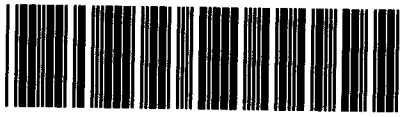

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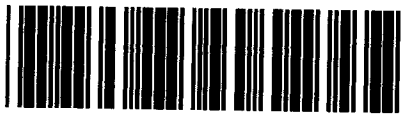

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APPLICATION OF TAPATIO SPRINGS SERVICE COMPANY, INC., TO AMEND CERTIFICATES OF CONVENIENCE AND NECESSITY NOS. 12122 AND 20698 IN KENDALL COUNTY, TEXAS	§	BEFORE THE STATE OFFICE
	§	
	§	OF
	§	
	§	ADMINISTRATIVE HEARINGS

APPLICANT'S RESPONSE TO INTERVENORS' EXCEPTIONS.

I.
INTRODUCTION

The intervenors opposed to the application[1] ("Intervenors") continue to disgorge volumes of minutiae to cloud the following undisputed facts, among others:

1. CDS wants its property within Applicant's CCN.

2. CDS is responsible for providing all new infrastructure, additional water supply, and permits required for Applicant to serve the property and has already financed the acquisition of at least 250 acre-feet of surface water supply towards this commitment.

3. If the application is granted, but CDS does not fulfill its contractual obligations to Applicant for whatever reason, Applicant is not committed to expend funds or use its existing water supply and sewage treatment resources to serve CDS' property.

4. Approval of the application benefits the ratepayers by providing access to $1.5 million for construction of a water main and increasing the Applicant's customer base without increasing its costs; while denial of the application harms the ratepayers because Applicant must then solely finance the water main.

5. Granting the application is consistent with state policy of consolidating retail utilities, consistent with the regional water plan promoting conjunctive use of surface and groundwater, and avoids the proliferation of individual water wells.

[1] The ratepayers supported the application withdrew as parties prior to the hearing on the merits. However, the pleadings in support of the application filed by these ratepayers remain a part of the record and show that more existing ratepayers support the application than the few numbers of ratepayers who oppose the application.

6. More ratepayers favor the application than the few who oppose the application.

II.
ALLEGEDLY NEW STUFF (INTERVENORS' SECTION ONE)

A. AFFIDAVITS FROM GBRA STAFF SHOULD BE EXCLUDED

The record in this proceeding is closed. Intervenors wrongfully attempt to introduce and argue new evidence, consisting of two affidavits both containing hearsay about conversations that occurred after the record closed. Intervenor does not allege any grounds for the admission of this evidence and the evidence is hearsay.

Even if this evidence is admitted, the recommendation to approve the application should not change. The ALJ concluded that the record reflects that the requirements of Water Code, 13.241 are satisfied. The record further reflects that the contract between the Applicant and the developer obligates the developer to obtain additional water supplies required to serve the developer's project and if the additional water supply in excess of the current supply cannot be developed, the developer will need to purchase a supply elsewhere, drill wells, or reduce the planned density accordingly.[23]

B. THE CONTRACT BETWEEN APPLICANT AND CDS INTERVENORS' CONTINUES IN EFFECT.

Intervenors allege that the contract has terminated since the closing of the record, ignoring the evidence in the record, the ALJ's analysis beginning on page 29 of the PFD, and without benefit of any first-hand knowledge. The record reflects that construction of the "Extension" had already begun at the time of the hearing.[4]

C. INTERVENORS' ARGUMENT THAT THE TCEQ CANNOT AMEND A CCN TO ADD TERRITORY IS LUDICROUS.

Intervenors argue that the Commission has wrongfully been amending CCNs to add territory during the past twenty years. The ALJ fully explained Intervenors' error. The undersigned counsel, who has been obtaining and amending CCNs for more than twenty-five years, cannot recall a CCN amendment that did not include the addition of territory.

III.
INTERVENORS' ADMITTEDLY OLD STUFF (INTERVENORS' SECTION TW0)

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[2] Testimony of John J. Parker, Evidentiary Hearing, pg 41. Testimony of John J. Parker, Pre-Filed Testimony, pg 5.
[3] Testimony of John Mark-Matkin, Pre-Filed Testimony, pgs 2, 5.
[4] Testimony of John J. Parker, Evidentiary Hearing, pgs 44, 41, 45. Testimony of John Mark-Matkin, Evidentiary Hearing, pg 69. Testimony of John Mark-Matkin, Pre-Filed Testimony, pg 3.

IV.
INTERVENORS' EXCEPTIONS SHOULD BE OVERRULED.

The Intervenors' listing of numerous findings and conclusions objectionable to the Intervernors without providing a summary of the grounds for the objection or stating the Intervenors' desired change to the finding of fact or conclusion of law is unfair to the ALJ and the Commission and should be overruled.

V.
CONCLUSION

Any exceptions based upon Intervenors' new evidence should be denied because these exceptions are based upon facts outside of the record. Intervenors' new argument that the agreement between Applicant and the developer has terminated is wrong and contrary to the evidence. Intervenor's new argument that the Commission does not have jurisdiction to increase a utility's service area by amending a CCN has already been addressed by the ALJ. The ALJ conscientiously addressed each of the Intervenors' previous arguments and reached supportable conclusions that do not need to be changed and should not be changed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 6th day of November 2006, a true and correct copy of Applicant's Response to Intervenors' Exceptions was forwarded to all parties via facsimile on the following mailing list.

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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	§	BEFORE THE STATE OFFICE
	§	
	§	OF
	§	
	§	ADMINISTRATIVE HEARINGS

APPLICANT'S RESPONSE TO CLOSING ARGUMENTS OF OPIC AND THE RATEPAYERS OPPOSED TO THE APPLICATION

I.
Introduction

OPIC and the Ratepayers opposed to the application focus on minor details in an effort to blur the following undisputed basic facts that support granting the application:

1. CDS wants its property within Applicant's CCN.
2. CDS is responsible for providing all new infrastructure, additional water supply, and permits required for Applicant to serve the property and has already financed the acquisition of at least 250 acre-feet of surface water supply towards this commitment.
3. If the application is granted, but CDS does not fulfill its contractual obligations to Applicant for whatever reason, Applicant is not committed to expend funds or use its existing water supply and sewage treatment resources to serve CDS' property.
4. Approval of the application benefits the ratepayers by providing access to $1.5 million for construction of a water main and increasing the Applicant's customer base without increasing its costs; while denial of the application harms the ratepayers because Applicant must then solely finance the water main.
5. Granting the application is consistent with state policy of consolidating retail utilities, consistent with the regional water plan promoting conjunctive use of surface and groundwater, and avoids the proliferation of individual water wells.
6. More ratepayers favor the application than the few who oppose the application.

II.
Financial Capability

Financial capability is one of the several factors that must be considered, but in this application financial capability is really of secondary importance.

The financial ability of the Applicant becomes an issue only if the application is denied. If the application is approved, CDS becomes responsible for practically all costs of extending Applicant's existing system and Applicant must pay only the incremental cost of oversizing the water main that connects its existing water system to the point of delivery for the treated water

from GBRA. However, if the application is denied then CDS cancels the agreement and the $1.5 million dollars of CDS contribution in aid of construction disappears, leaving Applicant and its existing ratepayers to shoulder the entire cost of the water main. Only then, if the application is denied, does the Applicant's financial capability become an issue. According to the Ratepayers, the Applicant does not appear financially capable of constructing the water main without CDS' contribution, and if that is the case, then the application should be granted so Applicant has access to the additional funding provided by CDS under the service extension agreement.

If the application is approved, CDS contributes at least $1.5 million towards the cost of the water main, and the letter from Bank of America confirms CDS has the funds for at least this share of the main. The Applicant has access to the funds necessary to pay its share of the expenses. (See Jay Parker, direct testimony, page 7, line 40-page 8, line 13.)

In addition, if the application is approved, the Applicant has the regulatory approval necessary to offer retail service within the area. Under its tariff and the CDS contract, Applicant is not obligated to advance funds to provide the service or to construct additional infrastructure, but only to use any its existing water storage and water distribution system to provide service. (See Jay Parker, cross examination, page 53, line 21 thru page 55, line 3.) The Applicant can require CDS or any other developer to install the infrastructure at the developer's cost. (See Daniel Smith, cross-examination, pg. 99-page 100, line 13.)

CDS has timely performed its obligations and there is no reason to doubt that it will not do so in the future. (See Jay Parker, direct testimony.) The Commission has previously allowed CCN applicants to rely upon contractual obligations of third parties to satisfy the requirements of section 13.241. *Bexar Metropolitan Water Dist. v. Texas Com'n on Environmental Quality,* 85 S.W.3d 546 (Tex. App.-Austin, 2006). The TCEQ regularly approves applications based upon utility contracts with developers. (See Daniel Smith, cross-examination, pg 99, line 24 to page 100, line 13, page 106, line 3.)

III.
Managerial Ability

The record clearly establishes that Applicant has been providing continuous and adequate service to its customers and that Applicant will be able to continue this service if the application is approved. The Ratepayers did not allege any prior or existing service complaints.

Jay Parker has been managing the utility for over fifteen years. During this time he has overseen main extensions in the past, when the Ranger Creek System and the Tapatio Spring System were interconnected and as new subdivisions within Tapatio have been developed. (See Jay Parker, direct testimony, page 6, line 6, to page 7, line 24; Jay Parker, cross-examination, page 45, line 5-16.) The service extension agreement with CDS is comparable to these past projects that were successfully completed. Under the agreement, CDS is responsible for hiring a registered professional engineer to design the system infrastructure and submit plans and specifications to Applicant for its review and approval and also to the TCEQ for its review and approval in

accordance with TCEQ rules.[1] (See Pre-Filed testimony of Darrell Nichols, page 5.) When these approvals are obtained, CDS hires the contractor to construct the improvement with oversight by the Applicant. When all the tests are completed and Applicant's engineers assure Applicant that the work was constructed in accordance with the approved plans and specs, the Applicant accepts title and places the line into service. (Id.) There is nothing complicated or unusual about this process.

What about the easements for the water line? Deciding on a final alignment in order to acquire the easement depends in large part on whether the Applicant has the additional $1.2 million contribution from CDS with which to work. Whether or not Applicant will have the additional $1.5 million from CDS depends solely on the TCEQ's decision in this matter. The Ratepayers' request for hearing delayed TCEQ action on the application, thereby stalling easement acquisition and CDS' contribution towards the water main project pending the TCEQ action on the application. Therefore, Ratepayers are themselves directly responsible for the delay occasioned by their request for hearing.

Applicant's decision to purchase 500 acre-feet of treated surface water from GBRA, and then increase this amount an additional 250 acre-feet, shows Applicant's commitment to the regional water plan. The regional water plan, attached to the pre-filed testimony of Darrell Nichols, promotes the need for utilities within Kendall County to develop conjunctive use of surface and groundwater supplies.

Jay Parker negotiated a contract with CDS that provides Applicant access to an additional $1.5 million for construction of a water main so that the Applicant is only required to pay the incremental cost of oversizing, and, at CDS' sole cost, requires CDS to provide the water supply sources and infrastructure needed to serve the development. This arrangement simply makes good sense for the Applicant and its ratepayers and demonstrates Jay Parker's commitment to address the real, substantive issues facing the utility.

IV.
Water Supply Issues

Ratepayers mischaracterize the extent of the service commitment, so their arguments based upon this mischaracterization are without merit. The service commitment is not for 1,700 connections, but for the lesser of either 1,700 connections or the number of connections that can be served by the additional water supply (surface and groundwater) provided by CDS to the Applicant. The Non-Standard Service Agreement (Jay Parker direct testimony, attachment 1) clearly states: (i) CDS requests service "to *no more than* 1,700 future customers within the Property" (3rd recital (emphasis added), and that facilities will be *sized* to accommodate Developer's projected demand equivalent to 1700 connections, but the *actual demand will be determined later*"(section 9(c)(emphasis added)), in the event Developer plans are revised to decrease the required number of connections, all contributions in aid of construction which are variable or no longer required will be proportionately reduced (section 9(f)), and under no circumstances is Utility Company obligated to use any portion of the 500 acre-feet reserved under the GBRA contract to provide

[1] In order to get TCEQ approval of plans, the Applicant at that time must show availability of water. 30 TAC §290.41(b).

water service to the property or to use the groundwater supply facility that it owns on the date of the contract to supply water to the Property (section 9(l)); *See also Pre-Filed Testimony of Jay Parker and cross examination of Jay Parker.*

As of the date of the hearing, Applicant has acquired an amendment to the GBRA contract for an additional 250 acre-feet for service to the territory to be added. (See Pre-Filed Testimony of Darrell Nichols, page 11.) There are several alternatives available to increase this already existing supply, as described in the testimony of Jay Parker and John Mark Matkin, P.E. However, if all of these alternatives to increase the supply of water available to the CDS property are exhausted without increasing the supply, then the service commitment is capped at this level. See Non-Standard Service Agreement (section 9 (l)); Jay Parker direct testimony, page 5, lines 14-22). Accordingly, Applicant has satisfied the requirements of Water Code, Section 13.241(b).

V.
Response to OPIC

Upon what basis does OPIC ignore the sixty ratepayers who support the application and defer to the ten who do not? There is absolutely no evidence that the amendment will result in a rate increase. There is absolutely no evidence of any legitimate financial risk. There is absolutely no evidence of any water quality risk. There is only evidence that granting the application will greatly benefit the ratepayers.

The need for service is clearly and irrefutably reflected by the contract between Applicant and CDS wherein CDS requests service.

Regarding the easement for the GBRA water main, Applicant had to pay GBRA "reservation" fees in order to have access to the GBRA water. Under the GBRA contract, Applicant had to begin paying for the GBRA project long before GBRA could deliver any water. GBRA did not begin supplying water until April 2006. (See Jay Parker, cross-examination, page 44, lines 3-23, page 59, line 17-19). Under Section 1 of the agreement between CDS and the Applicant, CDS is responsible for design of the water main and Section 9(a) requires CDS and the Applicant to cooperate with GBRA regarding the change of the delivery point. Until Applicant's authority to serve CDS is approved and the location of the delivery point is confirmed, easement acquisition must be deferred. But CDS has no incentive to resolve the delivery point issue and pay for the work required to obtain the easements until the application is approved. The Ratepayers' protest of the pending application casted doubt on whether Applicant would be authorized to serve the CDS property, which in turn delayed work on all other aspects relating to the service extension. In other words, the Ratepayers' actions delayed the easement acquisition; nevertheless OPIC unfairly blames Applicant for the delay.

Lost and unaccounted for water is an important issue to Applicant and Applicant has recently fixed a large break that it suspects is largely responsible for the loss. (See Jay Parker, cross-examination, page 39, line 2 thru page 40, line 2). The only evidence in the record is the percentage from past years, and there is no evidence in the record of the reasonable range of lost and unaccounted for water for systems comparable to the Applicant's system, so there is no

measure from which to conclude whether or not this percentage is unreasonable. Further, if the application is approved, Applicant will have access to a large customer base from which to recover the revenue needed to repair and replace mains.

Regarding Applicant's debt to equity ratio, the undisputed evidence is that the debt to Clyde Smith has been paid. (See Jay Parker, cross-examination, page 33, lines 10-16; page 35, lines 2-4.) This is no longer an issue. Dan Smith testified in favor of the application and did not change his testimony or his recommendation that the application be approved.

Regarding environmental integrity, the adverse environmental impacts if the application is denied were fully described in Applicant's pre-filed testimony. These adverse impacts included, among others, the proliferation of individual wells serving each lot within the CDS development, thus impairing water quality (contamination from more wells) and water quantity (base and peak demand being satisfied by groundwater, not base demand being satisfied from surface water).

OPIC proposes that the TCEQ "punish" Applicant by denying the application because of perceived lack of progress on easement acquisition and water loss. However, this does not punish Applicant, but punishes the existing ratepayers because the $1.5 million contribution by CDS towards the water main extension will not be available, nor will the increased customer base be available to recover the costs of constructing the new water main to get the GBRA water or repairing the existing water mains to reduce water loss (if the water loss is due to leakage, and not to other factors, such as slow running meters, etc.). Denial also punishes CDS, who wants service from Applicant.

VI.
Response to Ratepayers

Ratepayers' allegations regarding water supply, financial, and management related issues are addressed above. The Ratepayers never allege and certainly did not present any evidence that Ratepayers are harmed by any of the deficiencies they allege. The uncontroverted testimony is that the Ratepayers are insulated from harm and that approval of the application presents more potential benefits to all of the Applicant's ratepayers.

Applicant fully complied with the TCEQ's regulatory requirements to add the territory to its existing CCN. As the ALJ knows from many years of experience, addition of service area has always been processed as an application to amend a CCN. Applicant defers to the Executive Director to respond to Ratepayers' constitutional/statutory arguments, if any response is merited. Daniel Smith testified that the applications are extensive and that applicants are not expected to send every piece of documentation. Daniel Smith, cross-examination, page 107, lines 25. The Ratepayers conducted full discovery, including production of documents, interrogatories, and depositions, so they had full access to all information they needed to supplement and question the information provided in the application and testimony.

As explained below, the mere fact that a contested-case hearing was conducted is evidence that the application was deemed administratively complete and that the Applicant provided the Commission with all information that the Executive Director considered essential for its

recommendation. Applications for amended CCNs are subject to chapter 281 of the TCEQ rules. Section 281.2(8). If an application is not administratively complete, or requested information is not provided within thirty days, the ED issues a deficiency notice and returns the application. Section 281.18(a). If the application is deemed administratively complete, or not returned as deficient, the ED performs a technical review. During the technical review, if additional information deemed required by the ED is not timely provided and the information is considered essential to make recommendations to the commission on a particular matter, the ED may return the application to the applicant. Section 281.19(b). When the ED has competed the administrative and technical review, the application is forwarded to the commission. Section 281.22(a). Exhibit P-7 states that if the additional requested information is not provided by the Applicant, the application would be dismissed for failure to prosecute, so it can be presumed that Applicant provided all the information deemed essential by the ED or otherwise the application would not have been further processed and the ED witnesses would not have recommended approval of the application. Applicant is not required to establish at the contested-case hearing that its application complied with each administrative and technical requirement because it had already done so prior to the hearing. *Steidinger v. Texas Commission on Environmental Quality*, 169 S.W. 3d 258 (Tex. App.-Austin, 2005).

Ratepayers also mischaracterize the system. Mr. Matkin was quite clear in his testimony that Ratepayers' attempt to equate the requirement of 0.6 gallons per minute into acre-feet per year, is not accurate conversion or consistent with TCEQ rules. (See Matkin cross-examination, page 71, line 9 thru page 72, line 17, page 81, lines 10-19.) The utility system will be an integrated system with a common water main from GBRA delivery point to the Applicant's existing water tank on Jones Road, and from there using an existing water main to the existing service area for delivery within the CDS property. (See Pre-Filed testimony of Nichols, page 6, line 25 to page 7, line 6; Matkin-Hoover Pre-Filed testimony, attachment 1.)

Ratepayers propose to punish the Applicant by denying the application. But who is actually punished if the application is denied? CDS is punished because they will not have access to utility service. The Applicant's existing customers are also punished because CDS' monetary contribution to the water main will not be available nor will the increased customer base be available to share fixed costs of operating and maintaining the system. The regional water plan will be a victim if the application is denied because CDS will need to develop its property using individual water wells, rather than by using the conjunctive use of surface water and ground water. These individual wells will be used to supply all the water needs of the homes within the development, not just peak demand, and this increased demand will put greater stress on the groundwater resources including the wells used by Applicant.

VII.
Conclusion

The overwhelming evidence in this case supports granting of the application. Denying the application deprives CDS of utility service that it wants and for which it has agreed to pay; and deprives Applicant and its ratepayers access to $1.5 million in funds for construction of a needed water main. By contrast, the ratepayers who oppose the application, fewer in number than the ratepayers who support the application, cannot and did not specify one element by which they

may be harmed if the application is approved, primarily because such harm simply will not occur. The application should therefore be granted

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August 2006, a true and correct copy of the foregoing document was forwarded to each of the parties listed below via facsimile and first-class mail.

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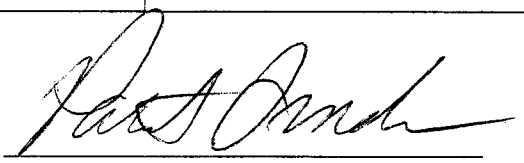

Patrick Lindner

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	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

THE EXECUTIVE DIRECTOR'S RESPONSE TO RATEPAYERS' EXCEPTIONS

TO THE HONORABLE WILLIAM G. NEWCHURCH, ADMINISTRATIVE LAW JUDGE OF THE STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), by and through Jessica Luparello, staff attorney in the Commission's Environmental Law Division, pursuant to 30 TEXAS ADMINISTRATIVE CODE ("TAC") § 80.257 and 1 TAC § 155.59, and files this Response to the Ratepayers' Exceptions.

INTRODUCTION

On July 6, 2006, a hearing on the merits was held regarding the TCEQ's approval of Tapatio Springs Service Company's ("TSSC") application to amend its Certificate of Convenience and Necessity ("CCN") Numbers 12122 and 20698 to extend water and sewer service in Kendall County, Texas. On October 6, 2006, the presiding Administrative Law Judge ("ALJ") published his Proposal for Decision ("PFD") agreeing with the ED's recommendation that the Commission approve TSSC's application. On October 26, 2006, Elizabeth Martin, representative for the ratepayers ("Ratepayers"), filed Exceptions to the PFD claiming TSSC's amendment application should be denied.

REPLY

I. The TCEQ has the Statutory Authority to Approve CCN Amendments Under the Circumstances Existing in This Case.

Prior to enactment of House Bill No. 2876, the TEXAS WATER CODE ("TWC") § 13.254(a) stated that, "The commission 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. . . ."[1] Ratepayers incorrectly contend that § 13.254 does not allow the TCEQ to expand a utility's CCN into an area not already certificated to that utility.[2] The statute, however, vests the TCEQ with the power to amend **any** CCN. It does not, as claimed by Ratepayers, limit the TCEQ in its amendment powers to reducing or transferring service area.[3]

Moreover, as correctly noted by the ALJ, the TCEQ has for many years routinely granted CCN amendments expanding service area, indicating that Commission interpretation of Chapter 13 of the TWC authorizes such action.[4] While only the legislature can delegate powers to state agencies, the legislature's decision over many legislative terms to not disturb the TCEQ's practice of approving CCN amendments expanding a utility's service area beyond the boundaries of its current CCN indicates the legislature's assent to the TCEQ's exercise of such power.

TSSC met the § 13.254 statutory requirement of providing written consent to amendment by submitting a signed application requesting amendment to its certificate numbers 12122 and 20698. The TCEQ, therefore, has the authority to amend "any" of TSSC's CCNs to which it

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

[2] Ratepayers' Brief Filed in Response to SOAH PFD and Exceptions (hereinafter Exceptions), page 3.

[3] *Id.* at 4.

[4] PFD, page 4.

gave written consent to amendment, provided that the CCN amendment is "necessary for the service, accommodation, convenience, or safety of the public."[5]

II. A Valid Request for Service Exists in the Requested Area.

As correctly noted by your honor, CDS International Holdings, Inc. ("CDS"), "is systematically planning an extensive residential development in the Requested Area and has requested TSSC provide the necessary utility services."[6] Nothing raised by Ratepayers in their Exceptions calls CDS's request into question.

Moreover, the Non Standard Service Agreement ("Agreement') between TSSC and CDS remains valid and enforceable despite Ratepayers' assertion that it is null and void. The Agreement states that, "[t]his agreement shall expire and be null and void if work on the Extension does not begin within twenty-four months after approval of this Agreement . . . ." The sentence, however, concludes with, "however, if any claim or suit is filed relating to this Agreement, this Agreement shall continue in effect until such claim or suit is finally resolved."[7]

This very suit relates to the Agreement in that it will determine whether TSSC is granted a CCN for the requested area and, consequently, whether TSSC and CDS can begin work on the Extension by extending TSSC's water and wastewater systems into the requested area. The Agreement, by its own terms, remains valid and enforceable and continues in effect until this suit is resolved. Thus, a request for service remains as evidenced by the valid Agreement.

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[5] TEXAS [WATER] CODE ANN. § 13.246(b).

[6] Tr. 8.

[7] Ex. A-1, subex. 1, attch. B., page 13. The "Extension" refers to the extension of TSSC's water and wastewater systems into the requested area totaling approximately 5,000 acres.

III. TSSC has an Adequate Water Supply to Serve Current Customers and Future Customers in the Requested Area.

TSSC has an adequate supply of water to serve current customers, as well as future customers in the requested area. Ratepayers' attempts to show otherwise are mistaken and unsupportable by the record.

a. GBRA Verbal Agreement

While Ratepayers allege that GBRA has no verbal agreement with TSSC, Ratepayers failed to provide evidence in the record that, if true, supports their allegation. Ratepayers instead attempt to submit new evidence, in the form of affidavits of W.E. West, Jr. and David Welch after the record has closed.

According to TEXAS GOVERNMENT CODE § 2001.060, a contested case hearing record includes:

> (1) each pleading, motion, and intermediate ruling; (2) evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings on them; (5) proposed findings and exceptions; (6) each decision, opinion, or report by the officer presiding at the hearing; and (7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

While the record does include exceptions, it clearly does not include attachments to those exceptions submitted as new evidence after the record closes.

The Proposal for Decision must be based on evidence in the record.[8] In the case at hand, no evidence in the record indicates that GBRA did not agree to amend its existing contract with TSSC to increase the amount of treated water it supplies to TSSC. Additionally, nothing in the

[8] TEXAS [GOV'T] CODE ANN. § 2001.141 (Vernons 2006) (stating that findings of fact must be based only on evidence and matters that are officially noticed); TEXAS [GOV'T] CODE ANN. § 2001.062 (requiring that PFDs be prepared by the individual who conducted the hearing or by one who has read the record; 80 TEX. ADMIN. CODE § 80.252 (West 2006) (requiring that PRDs shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record).

record indicates that finding of fact number 51, regarding the water availability from GBRA to utilities in the Kendall County area, is incorrect.

The ED has great concern regarding Ratepayers' attempt to add additional information to the record at this late date. Allowing Ratepayers to submit new evidence prejudices the parties by robbing them of an opportunity to question Mr. West and Mr. Welch regarding statements made in their affidavits. The ED, therefore, requests that your honor not allow the affidavits of Mr. West and Mr. Welch to become part of the record and deny Ratepayers' exception regarding GBRA's verbal agreements.

b. Groundwater Availability

While Ratepayers attempt to show that a potential lack of groundwater in the Hill Country PGMA, in which Kendall County lies, leaves TSSC with an inadequate supply of water, such is not the case. The ED considers multiple water sources when determining the ability of an applicant to provide adequate service. Such sources may include stored water, groundwater, surface water, and purchased water. Mr. Matkin indicated that multiple water sources will in fact be used to serve the requested area.[9] Groundwater availability, thus, is not determinative in assessing whether TSSC has an adequate supply of water.

Moreover, Ratepayers complain that the ED did not check whether TSSC could pump groundwater, and in what amount, from the aquifer managed by the Hill County PGMA. In the case at hand, the ED's staff relied on representations made by TSSC regarding groundwater sources. Nothing in the record indicates that such reliance was misplaced. In fact, Ratepayers themselves indicate that 1,087 acre feet of unallocated groundwater exists in Kendall County.[10]

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[9] 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).

[10] Exceptions, page 7. 4,591 acre feet of total supply minus 3,504 acre feet of already allocated water equals 1,087 acre feet of unallocated water.

Finally, Ratepayers request that the ALJ incorporate into his findings of fact that the amount of water to be extracted from the Hill County PGMA by TSSC exceeds the Texas Water Development Board's ("TWDB") estimate of unallocated water for Kendall County.[11] However, as indicated by Ratepayers themselves, this statement is unsupportable by the record. Assuming that TSSC uses 1,020 acre feet of groundwater in Kendall County, and 3,504 acre feet of groundwater in Kendall County is already allocated, that totals 4,524 acre feet of allocated groundwater in Kendall County.[12] The TWDB established the total county supply of groundwater at 4,591 acre feet.[13] Using the numbers Ratepayers used, there would remain 66 acre feet of groundwater available in Kendall County making Ratepayer's requested finding of fact wholly untenable.

c. Worse Case Scenario

Finally, assuming a worse case scenario in which GBRA made no verbal agreements with TSSC and in which an inadequate supply of groundwater exists, TSSC is still not in danger of having an inadequate water supply. As noted by your honor, the Agreement requires CDS to obtain all of the water needed to serve the requested area. Should CDS fall short of its obligations, TSSC could enforce the provision of the Agreement requiring CDS to obtain all necessary water and deny service to further CDS development in the requested area.[14] Additionally, if CDS could not obtain enough water to serve all 1,700 proposed connections, the requested area could still be developed with fewer connections for which an adequate supply of water exists.[15]

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[11] *Id.* at 8.

[12] Exceptions, page 7.

[13] Exceptions, page 7 (citing Ex. A-1, subsex. 2, 4-75, Table 4-14, total Kendall County Supply).

[14] Tr. 13.

[15] *See* Findings of Fact No. 41.

Because the record shows that GRBA made verbal agreements with TSSC regarding water availability, because the record shows that unallocated groundwater exists in Kendall County, and because the Agreement does not require TSSC to serve customers in the requested area that CDS fails to secure water for, the ED requests that your honor not amend the PFD or findings of fact on these grounds.

IV. TSSC has Sufficient Financial Capability to Serve Current Customers and Future Customers in the Requested Area.

TSSC has sufficient financial capability to serve current and future customers. Ratepayers attack TSSC's financial capability primarily based on numbers calculated using facts contrary to the record. Namely, Ratepayers' calculations are primarily based on their assumption that TSSC has not paid the debt owed to Clyde B. Smith in the amount of $905,146. This assumption is not supported by the record.

a. Debt Situation (debt-to-equity ratio)

Ratepayers rehash old arguments regarding TSSC's debt situation. TSSC, as of December 31, 2005, owed $891,809.00 in outstanding debts.[16] At the hearing on the merits on July 6, 2006, Mr. Parker testified under oath that TSSC paid the $905,146.00 debt owed to Clyde B. Smith.[17] Mr. Dan Smith testified that if TSSC satisfied the $905,146.00 debt that TSSC's debt-to-equity ratio would improve significantly.[18]

The ED reiterates that nothing in the record controverts Mr. Parker's testimony. While Mr. Parker misstated his position at TSSC, he voluntarily remedied his mistake.[19] To disregard all of a witness' testimony based on one misstatement, as recommended by Ratepayers, would

[16] Exhibit P-5, page 3, TCEQ Annual Report of December 31, 2005.

[17] Tr. 17, lines 6-10 and at 20, lines 20-22 and at 21, lines 1-2.

[18] Tr. 110, lines 18-19, 25 and at 111, lines 1-7.

[19] Tr. 18.

set a dangerous precedent and likely effectively render the sworn testimony of numerous witnesses invalid. Because TSSC paid the debt owed to Clyde B. Smith, and because Ratepayers have failed to show otherwise, the ED requests your honor not alter the PFD of findings of fact on these grounds.

b. Ratepayers Proposed Calculations

Ratepayers also attempt to calculate TSSC's shareholder equity, debt-to-equity ratio, retained earnings, and net income; however, their calculations are flawed. Ratepayers state that TSSC has negative shareholder equity of $616,500.00, in addition to outstanding debt.[20] The debt Ratepayers refer to is the $905,146.00 debt owed to Clyde B. Smith. It is precisely because of that debt, however, that TSSC has negative shareholder equity. If the debt were substantially paid, as indicated by the record, with resources separate from TSSC's balance sheet, the equity becomes positive $288,695.00. Ratepayers instead attempt to go outside of the record, assert that the debt owed to Clyde B. Smith was not paid, and use that debt as a basis for calculating TSSC's shareholder equity.

Ratepayers also assert that TSSC's retained earnings are negative $1,293,378.00.[21] Without any comment on the possibility of misclassified amounts, if TSSC paid the debt owed to Clyde B. Smith, as indicated by the record, the retained earnings would have to be reduced by that amount. This leaves TSSC with negative retained earnings of $288,183.00.[22] This amount would be more than offset by the category of "Additional Paid-in Capital" which totals a positive $634,105.00. Additionally, TSSC's cash net income for the fiscal year ending on December 21,

[20] Exceptions, page 10.

[21] Exceptions, pages 10-11.

[22] Beginning Retained Earnings ($-1,293,378) - Adjusted for debt repayment ($905,146) = Adjusted Retained Earnings ($-288,183).

2004, is shown at $41,773.[23] This is after covering an interest expense of $55,314.00. If, however, the debt owed to Clyde B. Smith was paid, this interest payment would no longer exist and that amount ($55,314.00) could be added to the net income, putting it over $90,000.00.

In sum, Ratepayers based most, if not all, of their calculations regarding TSSC's shareholder equity, debt-to-equity ratio, retained earnings, and net income on TSSC not having satisfied the $905,146.00 debt owed to Clyde B. Smith. The record, however, indicates this debt was paid. The ED, therefore, recommends that your honor not amend the PFD or findings of fact based on Ratepayers skewed calculations.

c. New v. Existing System

Ratepayers contend that Mr. Adhikari testified that the proposed systems will be existing systems, thereby allowing TSSC to avoid submitting information required of new, stand alone systems.[24] Mr. Adhikari, however, did not determine whether the proposed systems will be new, stand alone systems or part of existing systems.[25] Instead Mr. Adhikari indicated that he would need to see final engineering plans and specifications before making such a determination.[26] Because no determination was made regarding whether the proposed systems will be new, stand alone systems or part of existing systems, TSSC was not required to submit data required of new, stand alone systems, such as Item 6 on the TCEQ Amendment Application.

If it turns out that the proposed systems will not be inter-connected to the existing systems, then they will be considered new, stand alone systems. TSSC might then be required to submit documents, such as those contained in Item 6, to demonstrate that it has financial

[23] Exceptions, page 11 (citing Ex. A-1, subsex 1, attach. G).

[24] Exceptions, page 13.

[25] Tr. 134, lines 4-10.

[26] *Id.*

capability to operate and maintain a new water and/or sewer system. Moreover, if it is determined that the proposed systems are new, stand alone systems then TSSC must obtain a new Public Water System Identification Number ("PWS ID") from the TCEQ. At that time, the TCEQ would require TSSC to meet all the requirements for new, stand alone systems before assigning a PWS ID. TCEQ's review of the final construction drawings for new, stand alone systems serves as a check point for ensuring that these systems comply with TCEQ rules.

Moreover, the ED is not substituting a letter from CDS's bank for the information required of new, stand alone systems in Item 6 of the TCEQ Amendment Application.[27] The ED has not made a determination on whether the proposed systems will be new, stand alone systems or part of existing systems. As such, the information in Item 6 was not required of TSSC and the ED is not substituting a letter from CDS's bank for that information.

Finally, Ratepayers correctly assert that it is TSSC's burden of proof to show adequate financial capability.[28] They largely did so through reliance on the Agreement requiring CDS to fund all necessary construction to serve the proposed area. Ratepayers have pointed to nothing in the record indicating that CDS cannot satisfy its obligation.[29] While Ratepayers imply that the Bank of America letter stating that CDS has unrestricted funds in the low seven figure amount available for use to comply with the Agreement is unreliable,[30] Ratepayers introduced nothing supporting their implication. Moreover, as recognized by your honor, the Agreement can be amended to add a requirement that a developer contribute financially to aid construction in the requested area,[31] thereby not leaving TSSC to shoulder the burden alone should CDS back out of

[27] *See* Exceptions, page 14.

[28] *Id.* at 15.

[29] *See* Tr. 28.

[30] Exhibit A-1 at exhibit 4, Bank of America Letter.

[31] Tr. 30.

the development. Nothing submitted by Ratepayers disturbs this finding. The ED, therefore, recommends that your honor not amend the PFD of findings of fact of these grounds.

V. TSSC has the Managerial and Technical Capability to Serve Current and Future Customers in the Requested Area.

TSSC demonstrated that it posses the technical capability to serve current and future customers. As correctly noted by your honor, Mr. Parker has over fifteen years of experience managing the daily operation of TSSC, TSSC has corrected all statutory and rule violations, TSSC has satisfactorily addressed all issues raised in the latest TCEQ inspection of its facilities, and TSSC currently operates a wastewater treatment facility that exceeds the sewer demands of its customers.[32] Ratepayers would have your honor overlook TSSC's good record and successful management based on what they characterize as high water loss. The ED recommends otherwise.

As noted in the PFD, nothing in the record provides a basis for comparison to determine if TSSC's water loss is in fact high when compared to similar utilities.[33] Additionally, TSSC indicated that correcting water loss is a concern and recently repaired a major leak.[34] If anything, TSSC's attention to its rate of water loss shows good management and technical ability. The ED requests that you honor not overlook all the positive indicators of TSSC's managerial and technical ability on the sole basis of what Ratepayers characterize as high water loss. The ED recommends that your honor not revise the PFD or findings of fact on these grounds.

VI. The ED's Staff Completed an Effective Review of TSSC's Application.

The ED's staff satisfactorily reviewed TSSC's amendment application prior to recommending approval. Ratepayers protest that the ED did not receive all requested

[32] Tr. 15-16.

[33] Tr. 17.

[34] Tr. 39, lines 6-11 and lines 21-25.

information and due to pressure to approve applications approved TSSC's application.[35] This is simply not the case.

While the ED's staff did not receive all requested information, they clearly received a sufficient amount on which to recommend approval. Should this have not been the case, then staff would have recommended denial. The ED is satisfied with the information presented by TSSC supporting its application. To overturn the ED's decision, as requested by Ratepayers, when the ED itself is satisfied with responses to its own requests seems unusual.

Your honor determined that TSSC carried its burden of proof regarding the requirements for approving its application.[36] The ED sees no information presented by Ratepayers which disturbs this conclusion. Accordingly, the ED recommends that the PFD and findings of fact not be amended on these grounds.

VII. TSSC is a Proper Applicant for This Application.

A proper Applicant for this application is TSSC. It is TSSC which filed the amendment application. It is TSSC that will maintain and operate the system. It is TSSC, as the utility, that will have to comply with all applicable statutes and TCEQ rules regulating water and sewer utilities.

While CDS will bear the financial burden of extending TSSC's system in the requested area, possibly design the system, and supply water for the system; these facts do not mean that TSSC is an incorrect applicant for this application. In the *Bexar Met* case, the Commission and Court of Appeals allowed approval of a CCN for the City of Bulverde even though GBRA would design, construct, finance, operate, and maintain the system.[37] The facts of this case are similar

[35] Exceptions, page 8-9.

[36] Tr. 36.

[37] Bexar Metropolitaian Water Dist. v. TCEQ, 185 S.W.3d 546 (Tex. App. – Austin 2006).

to the case at hand and, as in *Bexar Met*, TSSC's CCN should be approved not withstanding CDS's contributions. Because TSSC is a proper applicant for this application, the ED recommends that your honor not amend the PFD of findings of fact of this basis.

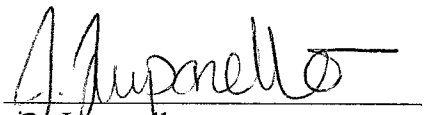
CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Executive Director respectfully prays that the Administrative Law Judge deny Ratepayers' Exceptions and not amend his Proposal for Decision, Findings of Fact, or Conclusions of Law.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENT QUALITY

Robert Martinez, Acting Director
Environmental Law Division

by 

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 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

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October 26, 2006

Docket Clerk for
Honorable William G. Newchurch
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Ref: **SOAH DOCKET NO. 582-06-0425; TCEQ DOCKET NO. 2005-~~1515~~-URC**
1516

Dear Clerk;

Please find enclosed for filing **Ratepayer's Brief Filed in Response to SOAH Proposal for Decision and Exceptions** concerning the above referenced matter.

Thanks in advance for your assistance.

Sincerely yours,

Elizabeth R. Martin

erm/dw
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October 26, 2006

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Ref: **SOAH DOCKET NO. 582-06-0425; TCEQ DOCKET NO. 2005-1515-URC**

Dear Ms. Castañuela;

Please find enclosed for filing an original and 11 copies of **Ratepayer's Brief Filed in Response to SOAH Proposal for Decision and Exceptions** concerning the above referenced matter.

Thanks in advance for your assistance.

Sincerely yours,

Elizabeth R. Martin

erm/dw
cc Mailing List

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	§ § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

RATEPAYERS BRIEF FILED IN RESPONSE TO SOAH PROPOSAL FOR DECISION AND EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Ratepayers request the Administrative Law Judge (ALJ) consider the following for revision of its Proposal For Decision (PFD) to be submitted to the Commissioners of Texas Commission on Environmental Quality arriving at a decision concerning the Application to Amend a Water and Sewer Certificate of Convenience and Necessity for Tapatio Springs Services Company, Inc. (herein referred to as "Application"). Ratepayers have incorporated the arguments filed in Closing Brief previously submitted as part of this document. Those arguments not previously submitted to the ALJ are presented in SECTION ONE and the arguments filed in Closing Argument are presented in SECTION TWO for the convenience of the ALJ. SECTION THREE sets forth Ratepayers Exceptions. Ratepayers urge the ALJ to reconsider their arguments herein and amend the Proposal for Decision (PFD).

SECTION ONE

GBRA Has No Verbal Agreements with Applicant and Disputes Water Availability Estimates.

Guadalupe Blanco River Authority (GBRA) has no verbal agreement with Tapatio Springs Service Company as evidence by the attached affidavits.[1] Additionally the GBRA states Upon review of the ALJ's PFD, the GBRA submitted the affidavits to clarify misrepresentations before the ALJ. Mr. Welsch with the GBRA specifically states that he informed applicant that GBRA would not agree to purchase of additional 250 ac. ft. of water.[2] Mr. West, General Manager of GBRA, verifies this testimony and additionally states that GBRA has made no determination that it has 1,600 acre-feet, or any other amount, of treated water available for private utilities.[3] In Mr. Parker's prefiled testimony he stated that he was the President of the Applicant but upon Ratepayers objection Mr. Parker reformed his testimony at trial.[4] Without any supporting documentation, the ALJ should disregard Mr. Parker's representation that debt has been paid off by the applicant. Unfortunately, Mr. Parker's testimony is consistently unreliable and must be disregarded. Ratepayers request that the ALJ reconsider and amend each finding of fact supported by the testimony of Mr. Parker.

In SECTION I, SOAH DOCKET NO. 582-06-0425, Evid. Hearing is referenced as Tr. and the exhibits from the trial are referenced as Ex. and subex. conforming to ALJ's PFD notation style.

[1] Exhibit A attached to this brief.
[2] Welsch Affidavit, Exhibit A attached to this brief.
[3] West Affidavit, Exhibit A attached to this brief.
[4] Tr. 17-18; Ratepayers Objections to Pre-Filed Testimony and Exhibits, p. 1-2.

A. Non-Standard Service Agreement is Null and Void

The Non-Standard Service Agreement (NSSA) providing the basis of the application before the ALJ is null and void.[3] The NSSA was effective from the date of execution by all parties which the latest date of execution was September 9, 2004.[4] As provided by the contract, it expired and became null and void as work on the Extention has not begun.[5] The Ratepayers argue that the application must be denied because no valid request for service now exists and the underlying assumptions for approval are no longer valid. If the ALJ's PFD on this application is not so amended, Ratepayers offer the following for consideration.

B. Statutory Authority

Ratepayers request that the ALJ reconsider its finding that TCEQ may grant an amendment under the circumstances existing in this case. In its Jurisdiction section, the ALJ correctly interprets §13.246 of the TEXAS WATER CODE to authorize the TCEQ to act on applications filed for amendment. The Ratepayers argument is not that the TCEQ did not have authority to issue amendments but rather the TCEQ is authorized only to consider amendments under TEXAS WATER CODE §13.254 which does not allow expansion of a utility's service certificate over an area not already under a CCN. The TCEQ is authorized to act on amendments, however the only statute under which legislature has authorized an amendment to a CCN is TEXAS WATER CODE §13.254. As provided in Chapter 13 of the TEXAS WATER CODE, the TCEQ is authorized to amend a certificate of convenience under TEXAS WATER CODE §13.254 only. There is no other

[3] PFD 5; Ex. A-1, subex. 1, attach. B.
[4] Ex. A-1, subex. 1, attach. B, p. 13-14.
[5] Ex. A-1, subex. 1, attach. B, p. 13.

grant of an amendment power to Texas Commission on Environmental Quality (TCEQ) but under this section.

TEXAS WATER CODE §13.254 provides that the "commission may revoke or amend any certificate of public convenience and necessity" by written consent of the certificate holder or if it finds that the utility cannot or has not been servicing the area over which it holds the certificate. The legislature gave the TCEQ the authority in §13.254 to reduce the service area or to transfer the area to another utility. Under Chapter 13, the legislature did not give the TCEQ authority to expand a CCN unless the entity to serve the area complied with the certification under TEXAS WATER CODE §13.251 and §13.252.

Procedural requirements in statutes do not expand statutory authority. The Ratepayers disagree that the procedural section controlling CCN compliance process expand the authority of the TCEQ. TEXAS WATER CODE §13.246(a) is the notice requirement in the statute, if an application for either a CCN or an amendment is received, the legislature provides in this section what notice is required and how the notice is to be delivered. Subsequently, §13.246 (b) sets forth the statutory content requirements for an application whether it is for a new CCN which the commission is authorized to grant under §13.241 or for an amendment which the commission is authorized to grant under §13.254. This statute provides the notice and content requirements for application, it does not expand the authority under which the agency is allowed to issue amendments or new certificates. TEXAS WATER CODE §13.246 set out the procedural accompaniments to the authorization statutes of §13.241 (granting

certificates) and §13.254 (grounds to amend certificates). Thus TEXAS WATER CODE §13.246 cannot be interpreted to expand the TCEQ authority.

Also, Ratepayers specifically disagree with the ALJ's finding that the TCEQ has additional amendment authority because it has for years interpreted Chapter 13 of TEXAS WATER CODE to allow amendment of CCNs other than under §13.254.[6] Only the legislature can delegate to the agency the power to carry out laws and agencies cannot expand their legislative delegated authority by interpretation or practice.[7] The legal determination of whether actual authority it has been granted by the legislature must focus on the provisions and grant of authority found in the TEXAS WATER CODE.

The Applicants have filed for a CCN Amendment. The only provision for amendment of a CCN is TEXAS WATER CODE §13.254. As determined by the ALJ, "no party argues that section applies to this case."[8] The TCEQ is not authorized to issue an amendment in this case. The Ratepayers request the ALJ amend its PFD to incorporate this finding and deny the application.

C. Conflict Between the Hill Country PGMA and TCEQ finding of Adequate Water.

TCEQ must wear two hats in considering this application as the environmental steward over groundwater and the permitting agency for utilities. Kendall County has been designated by the TCEQ as being in an area with critical groundwater problems. Priority Groundwater Management Areas (PGMA) are delineated and designated by the

[6] PFD 4.
[7] See in this brief Section II, C. Authority Conveyed to TCEQ by Legislature.
[8] PFD 3.

TCEQ.[9] The Hill County, which Kendall County is in, was the first area to be studied as an area where "critical groundwater problems exist or may exist in the future".[10] In fact, the county is in the very first area, the Hill Country, to be studied as having critical groundwater problems.[11] The study was commenced April 7, 1987 and the Hill Country Priority Groundwater Management Area was established on June 6, 1990.[12]

Chap 36 of the Tex Water Code requires the groundwater districts within the PGMA to implement management plans for effective management of the groundwater resources and enforced by the TCEQ. But then the Executive Director's staff ignores the impact of certifying a water supply company which will drain at least 1020 acre feet from the Kendall groundwater supply.[13] The applicant submitted a Water Supply Analysis indicating that it would pump 1020 acre feet of groundwater in a PGMA but the TCEQ did not verify or follow up on this representation.[14] Mr. Adhikari, TCEQ's expert, was aware that the proposed water/sewer system was in Kendall County but did not know the county is in a PGMA. [15] When asked about pumping from a PGMA, Mr. Adhikari that he had no idea what regulation applied in the county.[16] Mr. Adhikari did not consider this in reviewing the applicant's water supply.[17] However the information is critical to approval of this project.

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[9] Priority Groundwater Management Areas and Groundwater Conservation Districts, Report to 79th Legislature; TCEQ, January 2005, p. 9.
[10] Id.
[11] Priority Groundwater Management Areas and Groundwater Conservation Districts, Report to 79th Legislature; TCEQ, January 2005, Table 1. (found at http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/053_04.pdf).
[12] Id.
[13] TEXAS WATER CODE, CHAP. 36; Tr. 134 – 135.
[14] Tr. 135-136, (Mr. Adhikari, TCEQ, testifying that he did not know if the applicant could pump the amount of water but it was his responsibility to determine if the utility company had an adequate water supply.).
[15] Tr. 135 -136.
[16] Tr. 135.
[17] Tr. 135.

The Texas Water Development Board, South Central Texas Region, responsible for determining the groundwater availability for Kendall County, established that the total county supply of groundwater is only 4,591 acre feet of water.[18] By approving this CCN the TCEQ is substantiating applicant's claim that they can use more than 22% of the total groundwater in the county with less than 1.2% of the total acreage of the county.[19] Additionally, the TCEQ is not taking into consideration the amount of groundwater already allocated within the county which is estimated to be 3,504.[20] Thus the 1,020 ac ft of water projected to be pumped will take almost all of the water still available for Kendall County's allocation. Then taking into consideration the additional groundwater needed for peaking as the ALJ recognized, there will be an extreme deficit created in the groundwater supply in Kendall County.[21]

Therefore by approving this CCN, the TCEQ is setting a dangerous precedent whereby it is verifying the availability of the groundwater for this 5,000 acres. Approval of this CCN presents grounds whereby the water company and developer can challenge the rules and findings of the Groundwater District. This is an obvious and real concern as evidenced by the offer of proof at P-6 which is a letter of the Groundwater District to the TCEQ stating their concern with the precedent of the CCN approval.[22] If the TCEQ approves this application, it is effectively ignoring the situation in Kendall County to the detriment of its water district and its citizens.

This impact on the customers in the Applicant's service area is dire. The current customers have been on drought restrictions regularly, including being on Stage 3

[18] Ex. A-1, subex, 2, 4-75, Table 4-14, Total Kendall County Supply.
[19] Calculation [1020 ac ft divided by 4591 ac ft = +22%]; [5,000 ac divided by 424,320 ac = 1.2%].
[20] Ex. A-1, subex, 2, 4-77, Table 4-14, Total Kendall County Allocated.
[21] PFD 11-12.
[22] P-6.

drought restrictions since June 2006.[23] If the TCEQ approves this application the demand on the groundwater resources will jeopardize the current customers' water supply as well as the groundwater users throughout Kendall County.

The Ratepayers request that the ALJ incorporate into its proposed findings of facts that the proposed project is in the Hill Country PGMA and that the proposed amount of water to be extracted exceeds the Texas Water Development Board's estimate of unallocated water. The Ratepayers further request that the ALJ amend its PDF to recommend denial of the application based on these findings.

D. Capability Review

The TCEQ experts unwaveringly recommended approval of this CCN even though their testimony revealed that the applicant had not supplied requested data, additional information had to be reviewed prior to final approval, and the ALJ had to take official notice of evidence that should have been submitted.[24] Additionally, the TCEQ staff did not require submission of documentation formally requested of the applicant.

For Example, Mr. Adhikari on June 22, 2005 requested from Tapatio Springs Service Company, the following information in order to proceed with its application;

a) "Evidence of financial capability for CDS International Holdings, Inc., to provide all funds necessary for construction of the facilities. A financial statement for the most recently completed year-end, should be sufficient, if it shows good liquidity and solvency. Please provide prior board authorization for the 'Treasurer' to obligate the corporation financially, as indicated with the utility."

[23] P-2; P-3; Tr. 29.
[24] PDF , Tr. 91, 98-99, 103-109, 116, 127, 129, 132.

This information was not submitted for review to the TCEQ.[25] There is no evidence of liquidity or solvency for the developer as required. Mr. Adhikari gave the applicant a July 15, 2005 deadline and he stated "If...the requested information listed above are not received by this date, your applications will be returned for failure to prosecute."[26] However, obviously, the application was not returned. The TCEQ staff appears pressured to approve applications, the Ratepayers assert this due the lack of enforcement the requirements and corresponding noncompliance by the applicant. Furthermore, the fact is that if the TCEQ staff recommends denial of a CCN application the review is far more extensive than if approval of a CCN application is recommended.[27] The Ratepayers question whether the TCEQ policy enables staff to effectively review applications. Considering the following, effective review would have resulted in a recommended denial of the application.

Applicant's Water Loss

The applicant reported to the TCEQ that in 2004 it lost 20% of all the water pumped and in 2005 it lost 18.6% of all the water pumped.[28] The actual total is over 17 million gallons of groundwater that was lost.[29] The Ratepayers argue that a loss of 1 out of every 4 gallons of water proves the technical incapability. Based on this reported loss for the last two years, if the Applicant pumps 1,020 acre feet of water just for the base demand of its customers over 255 acre feet of water will be lost per year. This is more water than purchased from the GBRA for the expansion area. While the ALJ notes a major water leak was repaired, according to Mr. Parker, Ratepayers assert his

[25] No such information is in evidence.
[26] Ex. P-9.
[27] Tr. 110-111, (Mr. Smith, TCEQ, testifying that affirmative decisions are reviewed more extensively.).
[28] Ex. P-4, Ex. P-5.
[29] Ex. P-4, Ex. P-5.

misrepresentations on numerous items renders this testimony unreliable. Furthermore, two years of not being able to find such a tremendous leak indicates incompetence. Operating its existing water supply system with this type of loss for more than two years evidences the applicant's extreme lack of technical capability. Ratepayers urge the ALJ to amend its PFD to find the applicant has insufficient technical capability.

Financial Capability of Applicant and Developer

There are two components to this financial review. First the review should consider whether the applicant or developer has the financial capability to install the proposed systems. Second the review should consider whether the applicant has the financial capability to operate this system. The Ratepayers pointed out earlier that the debt situation for the Applicant was unacceptable and indicative of inability to effectively financially manage this expansion. The Ratepayers contend that the Applicant's past performance in operating its system proves its financial incapability.

The applicant's financial capability is relevant in this matter as ultimately it would hold the CCN over the area. While the ALJ finds the applicant is "barely financially stable,"[30] Ratepayers argue that the Applicant is not even close to financially stable. The financial information presented by the applicant, in evidence before the ALJ, shows that it has a negative shareholder equity of $616,500.[31] This is in addition to the outstanding debt. In order to have a meaningful debt to equity ratio, a company must have a positive equity balance. This company has negative equity therefore the company is beyond leveraged. There is no equity in the company. The Retained Earnings are reported to be

[30] PFD 20.
[31] Ex. A-1, subex. 1, Attachment G.

negative $1,293,378.[32] Retained Earnings are calculated by adding net income to (or subtracting any net losses from) beginning retained earnings and subtracting any dividends paid to shareholders. The applicant's reported retained earnings are negative showing a huge deficit. The applicant's business operations have resulted in creating a negative shareholder equity of $616,500 with net income of $41,773 as shown.[33] The applicant's financial practices over its existing area has resulted in tremendous $1.29 million cumulative loss and indicates financial incapability to run a water/sewer company.[34] The applicant's historical financial practices have not only created this tremendous negative equity position but it has incurred large debt obligations.

As for the applicant's debt situation, the ALJ dismisses any question as to the source of the alleged debt payment again calling on the Ratepayers to prove it was paid off by debt, instead of requiring the Applicant to carry its burden of proof showing it was in fact paid off.[35] The only evidence that the significant debt had been paid is the testimony of Mr. Parker. This is the witness that misrepresented himself as President of the Applicant in his prefiled testimony.[36] Mr. Parker also testified to verbal agreements to the GBRA for additional water. Mr. Parker as treasurer saw no reason to present updated balance sheets after the payment of the debt.[37] So the "possibility" that the Applicant's debt problem was resolved is found to be sufficient to show the Applicant's financial capability has improved. This ignores the applicant's TCEQ Annual Report of December 31, 2005 showing an outstanding debt of $891,809.[38] The Ratepayers urge the

[32] Ex. A-1, subex. 1, attach. G.
[33] Ex. A-1, subex. 1, attach. G.
[34] Ex. A-1, subex. 1, attach. G.
[35] PFD p. 21.
[36] Ex. A-3.
[37] Tr. 21.
[38] Ex. P-5, p. 3.

ALJ to find the "possibility" of the Applicant's debt reduction is insufficient to determine the Applicant's financial situation and future outlook is healthy enough to warrant issuance of a CCN. Even if the debt position has been improved, its negative equity balances overwhelmingly show that the applicant does not have the financial capability to operate an expanded system.

Despite operating its current water/sewer supply company into a position of negative equity, the ALJ and TCEQ find that expanding its operations will reverse the company's past performance and thereby render it financially stable.[39] Instead of requiring financial stability prior to approval of the CCN, the TCEQ and the ALJ find that an expanded service area will increase the Applicant's financial stability.[40] This determination is made despite the evidence in the record and without any cashflow projections or business plans from the applicant which must carry the burden of proof. This recommendation is based on hopeful speculation and not based on any financial plans, projections, or any evidence except for the documents filed by the Applicant which show after 25 years of operation it is in a serious negative equity position.[41] Actually extrapolating the actual negative retained earnings of 1.2 million for 207 Tapatio Springs Service Company customers, [1.2 million divided by 207 equals negative $5,797], to the ultimate customer base of 3,393, results in a projected negative retained earnings of 19.6 million for the company if the operations are continued in the same manner. Therefore the Ratepayers contend that the operation of the expanded service area, instead of improving the financial stability of the company, the additional expansion will further

[39] PFD 20,
[40] PFD 20.
[41] Ex. A-1, subex. 1, attach. G.

destabilize the applicant. Subsequently, this will expose more customers to potential collapse of their utility and create a larger problem.

Furthermore, a financial review of the proposed system operations was impossible as the TCEQ's expert, Mr. Adhikari, determined that the new systems are in fact existing systems. The designation of the new water and sewer systems as existing systems is factually wrong. Mr. Adhikari testified that the applicant or developer's consultant, Mr. Nichols, represented that the developer is required to provide all of the new infrastructure necessary to serve the new development.[42] However, even though all of the infrastructure would be built by the developer to serve the area, he finds this would not be a new stand alone system.[43] Mr. Nichols confirmed that the existing sewer capacity would not be used,[44] but Mr. Adhikari would not find the new sewer system to be a new stand alone system.[45] Then he testified that in fact he could not determine if it was a new stand alone system until the plans and specifications were submitted.[46] Therefore Mr. Adhikari did not have any basis for making a determination that the new systems were not stand alone systems. In fact based upon Mr. Nichols' representations these are to be stand alone systems. This determination is important because new systems are required to submit additional information proving technical capability of the which should be required in this matter.

Item 6. of the Amendment Application requests, for new systems or new stand alone systems, the Applicant provide;

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[42] Tr. 133.
[43] Tr. 133.
[44] Tr. 133-134.
[45] Tr. 134.
[46] Tr. 134.

i. five year analysis of all necessary costs for construction, operating and maintaining the system.

ii. Projected profit and loss statements, cash flow worksheets, and balance sheets for the first five years of operation.

iii. A proposed rate schedule or tariff. Describing the procedure for determining the rates.[47]

The Applicant in this case is not required to provide any of this financial information because Mr. Adhikari finds the proposed water and sewer systems to be an existing system even though it covers 5,000 acres with no current service. This classification is made even though the applicant's representative confirmed that the developer will build all new infrastructure to service the area and that no existing sewer system will be utilized by the new expansion area. Therefore no financial review was performed by the TCEQ staff of the future operations of the water and sewer systems. In addition to the needed financial capability to operate the system, the applicant must show it is financial capable of building the proposed systems.

In considering the financial capability for constructing these systems, the TCEQ finds that an unverified letter from the developers bank is a sufficient substitute for the information requested in Item 6. of the applicant's application. The applicant has submitted the developer's letter of credit because, as a review of their financial situation reveals, Tapatio Springs Service Company is unable to finance construction of this project.[48] As TCEQ did not require the financial information in Item 6., no construction

[47] Ex. A-1, subex. 1, p. 8 of 15.
[48] Ex. A-1, subex. 1, attach. G.

plans or costs were submitted to the TCEQ for this proposed expansion.[49] Again, it is the Applicant's burden to prove adequate financial capability to complete the proposed expansion. The only evidence presented by the applicant on behalf of the developer is one unverified letter from a bank.[50] Mr. Smith, TCEQ financial expert, testified that he usually tries to verify letters but had not verified this letter of credit.[51] Mr. Smith also testified the Applicant had not provided adequate information on phasing and capital requirements, expectation of timing and depth of cash flows, and annual connection rate.[52] Furthermore, Mr. Smith testified that the developer's unilateral ability opt out of the NSSA warranted review of the Applicant's tariff.[53] Upon request of the ALJ, the Applicant submitted its tariff which does not provide for the "developer contribution in aid of construction."[54] Therefore if this developer opts out of the contract the Applicant does not have the ability to require other developers to pay for the installation of the systems. The ALJ also finds that a possibility of a rate/tariff amendment is a supporting reason to find the Applicant financially capable of expansion into an adjacent area.[55] Thus the TCEQ is finding that the Applicant has financial capability to construct the water and sewer system infrastructure over 5,000 acres and 1,700 connections because the Applicant introduced a one page letter allegedly from the developer's bank. Furthermore the developer may walk away from the NSSA. The required standard for the applicant's financial review has thus slipped down from "capability" to "possibility."

[49] Tr. 129.
[50] Ex. A-1, subex. 4.
[51] Tr. 100.
[52] Tr. 98.
[53] Tr. 104-106.
[54] ALJ Order No. 10, Applicant's Certified Tariff.
[55] PFD 30-31.

The Ratepayers request the ALJ amend its PFD to find the applicant's financial capability is insufficient to recommend approval of its application.

E. Applicant is Straw Man for Developer.

In effect the developer is the water and sewer company to institute service for the 5,000 acres over which the CCN is sought in this case. In order to avoid compliance with the requirements for new supply company, the developer is using the applicant as its straw man.[56] The Applicant will not design the facilities, the developer will. The Applicant will not finance the project, the developer will. The Applicant will not provide the water, the developer will. The Applicant will not be responsible for the compliance with the TCEQ rules and regulations for the development, the developer will. The developer is in charge and control of all the design. The ALJ verifies that the applicant is the straw man for the developer, as it finds that the developer shall pay for all items and be responsible for all compliance in its PDF.[57] The proper applicant for this project is the developer. The Ratepayers request the ALJ amend its PDF to deny the application and find that the developer is the actual applicant for the CCN over the proposed expansion area.

[56] Tr. 110 (Mr. Smith, TCEQ, testifying that no Comptroller letter of good standing would be required of the developer.).
[57] PDF, p. 25.

SECTION TWO

I. INTRODUCTION

As referred to in this brief, "Applicant" is Tapatio Springs Services Company, Inc., "TCEQ" is the Texas Commission on Environmental Quality issued the governmental authority over the granting of Certificates of Convenience and Necessity (herein referred to as "CCN") by the State of Texas; "Ratepayers" are designated in this Court's Order No. 1. The parties participated in a trial on July 6, 2006 before this Court. As established, the Applicant currently serves approximately 200 water and sewer customers and in this proceeding seeks certification over 5,000 acres with 1,700 water and sewer connections.[58] Ratepayers request the Court deny the certification for reasons set forth in this brief.

II. AUTHORITY FOR ISSUANCE OF A CCN

As provided by law, the TCEQ is the agency which administers the granting of a CCN. In this matter, the TCEQ recommends the approval of a CCN[59] without requiring the Applicant to comply with the commission's rules,[60] the TEXAS WATER CODE provisions,[61] and despite the Applicant filing an incomplete and inaccurate Application.[62] If the Application is approved, as submitted, the TCEQ will exceed their authority as set forth by the legislature.

A. CONSTITUTIONAL LIMITATIONS

Any power exercised by the TCEQ must adhere to Constitutional law requirements. The Texas Constitution vests in the legislative branch the power to make

[58] SOAH DOCKET NO. 582-06-0425, Evid. Hearing, Exh. A1, exh. 1, p. 7; Parker, p. 22, ll. 7-11.
[59] Id., Exh. ED 5, p. 3; Exh. ED 7, p. 5.
[60] TEXAS ADMIN. CODE §291.
[61] TEX. WATER CODE § 13.241(setting forth legislative standards).
[62] SOAH DOCKET NO. 582-06-0425, Evid. Hearing, Exh. A1, exh. 1.

laws and create agencies to carry out those laws but the legislative authority may not be delegated without any limits.[63] The Texas Supreme Court established that the legislature may delegate powers to an administrative commission if reasonably clear standards are provided to allow fulfillment of legislative purpose and policy.[64] Regarding the granting of a CCN, the Austin Court of Appeals has held "[t]hat the legislature intended certificates of convenience and necessity to be creatures of statute is clear"[65] and therefore the constitutional limitations on delegation of authority apply to the TCEQ.[66] Since the CCN are created under the legislature's statutory authority, its direction to the TCEQ in granting a CCN as found in the TEXAS WATER CODE must be followed.[67] However, in this case, the Applicant is attempting to secure a CCN from the TCEQ without qualifying as required under the standards and guidelines provided by legislature.

B. LEGISLATIVE PURPOSE AND POLICY

The Austin Court of Appeals provides an interpretation of the legislative purpose and policy concerning the issuance of a CCN stating that;

> Finding that retail public utilities are "by definition monopolies in the areas they serve," that "normal forces of competition" do not operate, and that regulation will serve as a "substitute for competition," the legislature passed Chapter 13 of the water code to govern retail public utilities with the stated purpose to establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates,

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[63] TEX. CONST. art. II, § 1.
[64] *Edgewood Indep. Sch. Dist. v. Meno,* 917 S.W.2d 717, 740 (Tex. 1995)(quoting *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex.1992)).
[65] *City of Carrollton v. Texas Com'n on Environmental Quality*, 170 S.W.3d 204, 209 (Tex.App.-Austin, 2005)
[66] See generally, *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex.1992) (quoting *State v. Texas Mun. Power Agency*, 565 S.W.2d 258, 273 (Tex.Civ.App.-Houston [1st Dist.] 1978, writ dism'd)) (stating that "[a]lthough the 'legislature has the authority to delegate its powers to agencies established to carry-out legislative purposes ··· [,] it must establish reasonable standards to guide the entity to which the powers are delegated.'").
[67] Id.

operations, and services that are just and reasonable to the consumers and to the retail public utilities.[68]

The Court further explains that chapter 13 of the water code was "adopted to protect the public interest inherent in the rates and services of retail public utilities."[69] To achieve its' stated policies the legislature issued requirements Within Chapter 13 of the TEXAS WATER CODE for the issuance of a CCN.[70] The legislature set forth these requirements as the certificates create monopolies for retail public utilities and therefore as not subject to competition.[71] Therefore in the evaluation and issuance of a CCN, the TCEQ must follow the legislature's direction to allow the achievement of its stated purpose and policy.

[68] *City of Carrollton*, 170 S.W.3d at 210 (citing TEX. WATER CODE § 13.001(a)(West 2000)).
[69] Id.
[70] TEX. WATER CODE § 13.241 (West 2000).
[71] TEX. WATER CODE § 13.001 (West 2000).