



Control Number: 50787



Item Number: 38

Addendum StartPage: 0

**DOCKET NO. 50787**

**PETITION OF TYLER OAK CREEK §  
DEVELOPMENT, LLC TO AMEND §  
LIBERTY UTILITIES (TALL §  
TIMBERS SEWER) CORP.'S §  
CERTIFICATE OF CONVENIENCE §  
AND NECESSITY IN SMITH COUNTY §  
BY EXPEDITED RELEASE §**

**BEFORE THE PUBLIC UTILITY  
COMMISSION OF TEXAS**

**LIBERTY TALL TIMBERS' RESPONSE TO ORDER NO. 7 AND COMMISSION  
STAFF'S MOTION FOR EXTENSION AND TO REQUIRE PAYMENT FOR THIRD  
APPRAISER REPORT**

Liberty Utilities (Tall Timbers Sewer) Corp. (Liberty Tall Timbers or Intervenor) files this Response to Commission Staff's Motion for Extension and to Require Payment for Third Appraiser Report (Motion) in this streamlined expedited release (SER) matter.<sup>1</sup> Liberty Tall Timbers received the Motion on March 18, 2021. Since then, on March 23, 2021, the Honorable Administrative Law Judge issued Order No. 7 granting Staff's extension request without receiving this response.<sup>2</sup> This pleading is timely filed,<sup>3</sup> and in response to both, Liberty Tall Timbers shows as follows.

**I. RESPONSE TO ORDER NO. 7**

Order No. 7 grants Commission Staff's request for an extension, but it does not address Commission Staff's contentions regarding payment of a Commission appointed appraiser in this matter or Intervenor's previous objections. Intervenor does not object to the extension requested, but does object to the premise for granting the request to the extent it is based on (1) Commission Staff's contention that the Commission-appointed appraiser is needed, (2) Commission Staff's characterization of Intervenor's position, and (3) the baseless allegations that Intervenor's position has somehow made Commission Staff unable to allow the Commission-appointed appraiser to

<sup>1</sup> Commission Staff's Motion for Extension and to Require Payment for Third Appraiser's Report (Mar. 18, 2021).

<sup>2</sup> Order No. 7 (Mar. 23, 2021).

<sup>3</sup> 16 TAC § 22.78(a).

37

begin his work or is simply to effect delay as opposed to justice.<sup>4</sup> Intervenor will address Commission Staff's arguments below.

## **II. RESPONSE TO COMMISSION STAFF'S MOTION TO REQUIRE PAYMENT FOR THIRD APPRAISER REPORT**

Commission Staff requests the ALJ "order Liberty Utilities to sign the attached engagement letter and agree to pay half the cost for the third appraisal" in this case.<sup>5</sup> While there is in fact no attachment to Commission Staff's pleading, Intervenor did receive a proposed contract for the Commission-appointed appraiser from Commission Staff in a March 15, 2021 e-mail and has declined to sign it. Commission Staff's motion requesting an order for Liberty Tall Timbers to sign that engagement letter seems to be dismissing important facts and law applicable to this case.

Tyler Oak Creek, LLC (Petitioner) filed a "compensation determination" on February 24, 2021, not an "appraisal" performed by a professional licensed "appraiser" trained in the standards ordinarily used by appraisers, such as the Uniform Standards of Professional Appraisal Practice (USPAP). Petitioner's compensation determination is simply not a valid appraisal under Texas Water Code § 13.2541(i) and Commission rules. Significantly, Petitioner does not contend that its compensation determination is an "appraisal" prepared by a licensed "appraiser" in either its response or the report itself, and Petitioner acknowledges the Uniform Standards of Professional Appraisal Practice (USPAP) were not applied.<sup>6</sup> Consequently, Intervenor's appraisal is *uncontested*, there is no need for a Commission appraisal, and "the commission will base the amount of compensation to be paid on the appraisal provided by the CCN holder."<sup>7</sup>

---

<sup>4</sup> Order No. 7 (Mar. 23, 2021); Commission Staff's Motion for Extension and to Require Payment for Third Appraiser's Report (Mar. 18, 2021).

<sup>5</sup> Commission Staff's Motion for Extension and to Require Payment for Third Appraiser's Report at 2 (Mar. 18, 2021).

<sup>6</sup> Tyler Oak Creek Development, LLC Response and Objections at 1-2 (Mar. 9, 2021).

<sup>7</sup> 16 TAC § 24.245(i)(4).

Intervenor discussed these issues in its objections to Petitioner's compensation determination filing and in Intervenor's reply and response to Petitioner's filing regarding same.<sup>8</sup> Intervenor also discussed the fact that it would be unfair for Intervenor to have to pay for the Commission's appointed appraiser in this situation because Petitioner insisted upon using a conflicted appraiser which prevented agreement.<sup>9</sup> There is not yet a ruling on any of Intervenor's objections.

If Intervenor is correct, there is no need for the Commission to hire an appraiser at all here. If Petitioner's compensation determination is allowed, Petitioner and not Intervenor should be responsible for payment of the Commission's appointed appraiser because of the conflict issue. But rather than addressing or taking a position on the merits of Intervenor's arguments, Commission Staff wrongfully alleges Intervenor has made its arguments "to circumvent evaluation by an independent appraiser" and as "simply an attempt to delay the process."<sup>10</sup> That is false.

Liberty Tall Timbers' arguments are made in good faith and so that justice may be done, not for delay. It would be unfair for the Commission to even consider an improperly filed compensation determination as an appraisal or assess half the cost of a Commission appraisal to Intervenor under the circumstances. Moreover, the Texas Water Code and Commission speak in terms of requiring *payment* of cost for the Commission-appointed appraiser, not requiring *engagement* with the Commission's appointed appraiser.<sup>11</sup> Liberty Tall Timbers' has anticipated that apportionment of costs for that appraisal, if any, would take place at the end of this case, not

---

<sup>8</sup> Liberty Tall Timbers' Objections to and Motion to Strike Compensation Determination filed by Tyler Oak Creek Development, LLC (Mar. 3, 2021); Liberty Tall Timbers' Reply on Objections to and Motion to Strike Compensation Determination filed by Tyler Oak Creek Development, LLC and Response to Objections to Liberty Tall Timbers' Appraisal (Mar. 16, 2021).

<sup>9</sup> *Id.*

<sup>10</sup> Commission Staff's Motion for Extension and to Require Payment for Third Appraiser's Report at 2-3 (Mar. 18, 2021).

<sup>11</sup> See TWC § 13.2541(i) (stating, "The petitioner and the certificate holder shall each pay half the cost of the third appraisal."); 16 TAC § 24.245(i)(2)(B) (stating, "The former CCN holder and landowner must each pay half the cost of the commission-appointed appraisal directly to the commission-appointed appraiser."). There is no requirement for either the Petitioner or former CCN holder to contract with or engage with a commission-appointed appraiser.

in the middle. Even if the Petitioner and/or Intervenor are ultimately ordered to pay that appraisal's cost, the Commission, and not the parties, would be the client for purposes of that appraisal determining a just and adequate compensation amount to be awarded by the Commission.<sup>12</sup> Intervenor is not aware of authority for the Commission to force a person to enter a contract they do not wish to enter and such an order could be construed as running afoul of the Texas Constitution.<sup>13</sup> Regardless, that authority is plainly absent from Texas Water Code, Chapter 13, and the Commission rules applicable to SER decertification compensation.

Here, it seems Commission Staff is trying to get the Intervenor and Petitioner to pay the cost of the Commission's appraisal up front, replace the Commission as the client, and enter a contract neither has initiated, and that one opposes. That is contrary to applicable law. Whether Commission Staff chooses to move forward with an appraisal despite Intervenor's pending objections is not within Intervenor's control and cannot rightly be viewed as a delay tactic or attempt to circumvent the compensation process. To the contrary, Intervenor is trying to ensure this process which Intervenor did not initiate is properly and justly followed. At this point, Intervenor submits all that should happen is a Commission decision awarding Intervenor a just and adequate compensation amount based on Intervenor's appraisal and nothing else.

### **III. CONCLUSION**

Intervenor Liberty Utilities (Tall Timbers Sewer) Corp. respectfully requests that the Commission strike the compensation determination filing by Tyler Oak Creek Development, LLC, find that Liberty Tall Timbers is entitled to just and adequate compensation for Petitioner's streamlined expedited release from CCN No. 20694 in an amount based on the appraisal Liberty Tall Timbers filed in this docket, overrule Petitioner's objections to Intervenor's appraisal as

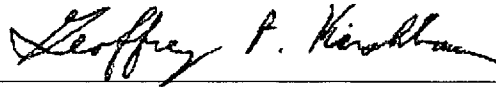
---

<sup>12</sup> See TWC § 13.2541(i); 16 TAC § 24.245(i)(3).

<sup>13</sup> See TEX. CONST. art. I.

untimely and without merit, and deny Commission Staff's Motion to Require Payment by Liberty Utilities and Tall Timbers, including the request for the ALJ to "order Liberty Utilities to sign the attached engagement letter and agree to pay half the costs for the third appraisal" (which was not attached to the motion). Further, Liberty Tall Timbers requests all other and further relief to which it may be justly entitled.

Respectfully submitted,

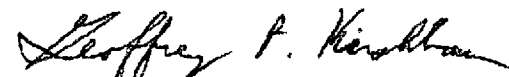
By: 

Geoffrey P. Kirshbaum  
State Bar No. 24029665  
TERRILL & WALDROP  
810 W. 10<sup>th</sup> Street  
Austin, Texas 78701  
(512) 474-9100  
(512) 474-9888 (fax)  
gkirshbaum@terrellwaldrop.com

**ATTORNEY FOR LIBERTY UTILITIES (TALL  
TIMBERS SEWER) CORP.**

#### **CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on March 25, 2021, in accordance with the Orders Suspending Rules filed in Project No. 50664.

  
Geoffrey P. Kirshbaum