

Control Number: 47556



Item Number: 13

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PETITION OF HMSC, LLC TO §
AMEND MCCOY WATER SUPPLY §
CORPORATION'S WATER §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY IN ATASCOSA §
COUNTY BY EXPEDITED RELEASE §

PUBLIC UTILITY COMMISSION PM 2:07
OF TEXAS
PUBLIC UTILITY COMMISSION
7000 CLARK

COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this response to Order No. 3, Staff's Recommendation on Final Disposition. Staff recommends that the petition be approved. In support thereof, Staff shows the following:

I. BACKGROUND

On August 29, 2017, HMSC, LLC (HMSC) filed a petition (Petition) for a streamlined expedited release (SER) of 292.16 acres (Property) from McCoy Water Supply Corporation's (McCoy) water certificate of convenience and necessity (CCN) No. 10649 in Atascosa County, Texas, pursuant to Tex. Water Code Ann. § 13.254(a-5) (West 2008 and Supp. 2016) (TWC) and 16 Tex. Admin. Code § 24.113(l) (TAC). HMSC asserts that the Property is not receiving water service from McCoy.¹ On September 28, 2017, McCoy filed a motion to intervene.² McCoy also filed a response to Order No. 3 (Response) on October 17, 2017.³

In Order No. 4, issued on October 26, 2017, the administrative law judge granted Staff's request for a deadline extension and ordered Staff to file a recommendation on final disposition by October 31, 2017.⁴ Therefore, this pleading is timely filed.

¹ Petition at 2 (Aug. 29, 2017).

² Motion to Intervene at 5 (Sept. 28, 2017).

³ Response (Oct. 17, 2017).

⁴ Order No. 4 at 1 (Oct. 26, 2017). Staff filed the request for a deadline extension on October 24, 2017, and inadvertently titled the document Commission Staff's Recommendation on Final Disposition.

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II. STATUTORY APPROVAL DEADLINE

Pursuant to 16 TAC § 24.113(I)(5), the Commission must render a decision on a petition for a SER “no later than the 60th calendar day after a presiding officer by order determines that the petition is administratively complete.” Order No. 3, issued on October 10, 2017, deemed HMSC’s petition administratively complete; therefore the 60-day deadline for administrative approval is December 11, 2017.⁵

III. RECOMMENDATION ON FINAL DISPOSITION

Staff and HMSC agree and McCoy does not contest that the Property is at least 25 acres in size and the Property is in a qualifying country.⁶ For the purpose of eligibility for a SER under 16 TAC § 24.113(I)(B)(2), the property must be “not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN.” The SER provision in 16 TAC § 24.113(I) is authorized by TWC § 13.254(a-5). In its Response, McCoy argues that the Property fails to satisfy the “not receiving service” requirement in TWC § 13.254(a-5) because they argue the no service requirement is not specific to service provided by the CCN holder and they allege the Property is receiving service from the City of Jourdanton.⁷ They also assert that McCoy is fully capable of providing and making service available because of a 6-inch water line adjacent to the property that Harold Brown Sons, Inc. constructed on behalf of McCoy from September 25, 2017 through September 28, 2017.⁸

A. “Receiving Service” Standard

Service is defined as “any act performed, anything furnished or supplied, and any facilities or lines committed or used by the retail public utility in the performance of its duties . . .”⁹ In *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, the court explained that:

The mere existence of water lines or facilities on or near a tract would not necessarily mean that a tract was ‘receiving water service.’ Rather . . . such a

⁵ The deadline cited in Order No. 3, December 9, 2017, is on a Saturday. The next business day is Monday, December 11, 2017.

⁶ Application at ¶¶ 2, 8; Response at ¶ 19.

⁷ Response at ¶¶ 20-21.

⁸ Response at ¶ 22; Exhibit B at ¶ 2.

⁹ TWC § 13.002(21); *see also* 16 TAC § 24.3(64).

determination is essentially a fact-based inquiry requiring the Commission to consider whether the retail public utility has facilities or lines committed to providing water *to the particular tract* or has performed acts or supplied anything *to the particular tract* in furtherance of its obligation to provide water to that tract pursuant to its CCN.¹⁰

The court in *Crystal Clear* clarified that “[c]ertainly an active water tap on the... [p]roperty would constitute a facility or line ‘used’ to supply water to the tract on which it was located. But it might also be sufficient if there were facilities or lines ‘committed’ to such service, such as a dedicated water line that had been installed to serve that property even if such line were not currently operative.”¹¹ The court further stated that a tract of land would not be considered to be receiving service “simply because the retail public utility has performed an act, such as entering into a contract to secure water supply, unless the act was performed in furtherance of providing water to the tract seeking decertification.”¹²

The Commission has held that “even though a utility has facilities available and capable of providing water service, that does not mean the facilities are committed and dedicated to serving that particular tract.”¹³ The Commission has further held that “the time that the petition is filed is the only relevant time period to consider when evaluating whether a tract of land is receiving water service under TWC § 13.254(a-5). Whether a tract might have previously received water or sewer service is irrelevant.”¹⁴

B. Parties’ Proof

HMSC asserts that it meets the criteria set forth in TWC § 13.254(a-5) and 16 TAC § 24.113(I) for a SER from McCoy’s CCN.¹⁵ The Petition asserts that:

¹⁰ 449 S.W.3d 130, 140 (Tex. App.-Austin 2014, pet. denied).

¹¹ *Id.*

¹² *Id.*

¹³ *Petition of HMP Ranch, Ltd. To Amend Johnson County Special Utility District’s Certificate of Convenience and Necessity in Johnson and Tarrant Counties by Expedited Release*, Docket No. 45037, Order, Finding of Fact No. 23 (Dec. 18, 2015).

¹⁴ *Id.* at Conclusion of Law No. 7.

¹⁵ Petition at 2.

- 1) HMSC has never submitted a formal written request with McCoy for retail water to the Property, but has engaged in some discussion with McCoy regarding the provision of water to the tract.¹⁶
- 2) HMSC is not a retail water service customer of McCoy nor has it ever received retail water service from McCoy on the Property.¹⁷
- 3) The City of Jourdanton (Jourdanton) has a retail service line that runs directly near the front of the Property. Jourdanton may have provided temporary water service for an oil and gas man camp which is no longer on the Property as well as a mobile home.¹⁸

McCoy asserts that HMSC's property is "receiving water or sewer service" pursuant to TWC § 13.002(21).¹⁹ McCoy's Response asserts that:

- 1) Before filing the Petition, HMSC had not filed for "non-standard" service from McCoy.²⁰
- 2) Prior to HMSC's ownership, the Property received water service from Jourdanton and it continues to do so.²¹
- 3) On September 28, 2017, McCoy completed the installation of a six-inch water line on County Road 430 to serve the property immediately adjacent thereto, including the Property.²² Construction of the pipe began on September 25, 2017.²³
- 4) Since December 21, 2012, McCoy has been federally indebted to the United States Department of Agriculture, Rural Development. McCoy's security to the United States includes its facilities, CCN territory, and current and future revenue therefrom.²⁴

¹⁶ *Id.* at ¶ 4.

¹⁷ *Id.* at ¶ 5.

¹⁸ *Id.* at ¶ 7.

¹⁹ Response at ¶ 20.

²⁰ *Id.* at ¶ 14.

²¹ *Id.* at ¶¶ 16, 24, Exhibit B ¶¶ 7-9.

²² *Id.* at ¶¶ 16, 22.

²³ *Id.* at Exhibit B ¶ 2.

²⁴ *Id.* at ¶ 17.

McCoy makes the legal argument that because TWC § 13.254(a-5) does not state that “service” must be provided by the CCN holder and the Property receives service from Jourdanton, therefore the Property is ineligible for a SER from the McCoy CCN.²⁵

C. Staff's Recommendation

McCoy argues that the “not receiving water or service” requirement in TWC § 13.254(a-5) refers to service from any provider, not only the CCN holder. Staff disagrees. TWC § 13.254(a-5), which authorizes the SER provision in 16 TAC § 24.113(I), is an alternative to releases and expedited releases under TWC § 13.254(a) and (a-1), respectively. When read in light of these other release provisions, it is clear that TWC § 13.254(a-5) intends for “service” to be service provided by the CCN holder. TWC § 13.254(a) allows the Commission to “revoke or amend” any CCN if the Commission finds that “the certificate holder has never provided, is no longer providing, is incapable of providing, or has failed to provide continuous and adequate service in the area, or part of the area, covered by the certificate.”²⁶ Furthermore, TWC § 13.254(a-1) allows for an expedited release from certification if the property is “not in a platted subdivision actually receiving water or sewer service . . . so that the area may receive service from another retail public utility.”

Staff recommends that the Property meets the eligibility requirements for a SER in 16 TAC § 24.113(I). The Property was not receiving water service from McCoy at the time of the filing of the Petition under TWC § 13.254(a-5), as defined by TWC § 13.002(21) and further clarified by the Commission and by the court in *Crystal Clear*. Neither informal conversations about water supply between HMSC and McCoy nor McCoy’s construction of six-inch water pipe from September 25, 2017 through September 28, 2017, which occurred after the filing of the Petition on August 29, 2017, amount to the Property “receiving service” from McCoy under 16 TAC § 24.113(I)(2)(B). Staff has reviewed HMSC’s Petition and, as supported by the attached memorandum of Jolie Mathis of the Water Utility Division, Staff recommends that the Petition be granted.

²⁵ *Id.* at ¶¶ 24-26.

²⁶ TWC § 13.254(a)(1).

Staff further notes that 16 TAC § 24.113(6) specifically states “[t]he fact that a CCN holder is a borrower under a federal loan program is not a bar to the release of a tract of land under this subsection.”

IV. CONCLUSION

For the reasons stated above, Staff respectfully recommends that the petition be granted.

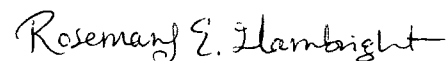
DATED: October 31, 2017

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF
TEXAS LEGAL DIVISION**

Margaret Uhlig Pemberton
Division Director

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Managing Attorney



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DOCKET NO. 47556

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on October 31, 2017, in accordance with 16 TAC § 22.74.

Rosemary E. Hambright
Rosemary E. Hambright

PUC Interoffice Memorandum

To: Rosemary Hambright, Attorney
Legal Division

Thru: Lisa Fuentes, Manager
Water Utilities Division

From: Jolie Mathis, Engineering Specialist
Water Utilities Division

Date: October 26, 2017

Subject: **Docket No. 47556:** *Petition of HMSC, LLC to Amend McCoy Water Supply Corporation's Water Certificate of Convenience and Necessity in Atascosa County by Expedited Release*

On August 29, 2017, HMSC, LLC ("Petitioner") filed a petition with the Commission for a streamlined expedited release from McCoy Water Supply Corporation's ("McCoy WSC") water Certificate of Convenience and Necessity (CCN) No. 10649 in Atascosa County, pursuant to Tex. Water Code Ann. § 13.254(a-5) (West Supp. 2016) (TWC) and 16 Tex. Admin. Code § 24.113(I) (TAC). The Petitioner asserts that the land is at least 25 acres, is not receiving water service, and is located in Atascosa County which is a qualifying county.

The Petitioner submitted an adequate map delineating the requested area for expedited release with enough detail to confirm the accurate positioning of their digital data pursuant to 16 TAC § 24.119. The map and digital data are sufficient for determining the location of the requested release area within McCoy WSC's certificated area. Mapping Staff were able to confirm the acreage of the subject property, and determined that the requested area is located within the subject property. Furthermore, the Petitioner provided a warranty deed confirming the Petitioner's ownership of the tract of land within the subject property. The area being requested for expedited release is approximately 292.16 acres, containing more than 25 contiguous acres of land. A statement was also filed with the petition that a copy of the petition was sent via certified mail to the McCoy WSC, the current holder of CCN No. 10649.

According to the petition, the property subject to this petition may have been receiving service from an entity other than the McCoy WSC, the CCN holder. Although service was not being provided at the time the petition was submitted, the CCN holder claims they constructed a 6" water line immediately adjacent to the subject tract of land after the petition was submitted. It is Staff's understanding, based upon the affidavit of Mr. Clay Morgan, Manager of HSMC, that there was no service being provided by McCoy WSC to the subject tract of land at the time the petition was submitted.

In addition, Staff recommends that there is no useless or valueless property, in accordance with 16 TAC § 24.113(n)(3). Staff further recommends that a compensation proceeding is not necessary, if the Commission determines that there is no useless or valueless property, pursuant to 16 TAC § 24.113(n)(7).

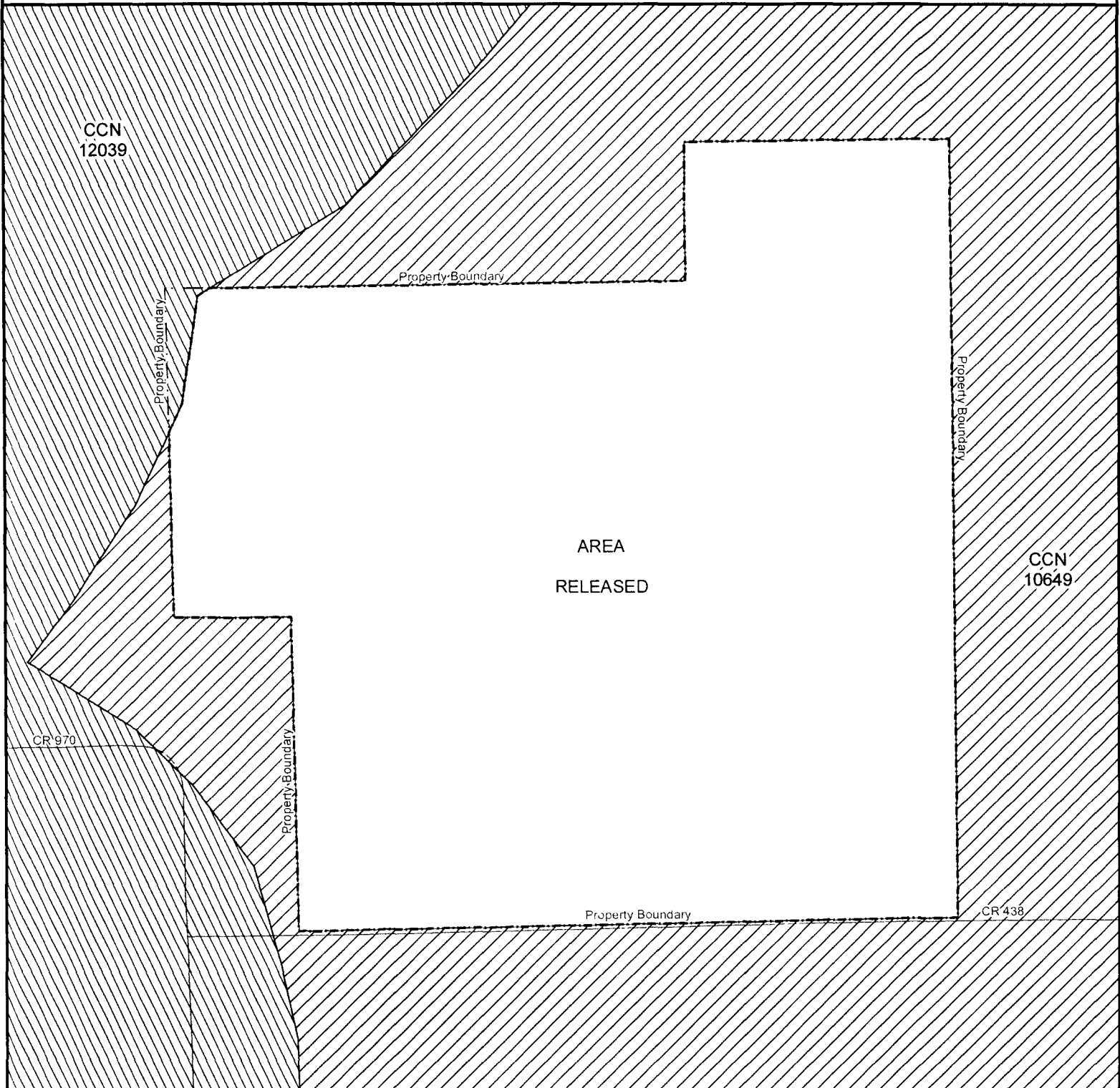
Staff reviewed McCoy's response to the petition and is convinced the requested area does meet the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(I). Therefore, Staff recommends approval of the petition. Enclosed is a final map and certificate for Commission approval.

McCoy Water Supply Corporation



Portion of Water CCN No. 10649


PUC Docket No. 47556

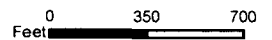
Petition by HMSC, LLC to Amend McCoy WSC's CCN by Expedited Release in Atascosa County



Water CCN

-  10649 - McCoy WSC
-  12039 - City of Jourdanton

-  Area_Released
-  Property Boundary





Public Utility Commission of Texas

By These Presents Be It Known To All That McCoy Water Supply Corporation

having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, McCoy Water Supply Corporation is entitled to this

Certificate of Convenience and Necessity No. 10649

to provide continuous and adequate water utility service to that service area or those service areas in Atascosa, Live Oak and Wilson Counties as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 47556 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the McCoy Water Supply Corporation, to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Issued at Austin, Texas, this _____ day of _____ 2017.