



Control Number: 47556



Item Number: 9

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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: 14
PUBLIC UTILITY COMMISSION
OF TEXAS
FILING CLERK

**MCCOY WATER SUPPLY CORPORATION'S
RESPONSE TO THE PUC'S DETERMINATION OF
ADMINISTRATIVE COMPLETENESS**

COMES NOW McCoy Water Supply Corporation ("McCoy WSC"), an interested party in this matter, and files this Response to the PUC's Determination of Administrative Completeness, and presents the following:

I.
STATUS OF MCCOY

1. McCoy WSC is a water supply corporation of the state of Texas organized and operating pursuant to Chapter 67 of the Texas Water Code.
2. The territory sought for expedited release under Texas Water Code § 13.254(a-5) is currently within the certificate of convenience and necessity ("CCN") of McCoy WSC. McCoy WSC is therefore a respondent pursuant to 16 T.A.C. § 24.113(l)(4) and 16 T.A.C. § 22.102(a)(2).
3. McCoy WSC has demonstrated standing and intervened based on the justiciable interest of McCoy which may be adversely affected by the outcome of the proceeding in accordance with 16 T.A.C. § 24.113(n)(2) and 16 T.A.C. § 22.103(b)(2).

4. In accordance with 16 T.A.C. § 22.101(c), the attorneys for McCoy WSC shall be the Law Offices of Louis T. Rosenberg, P.C. and the lead counsel for McCoy WSC shall be Louis T. Rosenberg.

II. PROCEDURAL HISTORY

5. On August 30, 2017, Petitioner HMSC, LLC (“HMSC”) filed a petition with the Public Utility Commission of Texas (“PUC”) to request the streamlined expedited release of 292.16 acres (“Subject Property”) from McCoy WSC’s CCN pursuant to Texas Water Code § 13.254(a-5) and 16 T.A.C. § 24.113(l).

6. On September 2, 2017, the Honorable Jeffrey J. Huhn issued Order No. 1 in this matter setting a response date for a written protest or motion to intervene.

7. Pursuant to Order No. 1, this Motion to Intervene and Written Protest is timely filed.

8. On September 29, 2017, the PUC’s Staff’s Recommendation on Administrative Completeness was filed.

9. McCoy WSC filed its Original Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Western District of Texas, San Antonio Division, on September 29, 2017. Concurrently, McCoy WSC filed its Application for Preliminary Injunction. This lawsuit has been assigned Case Number 5:17-cv-972-DAE.

10. The related request for a Temporary Restraining Order was filed on October 4, 2017. The requested Temporary Restraining Order was denied on October 5, 2017, and established a hearing date for Plaintiff’s Hearing on Preliminary Injunction for Wednesday, October 18, 2017.

11. On October 6, 2017, McCoy filed its Request to Drop Preliminary Injunction Setting, based on conference between counsel for Plaintiff and Defendant HMSC, LLC, citing that . . . “a

teleconference was held on matters that have the potential to render this [U.S. District Court] Cause moot pending negotiations and agreement between said parties.” Premised on that conference, the Plaintiff moved that Application for Preliminary Injunction, along with all associated response deadlines be stayed, and reserved Plaintiff’s right to reset said hearing. The Court, following the Columbus Holiday, on Tuesday, October 10, 2017, dropped the setting for October 18, 2017, and denied the Preliminary Injunction without prejudice to re-filing.

12. In this PUC Docket Number 47556, Order No. 2 was issued October 5, 2017, which granted McCoy WSC’s Motion to Intervene filed on September 28, 2017. The Order recognized McCoy’s Certificate of Convenience and Necessity encompassed property of the petitioner, and that as a respondent and interested party McCoy had a justiciable interest which may be adversely affected by the outcome of Docket.

13. Order No. 3 dated October 10, 2017, deemed the petition administratively complete and established a procedural schedule. In Order No. 3, the Administrative Law Judge Jeffrey J. Huhn established a deadline for McCoy WSC to file its response to the administratively complete petition as Tuesday, October 17, 2017.

III. FACTUAL FOUNDATION

14. McCoy WSC is obligated by the state of Texas to provide service to all applicants within its CCN, as defined and maintained by the PUC as CCN No. 10649. It is undisputed that the Subject Property is within the boundaries of such CCN, thus HMSC’s application for expedited decertification.

15. Before filing for expedited decertification, HMSC had not filed its request for “non-standard” service from McCoy WSC as provided by the McCoy WSC tariff and posted on its

website. Based on communication from HMSC's counsel, it is contemplated that the non-standard service application will be filed with McCoy on or about Monday, October 16, 2017.

16. Prior to HMSC's ownership, the tract received and continues to receive water service from the City of Jourdanton, Texas ("Jourdanton"). This is admitted to by HMSC in Paragraph 7 of HMSC's Petition and supported by the Affidavit of Robert Garza, McCoy WSC's Field Supervisor, attached hereto as Exhibit A and Affidavit of Rex Brown, President of Harold Brown & Sons, Inc., attached hereto as Exhibit B, in connection with their activities installing a 6" water line for McCoy WSC immediately adjacent to the HMSC property on County Road 430, Atascosa County, Texas. Said 6" water line was completed on September 28, 2017. See also **Plaintiff's Exhibit B** filed in support of McCoy WSC's Motion to Intervene and Written Protest.

17. Since December 21, 2012, McCoy WSC has been federally indebted to the United States Department of Agriculture, Rural Development. As part of such federal indebtedness, McCoy WSC has pledged its facilities, CCN territory, as well as current and future revenue therefrom, as security to the United States.

IV. LEGAL ARGUMENTS

A. INAPPLICABILITY OF 13.254(a-5)

18. HMSC has premised their Petition upon Texas Water Code § 13.254(a-5). Such code provision reads:

As an alternative to decertification under Subsection (a) and expedited release under Subsection (a-1), the owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for expedited release of the area from a certificate of public convenience and necessity and is entitled to that release if the landowner's property is located in a county with a population of at least one million, a county adjacent to a county with a population of at least one million, or a county with a

population of more than 200,000 and less than 220,000 that does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more, and not in a county that has a population of more than 45,500 and less than 47,500.

19. McCoy WSC does not contest that the Subject Property consists of land in excess of 25 acres, being 292.16 acres, nor that the population brackets apply, as Bexar County, a neighboring county, has a population in excess of one million.

20. McCoy WSC contends that the tract of land is in fact “receiving water or sewer service,” pursuant to the definitions contained within Chapter 13 of the Texas Water Code. The definition set forth in Texas Water Code § 13.002(21) for “service” is:

"Service" means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

21. The definition of service as established by the Texas Legislature sets forth that “any act performed”, anything “furnished or supplied”, and “any facilities and lines committed” [whether actually in use or not as indicated by the “or used”] constitute service. As a result of installing lines and meter boxes on the Subject Property, Jourdanton has provided service to the tract.

22. Further, as attested to by the Affidavits of Installer, Rex Brown, President of Harold Brown & Sons, Inc., and Robert Garza, Field Supervisor for McCoy WSC, McCoy WSC has installed a 6” water line on County Road 430 to serve the property immediately adjacent thereto, which includes the property described as the HMSC property sought for accelerated decertification. McCoy WSC is fully capable of providing and making service available per its legal requirements of Chapter 13, Texas Water Code, its CCN and federal law obligations to

provide retail public water supply as more fully required and set out in the Loan Resolution Security Agreement (**Plaintiff's Exhibit 3** attached to its Application for Preliminary Injunction filed in the U.S. District Court Case No. 5:17-972-DAE).

23. As related to this PUC proceeding, the Third (Austin) Court of Appeals has issued the most on-point determination on the matter of providing or making service available. In that Court's ruling in *Texas General Land Office v. Crystal Clear Water Supply Corporation*, the Court stated:

Rather, it is important to consider whether the facilities and lines are "committed" to the tract seeking expedited release or "used" to provide water to that tract. **Certainly an active water tap on the Decertified Property 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.**

Tex. Gen. Land Office v. Crystal Clear Water Supply Corp., 449 S.W.3d 130, 140 (Tex. App. – Austin, 2014, pet. denied).

24. The parameters of Texas Water Code § 13.254(a-5) do not stipulate that service must be provided by the CCN holder. Here, the City of Jourdanton is providing water to the HMSC tract. Additionally, McCoy WSC has provided significant capacity for the Petitioner's prospective build-out of single family residences and the matter of commitment of facilities or lines to such area including a dedicated water line installed to serve the property cannot be overlooked in reviewing the Austin Court of Appeals decision.

25. The Texas Legislature in enacting the provision left the service requirements as broad and all encompassing; if some sort of service is provided to the tract, of whatever nature or character, whether by the rightful provider or by any other entity, then the tract is not eligible for

expedited decertification under the narrow confines of this statute. This is further clarified in 24 T.A.C. § 113(1)(2)(B) where the Commission has set forth the requirement that, “the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN.” This cited rule is inapplicable in as much as the current CCN holder has in place a 6” water line fully capable of serving the property and is not limited to the 2” water line that the City of Jourdanton has installed inside the Protestant’s CCN and without its permission.

26. Under these facts, and analysis, HMSC is not eligible for streamlined expedited decertification. Furthermore, as described above in the context of the U.S. District Court proceeding, the parties have requested that the U.S. District Court Preliminary Injunction be delayed to allow an opportunity for matters to be reviewed for settlement.

B. PREEMPTION BY FEDERAL LAW

27. In addition to the inapplicability of the state statute, the expedited decertification is against federal law as codified in 7 U.S.C. § 1926(b). This statute reads:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan...

This statute has been more fully pled, briefed and articulated in the filing by McCoy WSC in the Western District as above described.

28. In decertifying the Subject Property from McCoy WSC’s CCN, there would be a curtailment of service as set forth in multiple precedential federal decisions. See *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996) and *Green Valley Special Utility Dist. v. City of Cibolo*, 866 F.3d 339 (5th Cir. Tex. Aug. 2, 2017).

29. The Texas Legislature attempted to legislate around the matter by adopting Texas Water Code § 13.254(a-6) which reads, “The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program.” It is McCoy WSC’s contention that such a statute is a patent violation of the Supremacy Clause of the United States Constitution, and has filed in the Western District of Texas as above described.

30. Accordingly, McCoy WSC requests that HMSC’s application for streamlined expedited release be immediately dismissed for prima facie failure to meet the requirements of Texas Water Code § 13.254(a-5) and (a-6) in as much as the owner of the tract of land with the required 25 acres is receiving water service from two (2) purveyors and does not meet the statutory requirement under state law to petition for expedited release.

V.
PRAYER

31. McCoy WSC further requests that PUC deny HMSC’s Petition due to failure to satisfy the statutory requirements of Texas Water Code § 13.254(a-5).

32. In the alternative, McCoy WSC requests that PUC deny HMSC’s Petition due to federal preemption of Texas Water Code § 13.254(a-5)-(a-6).

33. McCoy WSC be awarded all relief to which it is lawfully entitled.

Respectfully submitted,

LAW OFFICES OF LOUIS T. ROSENBERG, P.C.

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Floresville, Texas 78114

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By:



Louis T. Rosenberg

Texas Bar No. 17271300

Christopher C. Hugg

Texas Bar No. 24074450

Nohl Bryant

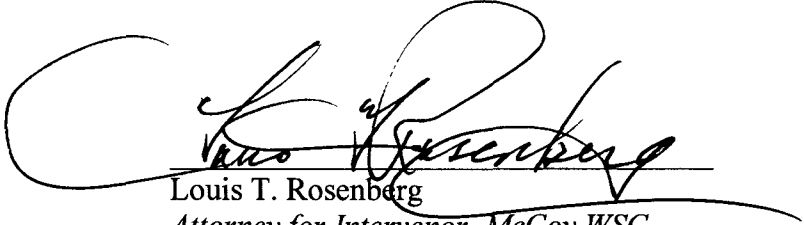
Texas Bar No. 24050346

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent on this 16th day of October, 2017, to the parties listed below in the manner described adjacent to their respective names, all in accordance with Rule 21 and/or 21a of the Texas Rules of Civil Procedure.

Jennifer B. Windscheffel, Esq.
Rosenthal Pauerstein Sandoloski Agather LLP
755 East Mulberry, Suite 200
San Antonio, Texas 78212
Phone: (210) 244-8869
Fax: (210) 244-8969
Attorney for Petitioner

Via First Class Mail



Louis T. Rosenberg

Attorney for Intervenor, McCoy WSC

DOCKET NO. 47556

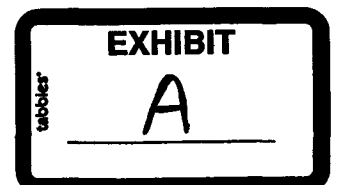
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**AFFIDAVIT OF ROBERT GARZA, FIELD SUPERVISOR,
MCCOY WATER SUPPLY CORPORATION**

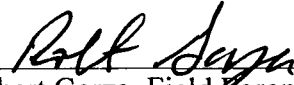
Before me, the undersigned authority, personally appeared ROBERT GARZA, who, being duly sworn by me, deposed as follows:

My name is ROBERT GARZA, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

- (1) I am the Field Supervisor for McCoy Water Supply Corporation. In my capacity as Field Supervisor, I supervised a McCoy WSC installation crew on Friday, September 22, 2017, and Monday, September 25, 2017, extending 2,000 linear feet of 6" SDR 21, Class 200, water pipe on County Road 430. This extension commenced from the existing location westerly for 2,000 linear feet and was further extended westerly by Rex Brown, President of Harold Brown & Sons, Inc., as described below.
- (2) As Field Supervisor, I further worked with Rex Brown, President of Harold Brown & Sons, Inc., in connection with that organization's extension of an additional 6,060 linear feet of 6" SDR 21, Class 200, water pipe during the period of Monday, September 25 through Thursday, September 28, 2017. This entire 8,060 linear feet waterline installation extended McCoy's waterline westerly from its existing location on County Road 430 to the intersection of County Road 430 and County Road 438;
- (3) The 6" pipeline installation by McCoy Water Supply Corporation is located on the north side of County Road 430 to avoid conflict with the City of Jourdanton's existing 2" line that had previously been installed on the south side of County Road 430. However, Jourdanton had installed its water meter boxes on the north side of County Road 430. As a result, McCoy's 6" waterline was installed between the County paved roadway and the existing Jourdanton meter boxes;



- (4) Based on investigation of the right-of-way, I found four (4) water meter boxes in the vicinity of the location of the HMSC tract at 2155 CR 430. The located four (4) water meter boxes were supplied water by incoming waterlines from the south side of County Road 430. Three (3) of the water meter boxes were not in operation. The fourth (4th) water meter box was in service to the HMSC tract based on visual inspection and information provided by Foreman, Drew Hudson. *See attached business card;*
- (5) To confirm water delivery to the HMSC site, I photographed the top of the meter for identification, with the face of the water meter open. Also, the position of the valve at the box confirmed the in-service use of the fourth (4th) meter;
- (6) Attached to this Affidavit are photographs of September 28, 2017, identifying the cover and face of the connected meter. I took these photographs with my cell phone and the photos accurately depict the identification (#8378879) and the connected Jourdanton water meter;
- (7) I returned to the HMSC site on Monday, October 16, 2017, and confirmed that the meter was still installed.

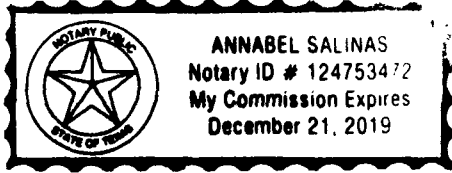


Robert Garza, Field Foreman
McCoy Water Supply Corporation
2125 FM 541
McCoy, Texas 78113
Affiant

Attachments: Attachment 1 – Business Card of Drew Hudson, Foreman for HMSC, LLC.

Attachment 2 – Two (2) photographs of the City of Jourdanton’s connected water meter reflecting Identification Number 8378879 and September 28, 2017, meter reading.

SWORN TO AND SUBSCRIBED before me on the 16th day of October, 2017.



Annabel Salinas

Notary Public, State of Texas

Notary's Printed Name:

Annabel Salinas

My Commission Expires: December 21, 2019



TGT Water Sales

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Water • Hay • Land • Operator
Man Camp

Drew Hudson

830.399.1056

Physical Address

2155 CR 430

Pleasanton, TX 78064

Billing Address

P.O. Box 339

Pleasanton, TX 78064



Exhibit A, Attachment 2
Page 1 of 2



Exhibit A, Attachment 2
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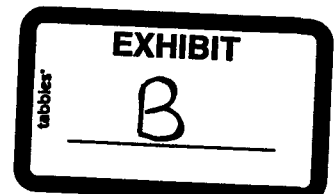
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**AFFIDAVIT OF REX BROWN, PRESIDENT
OF HAROLD BROWN & SONS, INC.**

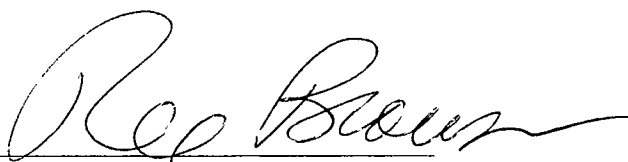
Before me, the undersigned authority, personally appeared REX BROWN, who, being duly sworn by me, deposed as follows:

My name is REX BROWN, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

- (1) I am the President of Harold Brown & Sons, Inc.
- (2) Harold Brown & Sons, Inc., installed 6,060 feet of 6" SDR 21, Class 200 water pipe on the north side of County Road 430 during the time period between Monday, September 25, and Thursday, September 28, 2017.
- (3) The 6" pipeline installation connected from McCoy's existing waterline on County Road 430 westerly to County Road 438.
- (4) While preparing for the waterline installation and investigating for the installation and to avoid cutting any utilities on County Road 430, I was approached by the HMSC, LLC's Foreman, Drew Hudson, who asked if I needed to park equipment off the road on the property he managed and if we needed any water for our personnel. As a result of my investigation, we located three (3) inactive water meters, a valve box and one (1) active water meter on the north side of County Right-of-Way on County Road 430.
- (5) The McCoy 6" water line was installed between County Road 430 and the existing blue plastic meter boxes so the installer, Harold Brown & Sons, Inc., had to exercise care to avoid cutting the service lines that connected the meters and box under County Road 430 to the Jourdanton 2" supply line.



- (6) Mr. Hudson, provided a gravel area for equipment parking. We used that site to store equipment for that four (4) day period.
- (7) I asked Mr. Hudson if he used water from the active Jourdanton water meter. He replied that the HMSC facility did use City of Jourdanton water on the property immediately north of County Road 430.
- (8) The HMSC Foreman, Drew Hudson, showed me where the active water meter was located so that I would be aware of location in connection with our pipeline installation for McCoy WSC.
- (9) I confirmed that one of the water meters on County Road 430 was an active water meter on Wednesday, the 27th of September by observing the numbers move to reflect water flow.



Rex Brown, President
Harold Brown & Sons, Inc.
P.O. Box 1000
2203 Rocky Mountain Drive
Lampasas, TX 76550
Affiant

SWORN TO AND SUBSCRIBED before me on the 14th day of October, 2017.



Notary Public, State of Texas
Notary's Printed Name:

Angelica Amezcua

My Commission Expires: March 03, 2019

