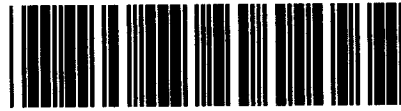




Control Number: 43990



Item Number: 49

Addendum StartPage: 0

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

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SOAH DOCKET NO. 582-06-0425  
TCEQ DOCKET NO. 2005-2014 DEC 19 AM 8:22

APPLICATION OF TAPATIO SPRINGS §  
SERVICE COMPANY, INC., TO AMEND §  
CERTIFICATES OF CONVENIENCE §  
AND NECESSITY NOS. 12122 AND 20698 §  
IN KENDALL COUNTY, TEXAS § BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

**TAPATIO SPRINGS SERVICE COMPANY INC.'S REPLY**  
**TO RATEPAYERS' MOTION FOR REHEARING**

**TO THE HONORABLE COMMISSION:**

COMES NOW, Tapatio Springs Service Company, Inc. represented by and though its attorney, and files the following Reply to Ratepayers' Motion for Rehearing. This reply is filed pursuant to 30 TAC § 80.271(b). Tapatio Springs Service Company requests that the Commission deny Ratepayers' Motion for Rehearing.

Ratepayers' now argue that the notice of hearing did not reference the particular section of statutes and rules involved in this case. The notice of hearing issued by the TCEQ Chief Clerk's office cited the particular chapter of the Texas Government Code, the particular chapter of the Texas Water Code and the relevant TCEQ rules. Tapatio Springs Service Company, Inc. submits that the notice of hearing was not deficient. In addition, Ratepayers had notice of the hearing and was represented by counsel at the hearing. It has been well established under the jurisprudence of this State that appearance, either in person or by attorney, waives any claim regarding deficiency of notice. *Webster v. Texas Water Rights Commission*, 518 S.W.2d 607 (Tex. App. Austin 1975, writ refused n.r.e.)

For each allegation of error, the motion must (1) identify and set forth the specific fact finding, legal conclusion or ruling complained of; and (2) set forth the legal basis asserted by the

moving party of the error that has been committed by the agency.<sup>1</sup> Failure to set forth these two requirements will constitute waiver of the error for purposes of judicial review, even if the party properly preserved error before the hearings officer or Administrative Law Judge (ALJ) or its objections to the proposed order of the hearing officer, ALJ or the agency itself.<sup>2</sup>

It is difficult, if not impossible, to determine from the Ratepayers' Motion for Rehearing the points of error that are being alleged. It is even more difficult to decipher the legal basis for the alleged error. In fact, Ratepayers' Motion for Rehearing does not set forth the specific fact finding and the legal basis for any error committed by the commission.

The Ratepayers continue to argue about the facts in the record, but the record supports the Findings of Fact that the Ratepayers' Motion for Rehearing claims to be error. By contract, the Findings of Fact that Ratepayers' assert in their Motion for Rehearing should be adopted are not supported by record. The ALJ and the Commission previously considered each of the Ratepayers' proposed findings of fact and have not previously been persuaded to view the facts as argued and presented by the Ratepayers'. Ratepayers' Motion for Rehearing merely rehashes the arguments made previously in this proceeding, which were fully considered and rejected by the ALJ and the Commission. Ratepayers' Motion for Rehearing does not present any basis for the Commission to grant a rehearing.

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Ratepayers' Motion for Rehearing rehashes the Ratepayers' disagreement with the ALJ regarding the evidence and the credibility of certain witnesses. Such allegation of error based upon a disagreement with the ALJ regarding the credibility of testimony does not help the Ratepayers.

In a contested case hearing, the ALJ is the sole judge of witness credibility and is free to accept or reject the testimony of any witness or even accept "part of the testimony of one witness and disregard the remainder." *Southern Union Gas Co. v. Railroad Comm'n*, 692 S.W.2d 137, 141-42 (Tex. App. Austin 1985, writ ref'd n.r.e.). We are not permitted to substitute our judgment for the ALJ's regarding the credibility of witnesses. *Ford Motor Co. v. Texas Dep't of Transp.*, 936 S.W.2d 427, 429-30 (Tex. App. Austin 1996, no writ). We must resolve evidentiary ambiguities in favor of the administrative order with a finding of substantial evidence to support the ALJ's decision. *Railroad Comm'n of Tx. v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex.1995). *Granek v. Texas State Bd. of Medical Examiners*, 172 S.W.3d 761 (Tex. App. Austin 2005, no pet.).

Ratepayers' Motion for Rehearing alleges in points of error nos. 50, 51, 58, 59 70, 81 and 82 that a witness lied in his prefiled testimony and at the hearing. This allegation is without merit, substance or evidentiary support. This allegation perfectly illustrates Ratepayers' reliance on facts that are not based on the record. There is absolutely no evidence that any of Tapatio Springs Service Company, Inc.'s witnesses lied in their prefiled testimony or at the hearing. Consequently, Ratepayers do not even provide any evidentiary support for this allegation. It should go without saying that such an allegation should not be made without clear and sufficient evidentiary support.

Ratepayers' point of error no. 91 asserts, "[b]ased on Applicant's operations it is not financially stable." Again, this allegation is made without even the hint of any factual support; and is yet another perfect illustration of Ratepayers' disregard for the standards and requirements of these proceedings.

Ratepayers' Motion for Rehearing refers to a letter from the Cow Creek Groundwater District to the TCEQ stating its concerns with the precedent of the CCN approval. This letter was offered by Ratepayers' counsel but was not admitted into evidence and should not be considered.

Ratepayers' Motion for Rehearing alleges that Finding of Fact No. 11 is in direct conflict with the TCEQ regulations which require a CCN holder to provide service for anyone requesting service within their CCN area. Ratepayers' fail to consider that a CCN holder only has to provide service after the individual requesting service complies with the CCN holder's tariff.

With respect to Finding of Fact No 42, Ratepayers' Motion for Rehearing alleges that the existing wells serving the current customers are threatened by the increase demand created by the larger area and the water supply will be spread over a larger number of users. There is no evidence to support that existing wells serving the current customers are threatened by the increase demand created by adding this service area.

With respect to Finding of Fact Nos. 43, 44, 45 and 49, Ratepayers' Motion for Rehearing alleges that if CDS sells any part of the 5,000 acres the subsequent owners may request service without supplying the water or financial backing. Again, there is no evidence in the record that supports finding that if CDS sells any part of the 5,000 acres that the subsequent owner could obtain service without supplying the water or any developer contribution.

The Commission did not arbitrarily determine that events in the future warranted granting the CCN amendment. The Commission took judicial notice of Tapatio Springs Service Company's tariff in effect at the time it decided this matter. An agency decision may be found

arbitrary and capricious if it is based on legally irrelevant factors or if legally relevant factors were not considered.<sup>3</sup>

In summary, the Ratepayers take eleven pages to argue that the Commission should change certain findings. These are the same arguments presented to the ALJ and the Commission. An agency may modify an ALJ's order or change an ALJ's finding of fact or conclusion of law only if the agency determines that (1) the ALJ improperly applied or interpreted the law, agency rules or policies, or prior administrative decisions; (2) the ALJ based her decision on a prior administrative decision that is incorrect; or (3) a finding of fact contains a technical error requiring correction. Tex. Gov't Code Ann. § 2001.058(e) (West 2006); *Granek v. Texas State Bd. of Medical Examiners*, 172 S.W.3d 761 (Tex. App. Austin 2005, no pet.). The agency is required to explain with particularity its specific reason and legal basis for each change made. *Id.*; *Levy v. Texas State Bd. of Med. Exam'rs*, 966 S.W.2d 813, 815-16 (Tex. App. Austin 1998, no pet.). The Ratepayers fail in their Motion for Rehearing to provide the Commission with a specific reason and legal basis for changing a finding of fact proposed by the ALJ.

With respect to the Conclusions of Law, Ratepayers' Motion for Rehearing maintains erroneously that the Commission is only authorized to amend a CCN under Texas Water Code Section 13.254. Tapatio Springs Service Company, the Executive Director, and the ALJ all disagree with this statutory interpretation of Section 13.246 of the Texas Water Code. Tapatio Springs Service Company, Inc. asserts that Section 13.246 of the Texas Water Code provides the Commission the statutory authority to consider applications to amend a CCN.

Ratepayers' Motion for Rehearing argues that there will be a stand-alone system to serve the area being requested. Tapatio Springs Service Company, Inc. will serve the area located

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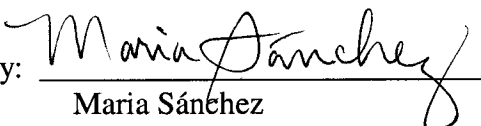
adjacent to its existing service areas and facilities that is being added to its CCN with its existing water system. There will be new distribution lines installed to provide service to the added service area and these lines will be connected to the existing water system.

Ratepayers' Motion for Rehearing argues that the Commission ignores the majority of the evidence presented in this case, fails to follow statutory requirements and rules. That contention is simply incorrect, the Commission's decision is based on the evidence provided and the applicable law and rules.

Ratepayers have failed to present sufficient grounds to justify granting their motion for rehearing. The Commission should deny Ratepayers' Motion for Rehearing.

Respectfully submitted,

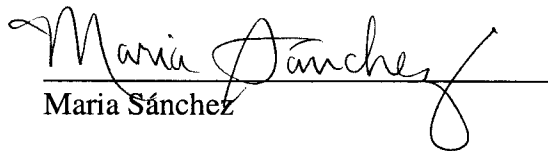
DAVIDSON & TROILO, P.C.  
919 Congress Ave., Ste. 810  
Austin, Texas 78701  
Telephone: (512) 469-6006  
Facsimile: (512) 473-2159

By:   
Maria Sánchez  
State Bar No.: 17570810

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of May 2007, a true and correct copy of Tapatio Springs Service Company, Inc.'s Reply to Ratepayers' Motion for Rehearing was forwarded to each of the parties listed below by hand delivery, via fax and/or first-class mail.

Elizabeth R. Martin Attorney at Law P. O. Box 1764 Boerne, TX 78006 830-816-8686 830-816-8282 (fax) Representing Ratepayers	Garrett Arthur Staff Attorney TCEQ Office of Public Interest Counsel PO Box 13087 MC-175 Austin, Texas 78711-3087 512-239-6363 512-239-6377 (fax) Representing TCEQ Public Interest Council
Derek Seal General Counsel MC-101 TCEQ P.O. Box 13087 Austin, Texas 78711-3087 512-239-5525 512-239-5533 (fax)	Ms. La Donna Castañuela, Chief Clerk Office of the Chief Clerk MC-105 TCEQ P.O. Box 13087 Austin, Texas 78711-3087 512-239-3300 512-239-3311 (fax)
Kathy H. Brown Staff Attorney TCEQ Environmental Law Division PO Box 13087 MC-173 Austin, TX 78711-3087 512/239-0600 512/239-0606 (fax) Representing the Executive Director of the Texas Commission on Environmental Quality	

  
Maria Sánchez

JOHN W. DAVIDSON  
ARTHUR TROILO  
TERRY TOPHAM  
CHEREE TULL KINZIE  
R. GAINES GRIFFIN  
RICHARD E. HETTINGER  
PATRICK W. LINDNER  
IRWIN D. ZUCKER  
RICHARD D. O'NEIL  
J. MARK CRAUN

LAW OFFICES OF  
**DAVIDSON & TROILO**

A PROFESSIONAL CORPORATION

AUSTIN

919 CONGRESS, SUITE 810, 78701  
512/469-6006 • FAX 512/473-2159

LEA A. REAM  
FRANK J. GARZA  
JAMES C. WOO  
RICHARD L. CROZIER  
R. JO RESER  
MARIA S. SANCHEZ  
DALBY FLEMING  
LISA M. GONZALES  
RENEE R. HOLLANDER

SAN ANTONIO OFFICE  
7550 W IH-10, SUITE 800, 78229-5815  
210/349-6484 • FAX: 210/349-0041

May 31, 2007

Ms. La Donna Castañuela, Chief Clerk  
Office of the Chief Clerk  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

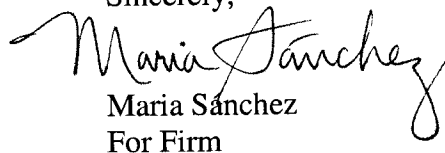
CHIEF CLERK'S OFFICE  
MAY 31 2007  
ON DEPT. OF NATURAL RESOURCES

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

Dear Ms. Castañuela:

Enclosed please find the original and eleven copies of Tapatio Springs Service Company, Inc.'s Reply to Ratepayers' Motion for Rehearing. Thank you for your attention to this matter. If you have any questions, please call me at 469-6006.

Sincerely,

  
Maria Sanchez  
For Firm

Enclosure

43990

TEXAS  
COMMISSION ON ENVIRONMENTAL QUALITY

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

RECEIVED

2014 DEC 19 AM 8:22

BEFORE THE TEXAS  
PUBLIC UTILITY COMMISSION  
FILING CLERK  
COMMISSION ON

CHIEF CLERK'S OFFICE

APPLICATION OF TAPATIO SPRINGS §  
SERVICE COMPANY, INC., TO AMEND §  
CERTIFICATES OF CONVENIENCE §  
AND NECESSITY NOS. 12122 AND 20698 §  
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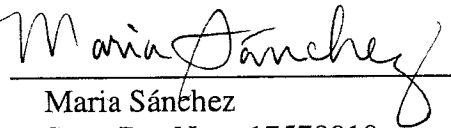
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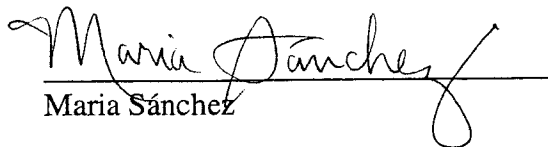
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919 Congress Ave., Ste. 810  
Austin, Texas 78701  
Telephone: (512) 469-6006  
Facsimile: (512) 473-2159

By:   
Maria Sánchez  
State Bar No.: 17570810

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