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PUC DOCKET NO. 49904

PETITION BY REPUBLIC BUSINESS §
CENTER, LLC FOR EXPEDITED §
RELEASE FROM WATER CCN NO. §
13203 AND SEWER CCN NO. 21065 §
HELD BY AQUA TEXAS INC. §

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BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

**REPUBLIC BUSINESS CENTER LLC'S REPLY TO AQUA TEXAS, INC.'S
SUPPLEMENTAL RESPONSE TO PETITION FOR EXPEDITED RELEASE**

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, Republic Business Center LLC (Republic), and files this Reply to Aqua Texas, Inc.'s Supplemental Response to Republic's Petition for expedited release from Aqua Texas Inc.'s (Aqua) water certificate of convenience and necessity (CCN) No. 13202 and sewer CCN No. 21065 pursuant to Texas Water Code Section 13.254 (a-5) and Rule 24.245 of the Public Utility Commission's (Commission) Rules found at 16 Texas Administrative Code § 24.245 and would respectfully show the following:

I. APPLICABLE REGULATIONS

Republic filed its petition for streamlined expedited release on August 27, 2019¹ pursuant to Texas Water Code section 13.254(a-5). The section was amended and reassigned to Water Code section 13.2541 by the 86th Texas Legislature through S.B. 2272², effective September 1, 2019. S.B. 2272 states that a proceeding affecting a certificate of public convenience and necessity that commenced before the effective date of the act is governed by the law in effect on the date that proceeding is commenced, and that law is continued in effect for that purpose. Accordingly, this application is governed by the law in effect at the time the petition was filed on August 27, 2019,

¹ Republic filed an amended petition on September 18, 2019 at the Commission's request to correct a non-substantive typographical error.

² Act of May 25, 2019, 86th Leg., R.S.

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Texas Water Code section 13.254(a-5), and so Republic will cite and apply the applicable law, section 13.254(a-5), throughout this Reply.

II. REPLY TO AQUA'S RESPONSE

A. The subject property is not receiving water service from Aqua.

Contrary to Aqua's contention, Republic's property is not receiving water or sewer service from Aqua. Aqua relies on the Third Court of Appeals' *Crystal Clear*³ decision interpreting Texas Water Code Sec. 13.254(a-5), but improperly applies the court's analysis to the present situation. The *Crystal Clear* court determined, and Aqua correctly repeated, that the term "service" under the Water Code is broad and encompasses an array of activities in which a utility may engage. *Crystal Clear*, 449 S.W.3d at 137. However, section 13.254(a-5) limits "service" because it applies specifically to situations where "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." *See* Tex. Water Code § 13.254(a-5) (emphasis added). The proper question is not whether Aqua is providing service to customers within its CCN generally, but rather whether the specific property in question is receiving water and sewer service. *Crystal Clear*, 449 S.W.3d at 137.

The court opined that "receiving water service" does not necessarily mean "actual present delivery of water the tract," but neither does the "mere existence of water lines or facilities on or near a tract" suffice to qualify as receiving water service. *Id.* at 138. Rather, the determination is a fact based inquiry dependent upon whether the 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*" pursuant to its obligation as a CCN holder. *Id.* (emphasis in original). The key is an act specific to the tract of land in question, and facilities nearby or even on the tract will not suffice if they are in place to serve another tract rather than the property seeking decertification. *Id.* To

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

illustrate, the court states that an active water tap on the property or lines committed to the property “such as a dedicated water line that has been installed to serve the property” but it not yet operative may suffice as “receiving water service”; conversely, simply securing a water supply contract or having lines or facilities in place near, or even on, a tract may not suffice. *Id.*

Aqua falls into the latter category for the Republic property in question. Aqua is not providing actual water service or wastewater removal service to the property, nor has it installed lines dedicated to the specific tract of land. Rather, Aqua argues – directly contrary to the court opinion it cites as support – that it because it provides service to “nearby properties, [and] has the capacity to do the same for the Property” in question, Republic receives water and wastewater service.⁴

Aqua exaggerates the realities of the standard it must meet in order for Republic to be “receiving service” pursuant to section 13.254(a-5). Aqua would not likely have to deliver actual water to a tract before it is developed; Aqua would, however, have to do more to commit service to Republic’s property than it has done in this case – which is simply serve nearby properties and allege that it possesses the ability to meet the necessary capacity. Regardless of the practical realities of the water and wastewater service business to which Aqua contends the Commission should be sympathetic, the statute allows for streamlined expedited release from a CCN if a property meets certain qualifications. As Republic’s property is not receiving service from Aqua, the property clearly qualifies for expedited release pursuant to the plain language of the statute, the courts’ interpretations of the statute, and Commission’s rules as applied to this situation.

B. Aqua is not entitled to compensation if the property is removed from its CCNs.

As the current CCN holder, Aqua bears the burden to prove what property is useless or valueless property. 16 T.A.C. § 24.245(n)(5). Aqua has failed to prove any of its property will be

⁴ See Aqua’s Response Brief, page 4.

rendered useless or valueless. Accordingly, Aqua is not entitled to compensation under Water Code section 13.254(a-5) (or the inapplicable newly amended section 13.2541) if the subject property is removed from its CCNs.

Aqua argues that the Commission should apply section 13.2541 rather than former section 13.254(a-5) based on the language in the Commission's rule in 16 Tex. Admin. Code § 24.8, because the rule states that an application is not considered "filed" until the Commission makes a determination that it is administratively complete. Aqua's reliance is misplaced. Rule 24.8 speaks to whether an application is "filed" for purposes of the Commission's deadlines under (a-6), which states that the "commission shall grant the petition not later than the 60th day after the date the landowner files the petition." *See* former § 13.254(a-6), recodified as § 13.2541(c). Rule 24.8 is not controlling regarding the effective date of a statute. The legislature directly spoke to which law applies through S.B. 2272, which clearly states that for proceedings "commenced" before September 1, 2019, section 13.254(a-5) is continued in effect. The proceeding was commenced when Republic filed its petition on August 27, 2019⁵, and former section 13.254(a-5) applies.

The decertification of the property would not render Aqua's property useless or valueless because Aqua does not provide service to any of the property in question. Aqua has not shown that it has committed facilities or constructed pipelines to serve the subject property, nor has it shown that it has designs and plans or permits dedicated to specifically servicing the subject property. Its facilities will continue to be useful and valuable in the manner in which they are currently put to use and maintained regardless of the decertification; likewise, Aqua will likely seek and maintain its permits regardless of the decertification. Because Aqua is not servicing the subject property

⁵ Again, Republic filed an amended petition on September 18, 2019 at the Commission's request to correct a non-substantive typographical error. The petition did not substantively change from when it was commenced on August 27, 2019.

nor committed anything specifically to the subject property, none of Aqua's existing property could be impacted.

Aqua further argues that decertification would deprive it of the right to provide service and "render that right useless or valueless with respect to the entire Property."⁶ Importantly, Aqua's CCNs cover only a small area of Republic's approximately 156 acres. Aqua does not have the right to serve the majority of the property. Regardless, a CCN is not a vested property right, and despite arguing that it is, Aqua fails to cite any authority (other than a declaration of its manager) supporting its claim. *Creedmoor-Maha Water Supply Corp. v. Texas Com'n on Environmental Quality*, 307 S.W.3d 505, 525 (Tex. App.—Austin 2010, no pet.).

Alternatively, if the Commission finds that the new statute applies, Aqua is not entitled to compensation for the same reasons. The statute contemplates just and adequate compensation for a decertified retail public utility based on factors all predicated on the fact that the public utility services the decertified area; here, however, Aqua does not provide service to the area in question and has not demonstrated it has dedicated property or resources to serve the area. *See* Tex. Water Code § 13.254(g). Again, the area being decertified is relatively small compared to Republic's property and Aqua's remaining CCNs. Accordingly, the Commission should not order compensation to Aqua under the former or newly enacted statute.

III. CONCLUSION AND PRAYER

Texas Water Code Section 13.254(a-5) entitles Republic to expedited release of the subject Property. The Property is greater than 25 acres, is not receiving water or sewer service from Aqua or any other provider, and is entirely within Harris County. Republic therefore respectfully requests that the Commission find that Aqua is not providing service to the subject property, and that no property of Aqua's has been rendered useless or valueless and thus it is not entitled to

⁶ *See* Aqua's Response Brief, page 7.

compensation, and requests that the Commission grant Republic's Amended Petition and issue an order under the authority of Section 13.254(a-5) releasing all portions of the Property that is within the boundaries of water CCN No. 13203 and sewer CCN No. 21065.

Respectfully submitted,

Emily W. Rogers
State Bar No. 24002863
erogers@bickerstaff.com

Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

BY: Emily W. Rogers
Emily W. Rogers

CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the 18th day of November, 2019, a true and correct copy of the above and foregoing document was forwarded via hand delivery, facsimile, U.S. mail or electronic mail to all parties of record and a true and correct copy of the above and foregoing document has been mailed by certified mail to Aqua Texas Inc., 1106 Clayton Ln., Suite 400W, Austin, TX., 78723-2476.

Emily W. Rogers
Emily W. Rogers