 5-7.

¹³ Hearing Transcripts at 23, lines 6-17 and at 25, lines 10-14.

¹⁴ Prefiled of Mr. Matkin at 4, lines 36-43 (indicating that wells and storage facilities will be constructed in the proposed development and that, at times, GBRA water will be supplemented with such water).

expressed uncertainty as to whether the map illustrated the final phase of development,¹⁵ thereby omitting other areas that TSSC will serve with a centralized system. Regardless of whether TSSC services 313 areas or additional acreage with a centralized system, TSSC exists as the only retail public utility in the area with an expressed desire to serve the proposed area.¹⁶ Any acreage in the area that TSSC services with a centralized system constitutes an improvement over utilizing septic systems on all 5,000 acres.

V. TSSC's Financial Capability

TSSC demonstrated its financial capability to provide continuous and adequate service to the requested area. TSSC must sufficiently satisfy this criteria prior to the TCEQ's issuance of a CCN amendment. The fact that CDS will provide financing for the necessary infrastructure in the proposed area does not render this criterion moot as TSSC suggests.¹⁷ Instead, CDS's financial responsibility weighs as a factor in determining the level of financial capability needed by TSSC.

Regarding TSSC's debt-to-equity ratio, Mr. Smith, the TCEQ program specialist, testified that if TSSC satisfied the debt owed to Clyde B. Smith in the amount of 905,146.00 dollars, that TSSC's debt-to-equity ratio would improve significantly.¹⁸ Mr. Parker, vice-president, secretary, and treasure of TSSC; testified under oath that TSSC paid the 905,146.00 dollar debt.¹⁹ Moreover, nothing in the record controverts Mr. Parker's testimony. As a result of TSSC's payment of the debt, its debt-to-equity ratio has significantly improved.

Both the ratepayers and OPIC allege that TSSC cannot fund its \$654,000 portion of the

¹⁵ Hearing Transcripts at 131, lines 14-18.

¹⁶ Prefiled of Mr. Adhikari at 6, lines 3-6.

¹⁷ Applicant's Closing Arguments at 10.

¹⁸ Hearing Transcripts at 110, lines 18-19, 25 and at 111, lines 1-7.

¹⁹ Hearing Transcripts at 17, lines 6-10 and at 20, lines 20-22 and at 21, lines 1-2.

construction costs needed to build a pipeline to bring surface water from GBRA to TSSC.²⁰ Both parties fail to consider that TSSC may request a rate increase from the TCEQ in order to cover these fixed costs.²¹ In essence, one way in which TSSC possesses the financial ability to construct the pipeline is through the adoption of a rate increase for its customers.

Additionally, TSSC will not incur expenses associated with constructing infrastructure necessary to provide water and sewer service to the proposed area. Per the Non Standard Service Agreement between TSSC and CDS ("Agreement"), CDS bears the sole financial responsibility of designing and constructing the infrastructure within the development necessary to provide water and sewer service.²² While CDS's heavy financial responsibility for the CCN expansion does not moot the relevance of TSSC's financial stability, it does ease the burden on TSSC and, therefore, lessens the financial capability required of TSSC.

Moreover, CDS demonstrated that it has the necessary funding to fulfill its obligations under the Agreement by submitting a letter from the Bank of America stating that CDS has unrestricted funds in the low seven figure amount available for use to comply with the Agreement.²³ Although the ratepayers argue that this amount is insufficient to cover the entire cost of the proposed expansion,²⁴ their assertion is irrelevant because the TCEQ does not require the entire system to be functional when the first phase of the development is complete. CDS may construct the infrastructure as the development progresses and customers become a reality. CDS, therefore, does not need the total 13 to 15 million dollars necessary to construct the entire system as this time.

²⁰ Ratepayers' Closing Arguments at 18; OPIC's Closing Arguments at 6.

²¹ See §§ 291.21-291.34

²² Exhibit A-3 at exhibit 1, attachment B, Non-Standard Service Agreement. See also Prefiled of Mr. Smith at 3, lines 8-12; Prefiled of Mr. Nichols at 7, lines 16-17.

²³ Exhibit A-1 at exhibit 4, Bank of American Letter.

²⁴ Ratepayers' Closing Arguments at 18.

VI. Managerial and Technical Capacity

TSSC demonstrated that it possesses the managerial and technical capacity to service the requested area. Mr. Parker, vice-president, secretary, and treasurer of TSSC, has over thirteen years of experience managing the daily operation of TSSC.²⁵ During that time, Mr. Parker has been directly involved in the extension of TSSC's water and wastewater services into several projects of similar cost and complexity to the project at hand.²⁶ Additionally, TSSC currently provides water to approximately 207 customers and sewer service to 173 customers, evidencing its technical ability to serve the new development.²⁷

CONCLUSION

The Executive Director evaluated TSSC's CCN amendment application under applicable provisions of the TWC and TAC. Upon weighing the criteria contained therein, the Executive Director's staff found that TSSC sufficiently demonstrated that amendment of its' CCN is "necessary for the service, accommodation, convenience, or safety of the public." Moreover, the ratepayers failed to rebut the Executive Director's evidence establishing that all applicable statutory and regulatory requirements have been satisfied. Accordingly, the Executive Director respectfully requests that the Honorable Administrative Law Judge recommend that the Commission amend TSSC's CCN numbers 12122 and 20698 to include all of the area requested.

²⁵ Prefiled Mr. Parker at 2, lines 24-25, 34-35.

²⁶ Prefiled of Mr. Parker at 6, lines 16-34.

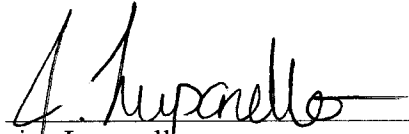
²⁷ TSSC's CCN Amendment Application.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENT QUALITY

Robert Martinez, Director
Environmental Law Division

by

A handwritten signature in black ink, appearing to read "J. Luparello", written over a horizontal line.

Jessica Luparello

State Bar of Texas No. 24035758

Environmental Law Division

P.O. Box 13087, MC 173


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Phone: (512) 239-0608

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2006, a true and correct copy of the foregoing document was placed into United States Mail, hand delivered, faxed, or sent by interagency mail to all persons on the attached mailing list.



Jessica Luparello
Staff Attorney
Environmental Law Division

MAILING LIST
TAPATIO SPRINGS SERVICE COMPANY, INC.
SOAH DOCKET NO. 582-06-0425
TCEQ DOCKET NO. 2005-1516-UCR

FOR THE STATE OFFICE
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Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 2, 2006

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

Re: Executive Director's Response to Closing Arguments
Application of Tapatio Springs Service Company, Inc. to Amend Certificates of
Convenience and Necessity Nos. 12122 and 20698
TCEQ Docket No.: 2005-1516-UCR; SOAH Docket No.: 582-06-0425

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2006 AUG -2 PM 4:10
CHIEF CLERK

Dear Ms. Castañuela:

Enclosed for filing is the original "Executive Director's Response to Closing Arguments". Please file stamp these documents and return them to Jessica Luparello, Attorney, Environmental Law Division, MC 173. If you have any questions or comments, please call me at (512) 239-0608.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Luparello", written over the typed name.

Jessica Luparello
Attorney
Environmental Law Division

Enclosure

cc: Mailing List

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 2, 2006

The Honorable Mike Rogan
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Re: Executive Director's Response to Closing Arguments
Application of Tapatio Springs Service Company, Inc. to Amend Certificates of
Convenience and Necessity Nos. 12122 and 20698
TCEQ Docket No. 2005-1516-UCR; SOAH Docket No. 582-06-0425

Dear Judge Rogan:

Enclosed is a true and correct copy of the "Executive Director's Response to Closing Arguments" in the above-referenced matter. The original was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Luparello", with a stylized flourish at the end.

Jessica Luparello
Attorney
Environmental Law Division

Enclosure

cc: LaDonna Castañuela, Chief Clerk, TCEQ, MC 105 (original)
Mailing List

TEXAS
COMMISSION
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QUALITY
2006 AUG -2 PM 1:10
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November 9, 2006

VIA FACSIMILE (512) 239-3311

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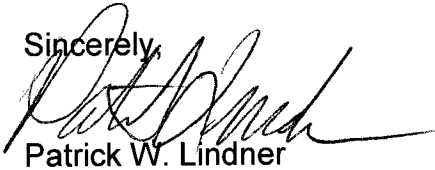
Re: SOAH Docket No. 582-06-0425; TCEQ Docket No. 2005-1516-UCR
Application of Tapatio Springs Service Company, Inc., to Amend
Certificates of Convenience and Necessity Nos. 12122 and 20698 in
Kendall County, Texas

Dear Ms. Castanuela:

Enclosed for filing is an original and 11 copies of Applicant's Response to
Intervenors' Letter Dated November 15, 2006 and Request for Setting in the above-
referenced matter

Thank you for your courtesy and cooperation.

Sincerely,


Patrick W. Lindner
For the Firm

PWL/re
Enclosure

cc: Mailing List

SOAH DOCKET NO. 582-06-0425

TCEQ DOCKET NO. 2005-1516-UCR

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November 6, 2006

VIA FACSIMILE & HAND-DELIVERY

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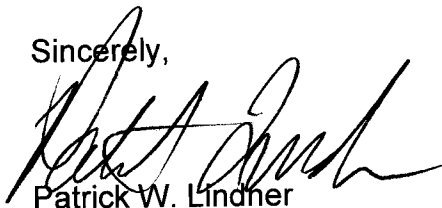
CHIEF CLERK'S OFFICE
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TWO

Re: SOAH Docket No. 582-06-0425; TCEQ Docket No. 2005-1516-UCR
Application of Tapatio Springs Service Company, Inc. to Amend
Certificates of Convenience and Necessity Numbers 12122 and 20698 in
Kendall County, Texas.

Dear Ms. Castanuela:

Enclosed for filing is an original and 11 copies of Applicant Tapatio Springs Service Company, Inc.'s Response to Intervenors' Exceptions in the above-referenced matter.

Sincerely,



Patrick W. Lindner
For the Firm

PWL/re
Enclosures

cc: Mailing List

SOAH DOCKET NO. 582-06-0425
TCEQ DOCKET NO. 2005-1516-UCR

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State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 13, 2006

Derek Seal
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Re: SOAH Docket No. 582-06-0425; TCEQ Docket No. 2005-1516-UCR; In Re: Application of Tapatio Springs Service Company, Inc. to Amend Certificates of Convenience and Necessity Nos. 12122 and 20698 in Kendall County, Texas

Dear Mr. Seal:

This is my recommendation concerning the exceptions filed by Andrew Calvert, *et al.* (Opposing Ratepayers) to my Proposal for Decision (PFD) in the above case. No other party filed exceptions.

Attachment A to the Opposing Ratepayers' exceptions is not in evidence, and they have not shown or even argued that there is good cause to reopen the record to admit it. I recommend that the Commission strike Attachment A and the Opposing Ratepayers arguments based on it, which would be from the top of page 2 through footnote 3 on that page.

The Opposing Ratepayers also argue that the area that Tapatio Springs Service Company, Inc. (Tapatio) seeks to add to its certificate of convenience and necessity (CCN) is within a Priority Groundwater Management Area (PGMA). That could be true, but there is no evidence that it is that I have found in reviewing the record. Counsel for the Opposing Ratepayers asked ED witness Adhikari if the area was in a PGMA, but he did not know if it was.¹ The Opposing Ratepayers did not offer evidence to show that the Requested Area lies within a PGMA.

The also argue that a groundwater district in that area is concerned about approval of Tapatio's application. That argument is based on an exhibit which the Opposing Ratepayers offered, withdrew, and reoffered, but that exhibit was *not* admitted into evidence. The Opposing Rate did

¹ Tr. 135.

Letter to Mr. Derek Seal, General Counsel
November 13, 2006
Page 2

make an offer of proof of that document.² I see no basis to reconsider the evidentiary ruling and admit the exhibit.

I recommend that the Commission strike the portions of the Opposing Ratepayers exceptions that discuss these matters that are not in evidence:

- page 5 from "C. Conflict Between the Hill Country PGMA" through the end of page 6;
- page 7, line 13 from "Approval of this" through line 17, footnote 24; and
- page 8, lines 4 through 8.

As to the Opposing Ratepayer exceptions that *are* based on evidence, I recommend that the Commission overrule them. For the most part, they are that same arguments that are considered and rejected in the PFD. Their only wholly new argument is that the Non-Standard Service Agreement between Tapatio and CDS International, Inc., is null and void. But as Tapatio responds, that argument is contradicted by the evidence.

Sincerely,



William G. Newchurch
Administrative Law Judge

WGN:nl
cc: Mailing List

² Tr. 76 *et seq.* and 144 *et seq.*

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: TAPATIO SPRINGS SERVICE CO, INC

SOAH DOCKET NUMBER: 582-06-0425

REFERRING AGENCY CASE: 2005-1516-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

REPRESENTATIVE / ADDRESS

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