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**Received - 2021-11-10 02:00:51 PM**  
**Control Number - 51091**  
**ItemNumber - 75**

**SOAH DOCKET NO. 473-21-0246.WS  
PUC DOCKET NO. 51091**

<b>COMPLAINT OF CERTAIN MEMBERS OF RIO ANCHO HOMEOWNERS ASSOCIATION AGAINST AQUA TEXAS, INC.</b>	§ § § § §	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
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**COMMISSION STAFF'S REPLY BRIEF**

Dated: November 10, 2021

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
LEGAL DIVISION**

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**COMMISSION STAFF’S REPLY BRIEF**

**I. INTRODUCTION**

Staff (Staff) of the Public Utility Commission (Commission) reaffirms its position that the Rio Ancho Homeowners Association (Rio Ancho HOA) and 22 individuals (collectively, Complainants) have demonstrated that Aqua Texas, Inc (Aqua) is in violation of 16 Texas Administrative Code (TAC) § 24.205 for three reasons. First, Aqua failed to provide continuous and adequate service to its system in the Rio Ancho subdivision. Second, Aqua failed to provide the additional capacity necessary to meet the local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock beyond the minimum standards for the water quantity requirements established by the Texas Commission on Environmental Quality (TCEQ). Finally, Aqua improperly implemented water-usage restrictions in lieu of providing facilities which meet the reasonable local demand characteristics during normal use periods.

Staff acknowledges Aqua’s contention that the Commission has not defined the phrase “reasonable local demand characteristics” within 16 TAC § 24.205. Nevertheless, Staff maintains its position that reasonableness is determined by a holistic review of the specific facts and circumstances particular to each individual docket and that the Commission has the sole authority to determine whether water usage amounts are reasonable. Likewise, Staff reaffirms its position that the Complainants’ water usage amounts, on the whole, are reasonable and that Aqua is implementing its drought contingency plan in lieu of expanding its capacity to provide continuous and adequate service to the Rio Ancho Subdivision.

## II. COMMISSION STAFF'S REPLY TO AQUA'S INITIAL BRIEF

### A. Aqua's Service is not continuous and adequate for all reasonable customers uses (Preliminary Order Issue No. 5)

Aqua's Initial Brief attempts to dismiss the very crux of the complaint. Aqua admits that not all the low-pressure events of the complaint period are the result of excessive system demand.<sup>1</sup> Aqua then focuses its attention on only those low-pressure events that it says result from excessive demand.<sup>2</sup> Aqua maintains that irrigation systems on the customer side of system meters are not [Aqua's] responsibility.<sup>3</sup> It is commendable that Aqua added some facilities to address initial customer complaints. But, if those improvements still fall short of providing Rio Ancho customers a continuous and adequate supply of water for all reasonable customer uses, Aqua remains out of compliance with 16 TAC § 24.205.

In other words, any improvements should be considered sufficient *only if* the underlying service issues are resolved such that Aqua can be reasonably said to provide continuous and adequate service as 16 TAC § 24.205 requires.<sup>4</sup> Complainants provided uncontroverted evidence of persistent water service issues. Aqua's admission that its system has any kind or number of service quality issues to the extent experienced by the Complainants is *prima facie* evidence that Aqua has failed to provide a continuous and adequate supply of water for all reasonable customer uses. It is Aqua's responsibility to demonstrate an alternative explanation for its service issues. That Aqua knows the reasonable demands of the customers in the Rio Ancho system and knows that the Rio Ancho development remains incomplete, more than suggests that Aqua is aware the Rio Ancho system is incapable of providing continuous and adequate service. Staff reaffirms its position that Aqua's water supply to the Rio Ancho Subdivision is not continuous and adequate.

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<sup>1</sup> Aqua Texas, Inc.'s Initial Post-Hearing Brief at 10 (Oct. 15, 2021) (Aqua's Brief).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 16 TAC § 24.205.

**B. Aqua has no authority to define the term “reasonable” within Commission rules (Preliminary Order Issue No. 5)**

In its Initial Brief, Aqua maintains that a determination of whether local demand characteristics are reasonable requires consideration of the nature of the system the TCEQ approved, local aquifer characteristics, climate, groundwater conservation district usage restrictions, and actual lawn watering needs, among other factors.<sup>5</sup> Aqua then asserts that reasonable local demand is not the same as actual local demand.<sup>6</sup> Aqua cites no authority that clearly defines “reasonable local demand characteristics.” Similarly, Aqua cites no Commission rule that distinguishes between *reasonable* and *actual* local demand characteristics. In the same manner, Aqua cites no explicit factors within 16 TAC § 24.205 that the Commission is obligated to consider in its determination of reasonableness.

More importantly, in their rebuttal testimonies, Aqua witnesses William Peña and Scot W. Foltz confirm Staff’s position on this issue: the phrase “reasonable local demand characteristics” is undefined.<sup>7</sup> Aqua President Robert Laughman himself acknowledged during cross-examination that Aqua is not the authority that determines which factors are relevant to the interpretation of this phrase.<sup>8</sup> Only the Commission has the authority to determine which factors it will rely upon in deciding whether local demand characteristics are reasonable. Nevertheless, for Aqua to assert that not only are Rio Ancho customers’ usage amounts unreasonable, but also that they are unreasonable because only Aqua’s interpretation of *reasonable* is worthy of consideration under Commission rules, is a farfetched attempt to usurp the Commission’s authority. Contrary to Aqua’s implication in its Initial Brief, Aqua has no authority to determine which analysis is applicable under the law. That analysis belongs to the Commission and to the Commission alone.

Moreover, Aqua misconstrues Staff’s statements regarding what Staff believes to be reasonable usage. Staff does not believe that usage amounts would *always* be reasonable if customers believe that is what is necessary to maintain one’s lawn in accordance with deed

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<sup>5</sup> Aqua’s Brief at 11.

<sup>6</sup> *Id.*

<sup>7</sup> Prefiled Rebuttal Testimony of William Peña, Ex. AT-31 at 4:8; Prefiled Rebuttal Testimony of Scot W. Foltz, Ex. AT-29 at 5:20-6:2; Ex. AT-31 at 7:9-11.

<sup>8</sup> Tr. at 129-130 (Laughman Cross) (Sep. 7, 2021).

restrictions.<sup>9</sup> Staff simply offered that lawn maintenance in accordance with deed restrictions is an example of a generally reasonable use and concluded that, *in this particular case, with these particular facts*, that the Rio Ancho customers' amount of water usage, on the whole, is reasonable.<sup>10</sup> Once more, there is no substantive reason to accept Aqua's bald assertion that it alone among the parties has the correct interpretation of the term "reasonable" within 16 TAC § 24.205. Aqua's analysis of the phrase "reasonable," though fastidiously detailed, is not based upon any authority, statutory or otherwise.

Aqua continues time and again throughout its Initial Brief to hang its hat on the fact that its facilities provide system service capacity in an amount that exceeds TCEQ minimum requirements.<sup>11</sup> This was neither the Complainants' nor Staff's chief concern. Aqua is obfuscating the issue by placing undue emphasis on the first sentence of 16 TAC § 24.205, while ignoring the second. The apposite provision states, "[a] *additional capacity* [emphasis added] shall be provided to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock."<sup>12</sup> This is the provision of the rule at issue in this docket, and this is the provision with which Aqua refuses to comply. TCEQ minimums are only the beginning of the analysis. Any elaborate discussion of Aqua successfully meeting TCEQ minimum requirements is superfluous at best and misleading at worst.

Additionally, Aqua misrepresents Mr. Rauschuber's testimony that "Aqua should be required to expand its system capacity for all components to double, triple, quadruple, or quintuple the TCEQ minimum requirements."<sup>13</sup> The testimony to which Aqua has cited, as a matter of fact, diminishes Aqua's position here. Mr. Rauschuber effectively says that the result of any improvements made to the Rio Ancho system need to be whatever is necessary to ensure that there are no low-pressure events or water outages.<sup>14</sup> He then speculates that the factor could be three,

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<sup>9</sup> Aqua's Brief at 13.

<sup>10</sup> Commission Staff's Initial Brief at 8 (Oct. 15, 2021); Tr. at 214:17-216:5 (Graham Cross) (Sep. 7, 2021).

<sup>11</sup> Aqua's Brief at 3, 7, 8, 14, 15, 16, and 23.

<sup>12</sup> 16 § TAC 24.205.

<sup>13</sup> Aqua's Brief at 16; Tr. at 64:17-24 (Rauschuber Cross) (Sep. 7, 2021).

<sup>14</sup> Tr. at 64:17-24 (Rauschuber Cross) (Sep. 7, 2021).

three and a half, or five.<sup>15</sup> A plain reading of the transcript demonstrates his underlying meaning: it isn't the number of the factor that is most relevant, but whatever factor is necessary to meet reasonable local demand.<sup>16</sup>

Equally important, Aqua insists that multiple factors must be considered when making capital improvement decisions, then proceeds to list sundry factors which, it implies, prevents Aqua from constructing additional facilities.<sup>17</sup> Ultimately, Aqua chose not to construct additional facilities despite customers' protests that its water service is inadequate. And in so doing, Aqua breached Commission rules. In essence, Aqua is acting as many profitable businesses do—skirting legal obligations that would require it to expend funds because it believes it has secured itself a loophole. Staff reaffirms its position as further detailed in its Initial Brief.

**C. Aqua improperly implemented water usage restrictions (Preliminary Order Issues Nos. 6-7)**

Aqua witness William Peña argues that if customers adhered to water usage restrictions, then Aqua's current facilities would be adequate to meet the local demand level he considers reasonable.<sup>18</sup> This reasoning is specious. The correct inference to draw is that Aqua fully understands its Rio Ancho system is incapable of providing continuous and adequate service absent its implementation of water usage restrictions. 16 TAC § 24.205(2) specifically identifies this as a condition for which, absent TCEQ approval, retail public utilities may not implement water usage restrictions.<sup>19</sup> Aqua is intentionally muddying this issue.

In contrast, Staff reaffirms its position that Aqua has chosen to implement its drought contingency plan in lieu of constructing the necessary facilities to meet the reasonable local demand characteristics during normal use periods. The technical details of the current Rio Ancho system, while categorically important to Aqua's bottom line, are not dispositive of this issue. The fundamental point is that Aqua is saying that *so long as Rio Ancho customers abide by usage*

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Aqua's Brief at 17.

<sup>18</sup> Prefiled Direct Testimony of William Peña, P.E., Ex. AT-22 at 5:6-7; Tr. at 159:7-11 (Foltz Cross) (Sep. 7, 2021).

<sup>19</sup> 16 TAC § 24.205(2).



*restrictions*, its water service is continuous and adequate.<sup>20</sup> If Aqua were genuinely concerned with compliance under 16 TAC § 24.205(2), the preceding statement cannot be true.

Furthermore, Aqua cannot convincingly argue that it has “made all necessary repairs and replacements as needed.”<sup>21</sup> Rio Ancho customers continue to experience water service issues as detailed in the complaint. Given the projected development of the Rio Ancho neighborhood and Aqua’s refusal to construct improvements despite known, outstanding service issues, one can only expect the frequency and severity of these service issues to persist or increase dramatically. It stands to reason that permitting Aqua to avoid constructing improvements to its Rio Ancho system will exacerbate service interruptions as the development expands.

Curiously, although Aqua insists there is a limit on “what Aqua’s System facilities can do,” it hasn’t conclusively demonstrated any limit that prevents it from constructing improvements.<sup>22</sup> Aqua insisted that capital isn’t a limit and that it would construct any Commission-ordered improvements.<sup>23</sup>

**D. Aqua’s compliance with 16 TAC § 24.205 is not restricted by 16 TAC § 24.25(k)**

Staff reaffirms its response to the system similarity issue as stated in its Initial Brief. Despite Aqua’s arguments to the contrary, Aqua President Robert L. Laughman testified that the system similarity requirement of 16 TAC § 24.25(k) is not an issue to be addressed in this docket.<sup>24</sup> He also testified that Aqua will not later argue that any Commission-ordered improvements in this docket would disturb Aqua’s systems consolidation under the multiple systems consolidation rule.<sup>25</sup> Staff respectfully recommends that the SOAH ALJ take Mr. Laughman at his word.

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<sup>20</sup> Prefiled Direct Testimony of William Peña, P.E., Ex. AT-22 at 5:6-7; Tr. at 159:7-11 (Foltz Cross) (Sep. 7, 2021).

<sup>21</sup> Aqua’s Brief at 23.

<sup>22</sup> Aqua’s Brief at 23.

<sup>23</sup> Tr. at 129:6-19, 129:20-22, and 101:11-18 (Laughman Cross) (Sep. 7, 2021).

<sup>24</sup> *Id.* at 128:2-9.

<sup>25</sup> *Id.* at 127:1-6.

**E. Water conservation is not at issue in this docket**

In its Initial Brief, Staff comprehensively addressed the issue of water conservation. Here, Staff emphasizes that Aqua's stated concern for water conservation, while ostensibly demonstrating its commitment to environmentally responsible decision-making, amounts to little more than an avoidance tactic. Aqua simply doesn't want to construct any more system improvements. Contrary to Aqua's mischaracterization of the Complainants' and Staff's position, Staff is not asking Aqua to supply an *unlimited* supply of water to Rio Ancho customers.<sup>26</sup> No party has asked Aqua to provide an *unlimited* amount of water. Rather, Staff avers that Aqua should be ordered to construct the necessary improvements to its Rio Ancho system to provide Rio Ancho customers with the continuous and adequate supply of water for all reasonable customer uses that they are entitled to receive under Commission rules.

**F. All remaining issues addressed in Staff's Initial Brief (Preliminary Order Issues Nos. 1, 2, 3, 4, and 8)**

For all other issues enumerated within the Preliminary Order, Staff reaffirms its position as set forth in its Initial Brief.

### **III. CONCLUSION**

For the reasons discussed above, and in Staff's Initial Brief, Staff respectfully reaffirms its request that the SOAH ALJ issue a proposal for decision finding that in violation of 16 TAC § 24.205: (a) Aqua Texas has failed to provide continuous and adequate water service to the Rio Ancho subdivision; and (b) Aqua has improperly implemented water usage restrictions. Furthermore, Staff respectfully reaffirms its recommendation that Aqua be ordered to: (a) expand its capacity to meet the reasonable local demand characteristics of the Rio Ancho subdivision as soon as is reasonably possible; and (b) cease using its drought contingency plan in lieu of expanding its capacity to serve the Rio Ancho subdivision once the expanded capacity is operational.

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<sup>26</sup> *Id.* at 119:20-23; Tr. at 216:22-218:11 (Graham Cross) (Sep. 7, 2021).

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**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 November 10, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Phillip Lehmann  
Phillip Lehmann