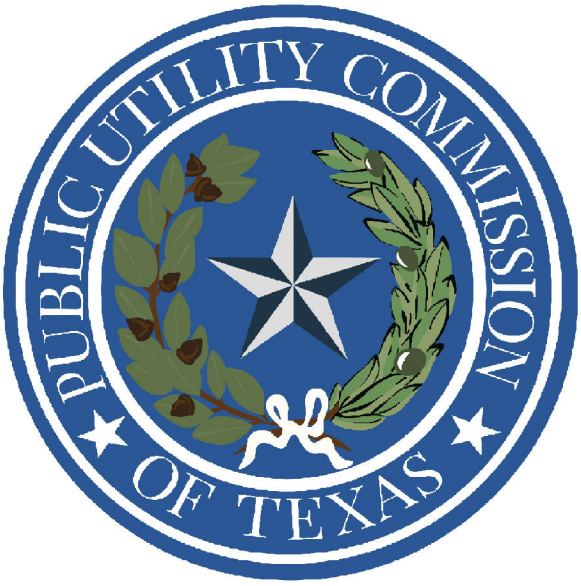

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State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

January 7, 2022

TO: **Stephen Journeay, Commission Counsel** **VIA EFILE TEXAS**
Commission Advising and Docket Management
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

RE: **SOAH Docket No. 473-21-0246**
PUC Docket No. 51091

Complaint of Certain Members of Rio Ancho Homeowners Association Against Aqua Texas, Inc.

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

Christiaan Siano
Administrative Law Judge

Enclosure
xc: All Parties of Record

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

COMPLAINT OF CERTAIN MEMBERS OF RIO ANCHO HOMEOWNERS ASSOCIATION AGAINST AQUA TEXAS, INC.	§	BEFORE THE STATE OFFICE
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PROPOSAL FOR DECISION

I. INTRODUCTION

Complainants[1] allege that Aqua Texas, Inc. (Aqua) failed to supply sufficient capacity to meet the reasonable local demand of the Rio Ancho subdivision and improperly imposed water use restrictions under its drought contingency plan. The Public Utility Commission of Texas (Commission) staff (Staff) agrees with Complainants. For the reasons explained below, the Administrative Law Judge (ALJ) recommends that the Commission find that Complainants failed to meet their burden of proof and take no action against Aqua.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to Texas Water Code (TWC) §§ 13.041, .250, .253; 16 Texas Administrative Code (TAC) §§ 22.242, 24.205, .247(b).[2] The State Office of Administrative Hearings (SOAH) has jurisdiction over matters relating to the conduct of the hearing and issuance of a proposal for decision, if needed, pursuant to Texas Government Code § 2003.049. There are no disputed issues of notice.

The complaint was filed on July 21, 2020, by Rio Ancho Homeowners Association (HOA) and certain residents, requesting specific improvements to Aqua's water system. Aqua moved to

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[1] Francis T. Rossi, James Justin Pogue, Julie Bowse, Kenneth W. Cline, Diana S. Cline, David Amador, Marshall Ault, Chester Jackson, Virginia Jackson, Bruce Brown, Sue Brown, David Meyers, Doreen Meyers, Daniel Winans, Andrea Winans, Samuel Cox, Jaime Torres, and Dustin Torres. *See* Second Amended Formal Complaint at Exh. 1 (Feb. 2, 2021),; SOAH Order No. 1 at 2 (Nov. 23, 2020).

[2] Further jurisdictional analysis is set out in SOAH Order No. 2 (Jan. 22, 2021).

dismiss the complaint on grounds that the Texas Commission on Environmental Quality (TCEQ) had jurisdiction, not the Commission.[3] At a prehearing conference on December 3, 2020, Complainants withdrew their request for specific improvements and amended their pleading accordingly.[4] The ALJ found jurisdiction over the complaint as amended and denied Aqua's motion to dismiss.[5]

In post-hearing briefing, Aqua asserts that the Complainants again seek specific improvements and therefore the issues of jurisdiction should be revisited. The ALJ will not consider any relief requested beyond the scope of the amended pleading and therefore will not revisit the issue of jurisdiction.[6] The Second Amended Formal Complaint asks the Commission to order Aqua to:

1. identify and make system improvements necessary to meet the reasonable local demand in the Rio Ancho subdivision and to complete these improvements as rapidly as can be accomplished;

2. impose drought plan restrictions only when authorized by Aqua's drought contingency plan; and

3. not implement the drought contingency plan in the future unless and until authorized by its drought contingency plan.[7]

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[3] Aqua Motion to Dismiss and Response to Formal Complaint (Aug. 11, 2020).

[4] SOAH Order No. 2 at 2. Second Amended Formal Complaint of Rio Ancho Homeowners Association and David and Doreen Meyers against Aqua Texas, Inc. at 2-3 (Feb. 2, 2021).

[5] SOAH Order No. 2 at 11-12 (addressing Preliminary Order Issue Nos. 1 and 2).

[6] Tex. R. Civ. P. 65; *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008) ("amended pleadings and their contents take the place of prior pleadings. So, causes of action not contained in amended pleadings are effectively dismissed at the time the amended pleading is filed . . .") (internal citations omitted); 16 Tex. Admin. Code (TAC) § 22.76.

[7] Second Amended Formal Complaint at 4 (Feb. 2, 2021). The pleading states "Complainants also seek an order from the PUC directing Aqua to impose drought plan restrictions only when authorized by Aqua's drought *management* plan, and an order that the plan not be implemented in the future unless and until authorized by its drought *management* plan." (emphasis added). The ALJ assumes that by "drought management plan," the complaint refers to the drought contingency plan.

Of the original Complainants, the Rio Ancho HOA, Ashlie Cobb, Casey Cobb, Rob Meyers, and Eric Robinson were dismissed as parties for failure to comply with the informal complaint process and the case was restyled accordingly.[8]

Complainants filed direct testimony of Rio Ancho subdivision residents Don Kevin Hay, David Meyers, Denise Johnston, and expert witness Donald Rauschuber, P.E. Aqua filed direct testimony of Aqua President Robert L. Laughman, Environmental Compliance Manager Scott W. Foltz, Field Supervisor Brian R. Tolle, and expert witness William Peña, P.E. Staff filed direct testimony of Lead Engineering Specialist Heidi Graham. Mr. Foltz and Mr. Peña filed rebuttal testimony.[9]

A hearing was held on September 7-8, 2021, via videoconference. Complainants, Staff, and Aqua appeared. The record closed on November 10, 2021, with the submission of reply briefs.

III. APPLICABLE LAW

Under Chapter 13 of the Water Code, the Commission may regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation, and do all things, whether specifically designated or implied, necessary and convenient to the exercise of these powers and jurisdiction.[10]

Any retail public utility that possesses or is required to possess a certificate of public convenience and necessity (CCN) shall render continuous and adequate service within the service area or areas.[11] Any discontinuance, reduction, or impairment of service, whether with or without

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[8] SOAH Order No. 1 (Nov. 23, 2020) (dismissing certain complainants, addressing Preliminary Order Issue No. 3). The ALJ notes that, although not a party, the Rio Ancho HOA continues to represent itself as a party. No party has objected to this.

[9] Although Complainants have the burden of proof, the parties agreed on a procedural schedule allowing all parties to file rebuttal testimony. SOAH Order No. 4 at 2 (Mar. 11, 2021).

[10] Tex. Water Code (TWC) § 13.041(a).

[11] TWC § 13.250(a).

approval of the Commission, shall be in conformity with and subject to conditions, restrictions, and limitations that the Commission prescribes.[12]

The Water Code authorizes the Commission to order any retail public utility required to possess a CCN to "provide specified improvements in its service in a defined area if service in that area is inadequate or is substantially inferior to service in a comparable area and it is reasonable to require the retail public utility to provide the improved service" or to "develop, implement, and follow financial, managerial, and technical practices that are acceptable to [the Commission] to ensure that continuous and adequate service is provided in any areas currently certificated to the retail public utility if the retail public utility has not provided continuous and adequate service to any of those areas . . . ."[13]

Similarly, Commission rules authorize the Commission to order a retail water utility to provide specified improvements in its service in a defined area if service there is inadequate under 16 TAC § 24.205 or is substantially inferior to service in a comparable area and it is reasonable to require the retail public utility to provide the improved service.[14] Regarding the adequacy of service, section 24.205 provides the following:

> Each retail public utility which provides water service shall plan, furnish, operate, and maintain production, treatment, storage, transmission, and distribution facilities of *sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses*.
>
> (1) The water system quantity and quality requirements of the TCEQ shall be the minimum standards for determining the sufficiency of production, treatment, storage, transmission, and distribution facilities of water suppliers and the safety of the water supplied for household usage. *Additional capacity shall be provided to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage* and livestock.

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[12] TWC § 13.250(e).

[13] TWC § 13.253(a). Failure to provide continuous and adequate service is also grounds for revoking a certificate of convenience and necessity. TWC § 13.254(a)(1).

[14] 16 TAC § 24.247(b).

(2) In cases of drought, periods of abnormally high usage, or extended reduction in ability to supply water due to equipment failure, to comply with a state agency or court order on conservation or other reasons identified in the utility's approved drought contingency plan required by 30 TAC §288.20 (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers), restrictions may be instituted to limit water usage in accordance with the utility's approved drought contingency plan. For utilities, these temporary restrictions must be in accordance with an approved drought contingency plan. Unless specifically authorized by TCEQ, *retail public utilities may not use water use restrictions in lieu of providing facilities which meet the minimum capacity requirements of 30 TAC Chapter 290 (relating to Public Drinking Water), or reasonable local demand characteristics during normal use periods, or when the system is not making all immediate and necessary efforts to repair or replace malfunctioning equipment*.

(A) A utility must file a copy of its TCEQ-approved drought contingency plan with the utility's approved tariff. The utility may not implement mandatory water use restrictions without an approved drought contingency plan unless authorized by the TCEQ. If TCEQ provides such authorization, the utility must provide immediate notice to the commission.

(B) Temporary restrictions must be in accordance with the utility's approved drought contingency plan on file or specifically authorized by the TCEQ. The utility shall file a copy of any status report required to be filed with the TCEQ with the commission at the same time it is required to file the report with the TCEQ.

(C) The utility must provide written notice to each customer in accordance with the drought contingency plan prior to implementing the provisions of the plan. The utility must provide written notice to the commission prior to implementing the provisions of the plan.[15]

The TCEQ's minimum system requirements under 30 TAC chapter 290 implement the safe drinking water standards set out in the Texas Health and Safety Code, chapter 341.

Pursuant to the Water Code, the TCEQ requires retail water suppliers to develop contingency plans to respond to (i) reduction in available water supply (up to a repeat of the drought of record); (ii) water production or distribution system limitations; (iii) supply source

[15] 16 TAC § 24.205 (emphasis added).

contamination; or (iv) system outage due to the failure or damage of major water system components (e.g., pumps).[16] Such plans are part of a utility's tariff.[17] Something of a misnomer, a drought contingency plan (DCP) is not limited to drought contingencies but may also be used in response to limitations in water production or distribution, contamination, or system outages.[18]

In sum, system plant must be of "sufficient size and capacity to provide a continuous and adequate supply of water to all reasonable consumer uses."[19] As such, capacity must exceed minimum standards sufficient "to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock."[20] Additionally, water use restrictions may not be imposed in lieu of providing plant to meet the "reasonable local demand characteristics during normal use periods."[21] If the service is inadequate to meet this standard, the Commission may order a retail public utility to provide specified improvements if "it is reasonable to require the retail public utility to provide the improved service."[22]

IV. DISCUSSION

A. Evidence

The material facts are undisputed. Unless otherwise noted, the evidence relates to the period between July 20, 2018 to July 20, 2020.[23]

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[16] TWC § 11.1272(a); 30 TAC § 288.20(a)(1)(E).

[17] 16 TAC § 24.205(2)(A); 30 TAC § 288.20(a)(2).

[18] 30 TAC § 288.20(a)(1)(E)(ii)-(iv).

[19] 16 TAC § 24.205.

[20] 16 TAC § 24.205(1).

[21] 16 TAC § 24.205(2).

[22] TWC § 13.253(a)(1)(A).

[23] *See* Preliminary Order, Issue Nos. 5-6.

1. Aqua Texas, Inc.

Aqua is a Class A retail public utility providing water and sewer service to over 370 public water systems in 53 counties in Texas.[24] Aqua's service territory is divided into four regions (North, Southeast, Southwest, and Ingram), and the systems within those regions have been consolidated for rate purposes. The Rio Ancho subdivision falls within the Southwest Region, which was consolidated in Aqua's last rate case at the TCEQ.[25] Regional rates allow Aqua to spread capital costs over a larger customer base, reducing the per customer impact of projects in a given community.[26] Accordingly, "Aqua must scrutinize every capital expenditure to assure that it is both needed and reasonable to assure that the overall region is not burdened by unnecessary expenses of one community."[27]

Aqua has properly followed the rules and regulations applicable to the Rio Ancho subdivision, Aqua's tariff, and its DCP within the tariff.[28] No party alleges that Aqua directly or indirectly demanded, charged, or collected any rate or charge, or imposed any classification, practices, rules, or regulations different from those prescribed in its approved tariff filed with the Commission.

2. Rio Ancho Subdivision

The Rio Ancho subdivision is a gated Hill Country subdivision near Liberty Hill, straddling Burnet and Williamson counties.[29] The average lot size is one acre and home values range from

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[24] Aqua Ex. 3 at 28 (Foltz Dir.).

[25] Aqua Ex. 1 at 5 (Laughman Dir.); *Application of Aqua Texas, Inc., Aqua Utilities, Inc., Aqua Development, Inc., Harper Water Company, Inc., and Kerrville Southern Water Company, Inc., dba Aqua Texas for Southwest Region Water Rate/Tariff Change*, TCEQ Docket No. 2012-1058-UCR, SOAH Docket No. 582-12-6658, Final Order (June 3, 2013), Tariff Table B.

[26] Aqua Ex. 1 at 4 (Laughman Dir.).

[27] Aqua Ex. 1 at 4 (Laughman Dir.).

[28] Aqua Ex. 3 at 28-29 (Foltz Dir.).

[29] Comp. Ex. 24 at 12 (Rauschuber Dir.), DGR-4 (Comp. Ex. 6).

$500,000 to $1,000,000; many have pools and irrigated landscaping.[30] The covenants and deed restrictions that run with the land include the following:

> Yards. All yards, including trees and plantings of all types, shall be well maintained and kept neat, trim and free of debris at all times. The front yard of any residence shall consist of that area between the street or streets adjacent to the Lot, the Property lines on each side of the Lot, and the rear building projection line. All residences must have hydro-mulched or sodded yard from the rear projection line of the house, to include side yards, to the street and all required sodding must be completed prior to occupancy.[31]

The subdivision lies within a semi-arid region of Central Texas and the design standards for the subdivision were "developed to communicate the philosophy of development with sensitivity toward preservation and maintenance of the environment."[32] In furtherance of that philosophy, the standards provide the following watering ethic:

> In keeping with the development's concern for the natural environment, Rio Ancho Subdivision encourages the conscientious consideration of water as a precious natural resource. As a property owner at Rio Ancho Subdivision, you too become a steward of the land and its resources. Here are just a few of the things you can do in planning your new home to conserve and protect our precious water:
>
> 1. Use low-flow fixtures.
> 2. Install drought-tolerant indigenous landscaping.
> 3. Discontinue irrigation once new plants have established themselves.
> 4. Install a cistern to catch rainfall in order to provide or augment irrigation.
> 5. Omit the use of pesticides and fertilizers within natural drainage areas to prevent contamination of the Edward's Aquifer.[33]

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[30] Comp. Ex. 24 at 12 (Rauschuber Dir.); Comp. Ex. 3 at 2 (Hay Dir.).

[31] Aqua Ex. 35 at 23, § 5.46 (Declaration of Covenants, Conditions, Easements & Restrictions, Rio Ancho Subdivision).

[32] Aqua Ex. 3 (Foltz Dir.), SF-5 at 46; Tr. at 103 (Laughman Cross); Aqua Ex. 36 at 2, § 1.1 (Preservation of the Natural Environment).

[33] Aqua Ex. 36 at 4, § 1.2 (Rio Ancho Subdivision Community Design Standards).

However, the watering ethic is not enforced and, while some lots are planted with indigenous grasses, others are planted with "carpet grass" such as St. Augustine or Zoysia.[34]

3. Rio Ancho System

Aqua serves the Rio Ancho subdivision through a dedicated system.[35] The system uses groundwater produced from three wells, stored in two tanks, moved by three booster pumps, and pressurized by two hydropneumatic tanks.[36]

a. Wells

The three wells draw from the Trinity Aquifer and their combined rated capacity is 125 gallons per minute (gpm), but actual total pumping capacity ranges from 121-128 gpm based on aquifer conditions and customer demand.[37]

Two wells are located in Burnet County in the Central Texas Groundwater Conservation District and are permitted at a total of 81.65 acre feet (26,605,730 gallons) annually—the maximum production limit allowed by the district.[38] This quantity allows for a half-acre foot of production per acre of controlled area.[39] The district considers this to be "the amount of groundwater needed per surface acre of land to allow reasonable beneficial use of groundwater

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[34] Tr. at 23 (Johnston Cross); Tr. at 291-93 (Peña Cross); Comp. Ex. 26 at 3 (Meyers Dir.).

[35] Comp. Ex. 24 at 7 (Rauschuber Dir.); *Application of Aqua Utilities, Inc., Aqua Development, Inc., and Aqua Texas, Inc. for Sale, Transfer, or Merger of Facilities and Certificate Rights in Bandera, Bastrop, Bexar, Blanco, Burnet, Comal, Gillespie, Hays, Kendall, Kerr, Kimble, Live Oak, Llano, Medina, Nueces, Travis, Williamson, and Wilson Counties*, Docket No. 48769, Notice of Approval (July 21, 2020), Tariff Table B.

[36] Aqua Ex. 3 at 6 (Foltz Dir.), SF-2 (Aqua Ex. 5).

[37] Aqua Ex. 22 at 7-8 (Peña Dir.), WP-2 (Aqua Ex. 24).

[38] Aqua Ex. 3 at 7-8 (Foltz Dir.), SF-4 (Aqua Ex. 7); Aqua Ex. 29 at 3 (Foltz Reb.), SF-R-1 (Aqua Ex. 30); Comp. Ex. 24 (Rauschuber Dir.), DGR-3 (Comp. Ex. 20).

[39] Aqua Ex. 3 at 7-8 (Foltz Dir.), SF-5.

without waste, encourage conservation, and support continued economic growth in the District."[40] These wells are subject to curtailment by the district, either through drought requirements based on aquifer levels or permit requirements.[41] The third well, in Williamson County, is not in the district, but draws from the same aquifer and is subject to similar hydrogeologic limitations as the other two.[42]

There are several limitations on increasing the water supply.[43] Within the district, the wells are already permitted at the maximum allowed and any increase is limited by district regulations.[44] Aqua has not exceeded its annual withdrawal limitations, and Aqua witness Mr. Peña testified that prudent management calls for maintaining a cushion of instantaneous well production capability to meet system demand.[45] Outside the district, in Williamson County, any increase is limited by challenges in securing a suitable wellsite. Aqua is seeking an additional wellsite as backup but none has been identified.[46] Aqua witness Mr. Foltz testified that even if a wellsite were identified and acquired, a new well would take about a year to bring to production—allowing for engineering, regulatory review, and construction.[47]

b. Storage Pumps, and Pressure

The Rio Ancho system's two ground storage tanks each have capacity of 42,000 gallons; the three booster pumps can produce over 600 gpm; and the two hydropneumatic tanks have a total volume of 6,000 gallons.[48] The TCEQ minimum standards for public water systems are based on

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[40] Aqua Ex. 3 at 8 (Foltz Dir.), SF-5 at 45.

[41] Tr. at 177 (Foltz Redir.).

[42] Aqua Ex. 3 at 7-8 (Foltz Dir.); Aqua Ex. 22 at 8 (Peña Dir.).

[43] Aqua Ex. 22 at 22 (Peña Reb.).

[44] Aqua Ex. 3 at 8 (Foltz Dir.); Tr. at 177-78 (Foltz Redir.).

[45] Aqua Ex. 3 at 8 (Foltz Dir.); *see also* Aqua Ex. 19 (Tolle Dir.), BT-2 (Aqua Ex. 21); Tr. at 337-38 (Peña Redir.).

[46] Aqua Ex. 3 at 14 (Foltz Dir.).

[47] Aqua Ex. 3 at 14 (Foltz Dir.).

[48] Aqua Ex. 3 at 6 (Foltz Dir.), SF-2 (Aqua Ex. 5), SF-3 (Aqua Ex. 6); Aqua Ex. 22 (Peña Dir.), WP-2 (Aqua Ex. 24); Aqua Ex. 19 at 6 (Tolle Dir.).

the number of connections.[49] The Rio Ancho subdivision is platted for 207 connections, but has not yet reached that number: the connection count increased from 137 to 164 between 2018 and 2020, and reached 168 in May 2021.[50] The Rio Ancho system capacity relative to TCEQ minimum requirements is shown in the following table:[51]

SYSTEM CAPACITY VS TCEQ REQUIREMENTS

TCEQ Minimum Requirement [a]	2019				2021				Build-Out			
	Connections:	156		Capacity/	Connections:	168		Capacity/	Connections:	207		Capacity/
	TCEQ Min. Rqmt.	System Capacity		Min. rqmt.	TCEQ Min. Rqmt.	System Capacity		Min. rqmt.	TCEQ Min. Rqmt.	System Capacity		Min. rqmt.
Well Capacity: 0.6 gpm/connection	94	125	gpm	134%	101	125	gpm	124%	124	125	gpm	101%
Storage: 200 gal/connection	31,200	42,000	gal	135%	33,600	84,000	gal	250%	41,400	84,000	gal	203%
Booster Pumps: 2.0 gpm/connection	312	450	gpm	144%	336	600	gpm	179%	414	600	gpm	145%
Hydro. Tanks: 20 gal/connection	3,120	3,000	gal	96%	3,360	6,000	gal	179%	4,140	6,000	gal	145%

When the water in the storage tanks drops below a certain level, a safety switch is engaged to protect the booster pumps from damage.[52] If the safety switch is engaged when all three wells are running, it indicates that demand exceeds capacity.[53]

4. Usage Characteristics

Water usage at the Rio Ancho subdivision is above average. Complainants do not dispute this.[54] Typically, indoor water usage is 7,000 gallons per month.[55] In the Rio Ancho subdivision, however, water usage is predominantly for outdoor use.[56] Compared to other Aqua systems in the

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[49] 30 TAC § 290.45(b)(1)(C) (setting minimum standards for community water systems with 50 to 250 connections); *see generally* 30 TAC §§ 290.38-.275.

[50] Aqua Ex. 3 (Foltz Dir.), SF-3 (Aqua Ex. 6); Aqua Ex. 22 (Peña Dir.), WP-2 (Aqua Ex. 24).

[51] Aqua Ex. 22 (Peña Dir.), WP-2 (Aqua Ex. 24).

[52] Aqua Ex. 3 at 13 (Foltz Dir.).

[53] Aqua Ex. 3 at 12-13 (Foltz Dir.).

[54] Complainants Initial Brief at 2 ("The residents of the subdivision do use more water per connection than Aqua Texas's other systems . . . .").

[55] Aqua Ex. 3 at 26 (Foltz Dir.); Tr. at 123 (Laughman Cross).

[56] Aqua Ex. 3 at 19 (Foltz Dir.), SF-8 (Aqua Ex. 11).

Central Texas area, the average Rio Ancho customer uses nearly twice the overall average, and over twice the average during summer months.[57] In the summers of 2019 and 2020, the amount of system water used was at or above more urban systems with less limited water sources (surface water) than the groundwater source for the system area.[58] Compared to the statewide monthly average of around 6,000 gallons (204 gallons per day (gpd)), the average Rio Ancho customer used around 14,000 gallons (or 465 gpd).[59] Complainants witness Mr. Rauschuber calculated the typical monthly Rio Ancho system average at around 15,000 gallons (or 506 gpd), and acknowledged that usage can be much higher in the summer months, with a majority of customers using more than 20,000 gallons, and some using over 80,000 gallons.[60] In fact, many Rio Ancho customers used over 100,000 gallons, and some as much as 120,000 gallons, in summer months.[61]

Peak demand for the Rio Ancho system occurred in the summer of 2019, reaching a monthly peak in July of 4,319,000 gallons (1,035 gpd per connection), and daily peak in August of 172,571 (1,150 gpd per connection).[62]

5. Drought Contingency Plan

As a retail water supplier, Aqua has adopted a DCP whose purposes are to "maintain an adequate supply of water during the various stages of drought conditions or other water supply emergencies," and to "comply with the requirements of a court, government agency, ground water district, wholesale provider or other authority."[63] Under the DCP, "to maintain supply, storage,

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[57] Aqua Ex. 3 at 10 and 19-20 (Foltz Dir.), SF-8 (Aqua Ex. 11).

[58] Aqua Ex. 22 at 9-10 (Peña Dir.), WP-5 (Aqua Ex. 27), WP-3 (Aqua Ex. 25).

[59] Aqua Ex. 3 at 19-20 (Foltz Dir.), SF-8 (Aqua Ex. 11).

[60] Comp. Ex. 24 at 21-22 (Rauschuber Dir.), DGR-10 (Comp. Ex. 12); Comp. Ex. 26 at 3 (Meyers Dir.).

[61] Aqua Ex. 3 at 26 (Foltz Dir.), SF-8 (Aqua Ex. 11), SF-11 (Aqua Ex. 14) at Bates 297, 310, 311, 326 (for usage over 120,000 gallons); Tr. at 102-03, 122-23 (Laughman Cross).

[62] Aqua Ex. 3 at 8-9 (Foltz Dir.); Aqua Ex. 22 at 8 (Peña Dir.), WP-3 (Aqua Ex. 25).

[63] Aqua Ex. 3 (Foltz Dir.), SF-6 (Aqua Ex. 9), SF-7 (Aqua Ex. 10). Aqua witness Mr. Foltz explained that he provided two DCPs because they must be reviewed every five years under 30 TAC § 288.20(c) and the second one was updated during the time period relevant to this proceeding. Aqua Ex. 3 at 16-17 (Foltz Dir.); Docket No. 48769, Notice of Approval (July 21, 2020), Water Utility Tariff, Appendix A.

and pressure or to comply with regulatory requirements, temporary restrictions may be necessary to limit non-essential water usage."[64] The DCP has four stages, with restrictions increasing with severity of need.[65]

6. Use Restrictions

The Rio Ancho system has been under some stage of the DCP at all times relevant to this proceeding.[66] These restrictions were used to ensure compliance with the groundwater conservation district's rules and to prevent low pressure during periods of excessive demand and drought conditions.[67] TCEQ personnel reviewed Aqua's DCP practices and confirmed they were an acceptable means to reduce peak demand.[68]

The reasons for implementing the water use restrictions were reflected in the notices to customers.[69] No party disputes that Aqua complied with the DCP's notice requirements.[70]

Nevertheless, the restrictions failed to avoid outages and low pressure events: average daily use dropped by only 19 gallons.[71] Aqua witness Mr. Foltz testified that in his 17 years of experience, he has never seen such resistance to water conservation, even after customers knew that high usage would result in low pressure or system outages.[72] Although the DCP includes such

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[64] Aqua Ex. 3 (Foltz Dir.), SF-6-7 (Aqua Exs. 9-10).

[65] Aqua Ex. 3 (Foltz Dir.), SF-6-7 at 3, 5-6 (Aqua Exs. 9-10).

[66] Specifically, Stage 2 (July 2017 – August 2019), Stage 3 (August 2019 – May 2020), Stage 1 (May 2020 – July 2020), and Stage 3 (July 2020 – current). Aqua Ex. 3 at 17–18 (Foltz Dir.), SF-9 (Aqua Ex. 12); Tr. at 97 (Laughman Cross).

[67] Aqua Ex. 3 at 16-20 (Foltz Dir.), SF-8 (Aqua Ex. 11), SF-9 (Aqua Ex. 12).

[68] Aqua Ex. 3 at 22 (Foltz Dir.), SF-9 (Aqua Ex. 12).

[69] Aqua Ex. 3 at 17-18, 20-22 (Foltz Dir.), SF-9 (Aqua Ex. 12).

[70] Aqua witness Mr. Foltz testified regarding notice to customers. Aqua Ex. 3 at 20-22 (Foltz Dir.), SF-9 (Aqua Ex. 12).

[71] Aqua Ex. 3 at 26 (Foltz Dir.); Aqua Ex. 19 at 8 (Tolle Dir.); Aqua Ex. 22 (Peña Dir.), WP-3 (Aqua Ex. 25) at 1-3 (from an average use of 529 gpd in 2019 to 510 gpd in 2020).

[72] Aqua Ex. 3 at 26 (Foltz Dir.).

enforcement tools as installing flow restrictors, Aqua prefers to encourage voluntary compliance.[73] Aqua did not impose any penalties or consequences and some customers did not comply at all.[74]

Resident David Meyers testified that "as temperatures rose in the later spring and summer [of 2019], we began to experience chronic low water pressure issues and instances of complete loss of service."[75] In fact, on 21 occasions, the Rio Ancho system experienced events of low pressure (dropping below 35 pounds per square inch (psi)).[76] Of these, three low-pressure events were caused by equipment failure or planned repairs.[77] All other instances of low pressure were, according to Aqua, due to high or "excessive" demand, as indicated by the lack of any equipment failure and the booster pump low-tank level safety being triggered.[78] With the exception of an anomalous event in October 2018 and a planned outage in February 2020, these low pressure or outage events occurred April to September.[79]

After July 2020, this began to change. Aqua enhanced its enforcement efforts.[80] It also turned off the HOA entrance fountain, and made booster pump upgrades to increase the combined capacity from 450 gpm to the current 600 gpm.[81] System problems caused by excessive demand were reduced to a single event in August 2021.[82] The peak monthly demand dropped somewhat,

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[73] Aqua Ex. 3 at 24-25 (Foltz Dir.).

[74] Aqua Ex. 3 at 23 (Foltz Dir.), SF-10 (Aqua Ex. 13); Aqua Ex. 19 at 8 (Tolle Dir.).

[75] Comp. Ex. 26 at 3 (Meyers Dir.); Comp. Ex. 25 at 3 (Hay Dir.).

[76] Aqua Ex. 3 at 11-12 (Foltz Dir.), SF-12-14; 30 TAC § 290.44(d) (requiring a minimum of 35 psi for public drinking water supply systems). Staff's Initial Brief cites to Complainants' Exhibit 1 (DGR-7) for support of alleged outages and low-pressure events. This exhibit was not admitted for the truth of the matter asserted and therefore will not be considered for that purpose. SOAH Order No. 6 at 2-3 (May 20, 2021) (ruling on admissibility of Exhibit DGR-7, also Complainants' Exhibits 1, 2, 9, 11, and 21).

[77] Aqua Ex. 3 at 11-12 (Foltz Dir.) (Aug. 26, 2019—booster pump failure; Sept. 23, 2019—pressure tank repairs; Feb. 24, 2020—planned outage-new pressure tank connection).

[78] Aqua Ex. 3 at 11-13 (Foltz Dir.), SF-12-14 (Aqua Exs. 15-17); Tr. at 194-95 (Tolle Cross).

[79] Aqua Ex. 3 at 11-12 (Foltz Dir.).

[80] Aqua Ex. 3 at 13, 23-25 (Foltz Dir.), SF-10 (Aqua Ex. 13) (listing violation notices sent to customers); Aqua Ex. 19 at 9 (Tolle Dir.).

[81] Aqua Ex. 3 at 13, 24 (Foltz Dir.), SF-10 (Aqua Ex. 13).

[82] Tr. at 193-94 (Tolle Cross). There was no testimony as to what the system problem in August 2021 was.

from 4,319,000 gallons in July 2019 to 4,003,000 gallons in August 2020 (872 gpd per connection), and the peak daily demand dropped from 172,571 gpd to 132,570 gpd the week of August 10-17, 2020 (875 gpd per connection).[83] Mr. Foltz testified that "enforcement of Aqua's watering schedule seems to have resolved the issues that prompted the Complaint."[84]

B. Arguments

Complainants and Staff allege that Aqua failed to provide continuous and adequate service; 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 TCEQ; and improperly imposed water-use restrictions in lieu of providing facilities which meet the reasonable local demand characteristics during normal use periods.[85]

1. Reasonable Use

Complainants emphasize the unique character of the Rio Ancho customer base: large-lot homeowners, many of whom have landscape watering systems.[86] Complainants argue that customers have the right to the reasonable expectation that, under normal conditions, they can operate their landscape watering system twice a week sufficiently to maintain their landscaped areas. Complainants further argue that the Rio Ancho system is inadequate because, even during water use restrictions, the system has failed on numerous occasions.[87]

Complainants' expert Mr. Rauschuber asserts that Aqua "needs to design and construct a combination of water supply, water storage and water pressurization improvements that uses a

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[83] Aqua Ex. 3 at 9 (Foltz Dir.); Aqua Ex. 22 at 9 (Peña Dir.), WP-3 (Aqua Ex. 25).

[84] Aqua Ex. 3 at 14 (Foltz Dir.).

[85] Staff Initial Brief at 3.

[86] Complainants Reply Brief at 1.

[87] Complainants Initial Brief at 6.

minimum factor of 2.0 times each respective TCEQ minimum requirement."[88] At the hearing, Mr. Rauschuber clarified that this is the starting point: "If that doesn't solve the problem, then they have to go to a higher level."[89] According to Mr. Rauschuber, the objective is to achieve "absolutely no water outages, nonemergency water outages, and no low pressure events below 35 PSI per customer meter during any day, any hour of the year," even if it requires exceeding minimum requirements by a factor of 5 or more.[90] Though agreeing that reasonable use depended on local geography, Mr. Rauschuber opined that the only limitation to the reasonableness is waste—water running off the lot and down the street.[91]

While conceding that the law identifies no specific capacity required to meet reasonable local demand characteristics, Staff contends that the capacity of Rio Ancho's system is not sufficient. Staff witness Heidi Graham opined that the demand in the Rio Ancho subdivision is reasonable.[92] In forming that opinion, she did not consider aquifer characteristics, groundwater permit limitations, or cost and rate impact, but found the deed restriction particularly relevant.[93] In her reading, the deed restriction requires all residences to "have well maintained grass, from the rear building projection line of the house, to include side yards, to the street."[94] In Ms. Graham's opinion, maintaining one's yard in accordance with deed restrictions is a reasonable local demand that Aqua is required to meet.[95]

Ms. Graham testified she spent many years as a TCEQ staff member reviewing plans and specifications for public water systems. She admitted she is not aware of the TCEQ ever requiring a public drinking water system to provide capacity beyond the minimum requirements to

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[88] Comp. Ex. 24 at 26 (Rauschuber Dir.).

[89] Tr. at 61, 63 (Rauschuber Cross).

[90] Tr. at 63-64 (Rauschuber Cross).

[91] Tr. at 54, 60 (Rauschuber Cross).

[92] Tr. at 214 (Graham Cross).

[93] Tr. at 218, 220-21 (Graham Cross).

[94] Staff Ex. 1 at 6 (Graham Dir.).

[95] Tr. at 214-16 (Graham Cross).

accommodate outdoor water usage; or ever finding that a utility failed to provide continuous and adequate service because it did not provide such additional capacity.[96] She has also never testified regarding meeting local demand above the minimum requirements or DCPs.[97] In this case, however, Ms. Graham recommended that the Commission order Aqua to "[e]xpand its capacity to meet the demand characteristics of the Rio Ancho Subdivision, with a deadline of 12 months from the Commission's order for the expansion to be operational."[98]

Aqua argues that its Rio Ancho system is adequate to maintain continuous and adequate service and no further upgrades are needed because the capacity already exceeds the TCEQ minimum requirements and allows for reasonable outdoor use.[99] Mr. Peña testified that the system capacity is adequate to supply continuous and adequate service for outside irrigation twice a week at 1,523 gallons per irrigation day.[100] He further estimated that meeting Mr. Rauschuber's starting point recommendation would require two additional wells and one additional 42,000-gallon storage tank, at an estimated cost of $700,000.[101] However, doing so would not be feasible unless additional well sites could be acquired, which Aqua is already seeking.[102]

Aqua further asserts that the customer usage of the Rio Ancho system is not reasonable. Mr. Peña opined that reasonable outdoor use is relative to the area and capacity of the source water; namely, use that "does not exceed the pro-rata capacity of the source (or what is mandated by the regulatory agency) and is used in a responsible and non-wasteful manner so that the source is maintained."[103]

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[96] Tr. at 206-08 (Graham Cross); *see also* Aqua Ex. 34 at 14-15 (Deposition Transcript of Heidi Graham); Staff Ex. 1 (Graham Dir.), HG-2 (resume); Tr. at 254 (Graham Clarifying).

[97] Aqua Ex. 34 at 11 (Deposition Transcript of Heidi Graham).

[98] Staff Ex. 1 at 12 (Graham Dir.).

[99] Aqua Ex. 3 at 14 (Foltz Dir.), SF-3 (Aqua Ex. 6); Aqua Ex. 22 at 22 (Peña Dir.), WP-2 (Aqua Ex. 24).

[100] Aqua Ex. 22 at 22 (Peña Dir.).

[101] Aqua Ex. 22 at 19-20 (Peña Dir.).

[102] Aqua Ex. 22 at 20 (Peña Dir.); Aqua Ex. 3 at 14 (Foltz Dir.) ("Aqua is looking for an additional water well site in Williamson County as a backup source of water supply, but we do not need it to meet TCEQ and PUC requirements.").

[103] Aqua Ex. 22 at 9 (Peña Dir.).

Complainants and Staff argue that Aqua's basis for contending the Rio Ancho system is adequate shows it is not. They argue that a restriction of 1,523 gallons per irrigation day twice a week shows that the system is inadequate to meet the reasonable local demand characteristics because it assumes a permanent restriction.[104] Moreover, they point to Aqua's admission that the existing storage tanks are insufficient to meet peak demand without irrigation schedules.[105]

2. Use Restrictions

Complainants contend that Aqua imposed restrictions under its DCP without regard to periods of drought, abnormally high usage, or extended reduction in ability to supply water due to equipment failure, or to comply with a state agency or court order on conservation.[106] Complainants argue that instead Aqua used restrictions to avoid having to provide improvements to meet the reasonable local demand characteristics of the Rio Ancho subdivision. Complainants point to testimony that restrictions on water usage may be necessary, on a full-time basis, to avoid system outages and low water pressure events.[107] According to Complainants, such restrictions should be temporary, not permanent.[108] Moreover, Complainants contend, what Aqua characterizes as excessive water use "is, was and will be the actual reasonable demand of these customers."[109] Complainants therefore ask that Aqua be prohibited from imposing its DCP in lieu of expanding its capacity to serve the Rio Ancho subdivision.

Staff argues that the subdivision's higher usage in summer months should not be considered abnormal for purposes of triggering the DCP because that usage has been high for over

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[104] Aqua Ex. 22 at 22 (Peña Dir.).

[105] Tr. at 159 (Foltz Cross).

[106] Tr at 97, 101 (Laughman Cross).

[107] Tr. at 154-59 (Foltz Cross); Tr. at 188-89 (Tolle Cross); Aqua Ex. 22 at 26 (Peña Dir.).

[108] Complainants Reply Brief at 3.

[109] Complainants Reply Brief at 3.

three years.[110] Staff argues that Aqua has imposed water use restrictions in lieu of providing facilities which meet the reasonable local demand characteristics during normal use periods, and therefore recommends ordering Aqua to discontinue using its DCP in lieu of expanding its capacity to serve the Rio Ancho subdivision once the expanded capacity is operational.[111]

Aqua argues that it has not imposed restrictions in lieu of what is needed to meet "reasonable local demand characteristics during normal use periods."[112] Aqua argues that the Rio Ancho system exceeds the TCEQ minimum requirements and is more than sufficient to meet reasonable, but not unlimited, local demand during both normal and excess demand periods.[113] Aqua points out that the "TCEQ has investigated low pressure and outage complaints and conducted regular compliance inspections during the 2018-2020 period and issued no violation for the use of the Drought Contingency Plan or restrictions issued under it."[114] Staff responds that the TCEQ's failure to find Aqua violated its DCP does not dispositively prove that the DCP was properly implemented. Nevertheless, Mr. Rauschuber agreed that it is reasonable to ask customers to adhere to a reasonable standard of outdoor watering and daytime restrictions to reduce their overall water consumption level, and that Central Texas utilities impose such water use restrictions.[115]

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[110] Staff Ex. 1 at 8 (Graham Dir.)

[111] Staff Ex. 1 at 12 (Graham Dir.).

[112] Aqua Ex. 3 at 28 (Foltz Dir.).

[113] Aqua Ex. 3 at 28 (Foltz Dir.).

[114] Aqua Ex. 3 at 29 (Foltz Dir.), SF-12 (Aqua Ex. 15).

[115] Tr. at 56-58 (Rauschuber Cross).

C. Analysis

Complainants bear the burden of proof.[116] To prevail, Complainants must show that the local demand characteristics are reasonable and that Aqua failed to meet them.[117] Complainants must show that the local demand characteristics during normal use periods are reasonable and that Aqua imposed use restrictions in lieu of providing sufficient plant to meet that demand.[118] Finally, if they meet their burden of proof with respect to the service being inadequate, they must show that it is reasonable to require Aqua to provide the improved service.[119] For the reasons set out below, the ALJ finds that Complainants failed to meet their burden of proof.

1. Reasonableness of Local Demand

This is an issue of first impression in Texas. The parties cite no precedent, and the ALJ has found none. Reasonable local demand is not defined and must therefore be viewed in the broader regulatory framework in which it is found. There is no dispute that the use at issue is outdoor watering and that outdoor watering is a reasonable customer use.[120] Outdoor watering, in reasonable amounts, is specifically identified as a use that retail public utilities must provide capacity for, above the TCEQ minimum standards.[121]

While conceding that the Rio Ancho system has higher peak demand than any other system operated by Aqua and that Rio Ancho's water usage is "substantially higher than average suburban use," Complainants argue that the unique character of the Rio Ancho subdivision—large lots and

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[116] 16 TAC § 24.12 (except in rate proceedings, the moving party bears the burden of proof); *see also* 1 TAC § 155.427 (the party seeking affirmative relief and to change the status quo are factors to be considered in assigning the burden of proof); *Formal Complaint of Northeast Medical Center Against Sprint*, Docket No. 31948, Preliminary Order at 6-7 (Apr. 18, 2006).

[117] 16 TAC § 24.205, .205(1).

[118] 16 TAC § 24.205(2).

[119] TWC § 13.253(a)(1)(A).

[120] *See* Comp. Ex. 25 at 4 (Hay Dir.).

[121] 16 TAC § 24.205(1).

landscaping—determines the reasonableness of demand.[122] Short of waste, Complainants place no limit on the reasonableness of outside usage. Although Staff argues that reasonableness is determined by a holistic review of the specific facts and circumstances pertinent to the complaint at hand,[123] Staff did not consider aquifer characteristics, groundwater permit limitations, or cost and rate impact. Instead, like Complainants, Staff focused on the Rio Ancho subdivision itself in determining reasonableness: lot sizes, deed restriction requirements, and actual demand for outdoor watering.[124]

By contrast, Aqua witness Mr. Peña testified that reasonable local demand characteristics should be based on the usage patterns in the local area, not only the system at issue.[125] The ALJ agrees. Under applicable law, the test is whether the local demand characteristics of the service area in excess of the TCEQ minimum requirements, including the quantities of water for outside usage and livestock, are reasonable.[126] Complainants' and Staff's analyses end at the characteristics of the subdivision and do not consider the local geography, water resources, other similarly situated utilities, cost, and rate impact.

The undisputed evidence shows that the Rio Ancho system has higher peak demand than any of the more than 370 public water systems operated by Aqua. Rio Ancho's usage during normal periods is over twice the state average and in summer months over twice the regional average, when monthly usage climbs above 20,000 gallons and some customers' usage exceeds 120,000 gallons. By any measure, this level of usage is abnormally high.[127] Staff's testimony to

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[122] Complainants Initial Brief at 6, 9.

[123] Staff Initial Brief at 8.

[124] Aqua Ex. 3 at 19-20 (Foltz Dir.).

[125] Aqua Ex. 31 at 5 (Peña Reb.); *see also* TWC § 13.253(a)(1)(A) (providing that the Commission may order improvements "if service in that area is inadequate or is substantially inferior to service in a *comparable area*") (emphasis added).

[126] 16 TAC § 24.205(1).

[127] It should be noted that the Legislature recently reduced average customer bill comparisons from 10,000 and 30,000 gallons to 5,000 and 10,000 gallons, presumably to better reflect average use. Acts 2019, 86th Leg., R.S., Ch. 967 (S.B. 700), Sec. 5, eff. September 1, 2019. *See* TWC §§ 13.187(a-1)(2), .1871(b)(2).

the contrary focuses on the iteration, not the height, of the peak. But abnormally high usage does not become normal by repetition. These usage levels do not comport with the state's water conservation policy embedded in chapter 13 of the Water Code, the State or Regional Water Plans, or the subdivision's own stated watering ethic.[128]

Additionally, Staff's reliance on the deed restriction is unfounded. Ms. Graham interpreted the deed restriction to require well-maintained grass. It does not. The deed restriction provides, in relevant part, that "[a]ll yards, including trees and plantings of all types, shall be well maintained and kept neat, trim and free of debris at all times."[129] Although this language could be reasonably read to include maintaining grass, it cannot reasonably be read to require watering the type of grass the landowner chose to the point of water-system failure. That is particularly true in light of the subdivision's watering ethic, which "encourages the conscientious consideration of water as a precious natural resource" and encourages using low-flow fixtures, installing drought-tolerant indigenous landscaping, discontinuing irrigation once new plants have established themselves, and use of rain capture for irrigation.[130] The deed restriction focuses on keeping the yard foliage tidy—not verdant. Moreover, Texas law does not give deference to deed restrictions in determining the reasonableness of local demand. Doing so would, as Mr. Peña opined, allow HOAs to set state water policy.[131]

The Rio Ancho subdivision lies in a semi-arid region of Central Texas, partly in a groundwater conservation district, where water supply is limited by permits, district curtailments, aquifer productivity, and practical logistics of wellsite acquisition. The permitted production limit is "the amount of groundwater needed per surface acre of land to allow reasonable beneficial use of groundwater without waste, encourage conservation, and support continued economic growth

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[128] TWC §§ 13.145(a)(2), .146, .1461, .184(b), .503; Aqua Ex. 31 at 9 (Peña Dir.); Aqua Ex. 36 at 4, § 1.2.

[129] Aqua Ex. 35 at 23, § 5.46.

[130] Aqua Ex. 36 at 4, § 1.2.

[131] Aqua Ex. 31 at 6 (Peña Reb.).

in the District."[132] Meeting the actual demand of the Rio Ancho subdivision system would require exceeding these parameters.

Under these facts, the ALJ finds that the actual demand of the Rio Ancho subdivision is not reasonable. The evidence further shows that the Rio Ancho system capacity above the TCEQ minimum requirements is reasonable. The system capacity exceeds the minimum requirements for well capacity by 124%, for storage by 250%, for booster pumps and hydro tanks both by 179%.[133] Although the well capacity in excess of the minimum will decline as the subdivision approaches full build-out (and Aqua should continue to diligently pursue additional well capacity), given the geography and practical limitations to expanding water supply, the ALJ finds that Aqua's responses to the demand of the Rio Ancho subdivision have been reasonable and sufficient.

2. Use Restrictions

Commission rules permit a retail public utility to restrict water usage in accordance with its DCP provided the restrictions are not "*in lieu of* providing facilities which meet the minimum capacity requirements of 30 TAC Chapter 290 (relating to Public Drinking Water), or reasonable local demand characteristics during normal use periods, or when the system is not making all immediate and necessary efforts to repair or replace malfunctioning equipment."[134] Complainants and Staff argue that Aqua has used its DCP in lieu of meeting reasonable local demand characteristics during normal use periods.

The evidence shows that Aqua used its DCP as authorized. Aqua imposed restrictions in response to district curtailments and drought, as authorized. The plan may also be used in conditions other than drought, and the evidence shows that Aqua's DCP usage conforms to TCEQ's rules and is an acceptable method of curtailing peak demand. Although Aqua imposed

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[132] Aqua Ex. 3 at 8 (Foltz Dir.), SF-5 at 45.

[133] Aqua Ex. 22 (Peña Dir.), WP-2 (Aqua Ex. 24).

[134] 16 TAC § 24.205(2) (emphasis added). There is an exception to this rule if specifically authorized by the TCEQ, which no one argues applies here. *See also* 16 TAC § 24.205(2)(A)-(B).

voluntary restrictions during periods of normal usage, the evidence does not establish that it imposed the restriction *in lieu of* providing facilities which meet the reasonable local demand characteristics *during normal use periods*. The evidence shows that its Rio Ancho system is adequate to meet the subdivision's demand during normal use periods (non-summer months), despite that demand being twice the state average.

Moreover, it bears noting that the Rio Ancho customers are somewhat insulated from the normal price incentives to reduce consumption. Ordinarily, conservation would be encouraged through rate structure, such as inclining block rates or other conservation rate structure.[135] Although the regional rate design does contain these features,[136]—and Complainants point out that the higher usage generates a commensurately higher revenue—Mr. Laughman testified that "Rio Ancho could never afford to stand alone on its rates, and regionalization is a way for us to accommodate high capital costs."[137] Thus, the Rio Ancho system's rates are not structured to meet the specific conservation needs of the system, which by law is a prerequisite to consolidation.[138] Rather, as regional rate customers, the Rio Ancho subdivision customers pay the same rates as all customers within the region.[139]

The ALJ agrees that the water use restrictions should be temporary. However, "temporary" is not defined and in the context of authorized water use restrictions, "temporary" must mean sufficient time for the drought to end, the equipment to be repaired, the agency or court order to be lifted—or the abnormally high use behavior to change.

The evidence shows that the DCP was used as authorized. Aqua used its plan in conformity with and subject to conditions, restrictions, and limitations that the Commission prescribes.[140] The

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[135] 16 TAC § 24.43(b).

[136] Docket No. 48769, Notice of Approval (July 21, 2020), Tariff Table B.

[137] Tr. at 95 (Laughman Dir.).

[138] TWC § 13.145(a)(2).

[139] Aqua Ex. 1 at 5 (Laughman Dir.).

[140] TWC § 13.250(c).

ALJ finds the evidence insufficient to show that Aqua used its DCP in lieu of meeting reasonable local demand characteristics during normal use periods.

3. Relief Sought

The Commission may order a retail public utility to "provide specified improvements in its service in a defined area if service in that area is inadequate or is substantially inferior to service in a comparable area and it is reasonable to require the retail public utility to provide the improved service."[141] Staff requests that Aqua be ordered to make "necessary improvements" and Complainants ask the Commission to order Aqua to "identify and make system improvements necessary to meet the reasonable local demand in the Rio Ancho subdivision."[142] In the view of Complainants' witness Mr. Rauschuber, this would require at a minimum, doubling the TCEQ minimum requirements, but possibly tripling or quintupling them—with no end to how much more would be needed—to achieve "absolutely no water outages, nonemergency water outages, and no low pressure events below 35 PSI per customer meter during any day, any hour of the year."[143] Aqua estimated the cost of the improvements necessary to meet Mr. Rauschuber's *minimum* starting point at $700,000, if unimpeded by the practical limitation of procuring a wellsite.[144]

To order the improvements Aqua identified as necessary to meet Complainants' requests, the Commission must find that requiring Aqua to provide the improved service is reasonable.[145] As a consolidated system, the additional cost would be borne not only by the customers that benefit from the upgrades, but by all the customers within the Southwest Region. Aqua President Laughman testified regarding how capital improvement decisions affect all customers within the region:

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[141] TWC § 13.253(a)(1)(A); 16 TAC § 24.247(b).

[142] Second Amended Formal Complaint at 4; Staff Initial Brief at 9; Staff Ex. 1 at 12 (Graham Dir.).

[143] Tr. at 63-64 (Rauschuber Cross).

[144] Aqua Ex. 22 at 19-20 (Peña Dir.).

[145] TWC § 13.253(a)(1)(A); 16 TAC § 24.247(b)(1)(A)(iii).

> Any future rate application filed for that region will include the Rio Ancho System facilities in Aqua's requested rate base total and that, in turn, would affect the regional rates set. Customers from outside the Rio Ancho subdivision would be subject to those rates and might choose to challenge Aqua's capital improvement decisions as part of that future rate case.
>
> Another concern is if we begin overbuilding facilities to accommodate Southwest Region area customers who want to have unlimited water use whether reasonable or not, we would have to start doing that for customers of our other systems to be consistent. Conversely, if unreasonable use can be curbed through either rates that promote water conservation or simply asking customers to adhere to a reasonable watering schedule, that eliminates the need to add more facilities, impact rate base totals, and drive up regional rates unnecessarily.[146]

This testimony points to the impact to Aqua's rates and rate structure of making the requested upgrades. First, other regional customers could challenge the prudence of Aqua's actions underlying the costs included in Aqua's rate request.[147] Additionally, because the improvements to meet the Rio Ancho subdivision's extremely high demand would benefit only the Rio Ancho customers, other customers who pay the same rate could argue the Rio Ancho customers would receive a preferential rate in violation of the law.[148] Moreover, as a precondition to consolidation, Aqua was required to show that its systems were substantially similar and that its rates would encourage conservation.[149] Upgrading capacity sufficient for its customers to use unreasonable amounts of water and avoid conservation efforts could be construed as rendering the systems no longer substantially similar and the antithesis of promoting conservation. Thus, other customers within the region could challenge the Rio Ancho system's consolidation with Aqua's other

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[146] Aqua Ex. 1 at 5-6 (Laughman Dir.).

[147] *See, e.g., Gulf States Utils. Co. v. Pub. Util. Comm'n*, 841 S.W.2d 459, 476 (Tex. App.—Austin 1992, writ denied); *Application of Southwestern Electric Power Company for Authority to Reconcile Fuel Costs*, Docket No. 32898, Second Order on Rehearing at Conclusion of Law No. 21 (Nov. 26, 2007).

[148] TWC §§ 13.182(b)("rates may not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of consumers."), .186(a)("If the regulatory authority, after reasonable notice and hearing, on its own motion or on complaint by any affected person, finds that the existing rates of any utility for any service are unreasonable or in any way in violation of any law, the regulatory authority shall determine the just and reasonable rates, including maximum or minimum rates, to be observed and in force, and shall fix the same by order to be served on the utility.")

[149] TWC § 13.145. *Application by Aqua Development Company and Aqua Utilities, Inc. d/b/a Aqua Texas, Inc. to Change its Water and Sewer Tariffs and Rates in Various Counties*, TCEQ Docket Nos. 2004-1671-UCR and 2004-1120-UCR, SOAH Docket Nos. 582-05-2770 and 582-05-2771, Final Order at 10-12 (Sept. 23, 2008).

systems.[150] Such a challenge was contemplated by the proposal for decision recommending approval of Aqua's rate consolidation.[151]

Finally, neither Complainants nor Staff's requested relief envisions any end to the amount of improvements Aqua would be required to make. The ALJ finds that it would not be reasonable to require Aqua to provide the improvements in service Complainants and Staff seek.

With respect to its DCP, both Staff and Complainants essentially ask that the Commission order Aqua to discontinue using restrictions except as authorized. However, the evidence shows that authorized uses of the DCP include meeting non-drought conditions and that Aqua has used its DCP as authorized. To the extent Complainants ask the Commission to limit authorized uses of the DCP, they cite no authority for this request. Although DCPs are a part of a utility's tariff, the authorized uses are set by the TCEQ, not the Commission.[152] Accordingly, the ALJ finds no basis to limit Aqua's authorized uses of its DCP.

V. CONCLUSION

Based on the evidence, the ALJ finds the Rio Ancho subdivision's actual demand is not a reasonable local demand characteristic that Aqua is obligated to meet and Aqua has not used water use restrictions in lieu of providing plant to meet reasonable local demand during normal usage periods. The ALJ further finds that requiring Aqua to make the requested upgrades to its Rio Ancho system is not reasonable. Although the ALJ recommends that Aqua continue to diligently pursue additional well capacity, the evidence does not show a need for the Commission to order it to do so. Moreover, the evidence shows that the low-pressure events upon which the complaint is based can be, and have been, remedied by increasing enforcement of water restrictions.

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[150] Tr. at 95-96 (Laughman Dir.); Tr. at 104 (Laughman Cross); Tr. at 133-34 (Laughman Redir.); Aqua Initial Brief at 25.

[151] *Application by Aqua Development Company and Aqua Utilities, Inc. d/b/a Aqua Texas, Inc. to Change its Water and Sewer Tariffs and Rates in Various Counties*, TCEQ Docket Nos. 2004-1671-UCR and 2004-1120-UCR, SOAH Docket Nos. 582-05-2770 and 582-05-2771, Proposal for Decision at 14 (July 5, 2007).

[152] 16 TAC § 24.205(2)(A); TWC § 11.1272(a); 30 TAC § 288.20(a)(1)(E), (2).

VI. FINDINGS OF FACT

Procedural Background (Preliminary Order [P.O.] Issue Nos. 1 through 3)

1. On July 20, 2020, the Rio Ancho Homeowners Association (HOA) and HOA members (Francis T. Rossi, James J. Pogue, Julie Bowse, Kenneth W. Cline, Diana S. Cline, David Amador, Marshall Ault, Chester Jackson, Virginia Jackson, Eric Robinson, Bruce Brown, Sue Brown, David Meyers, Doreen Meyers, Casey Cobb, Ashlie Cobb, Rob Meyers, Daniel Winans, Andrea Winans, Samuel Cox, Jaime Torres, and Dustin Torres), and David and Doreen Meyers (collectively, Complainants) filed a formal complaint against Aqua Texas, Inc. (Aqua).

2. On August 10, 2020, Aqua filed a Motion to Dismiss and Response to Formal Complaint.

3. On August 31, 2020, the Public Utility Commission of Texas (Commission) Administrative Law Judge (ALJ) denied Complainants' request for attorney's fees included in their original complaint.

4. On September 29, 2020, the Commission referred the complaint to the State Office of Administrative Hearings (SOAH).

5. On November 5, 2020, the Commission issued its preliminary order which listed the issues to be addressed in this docket.

6. On November 23, 2020, SOAH Order No. 1 dismissed the Rio Ancho HOA, Casey Cobb, Ashlie Cobb, Rob Myers, and Eric Robinson as Complainants for failure to comply with the informal complaint requirements.

7. On December 3, 2020, the ALJ conducted a prehearing conference, at which Complainants narrowed the scope of relief requested.

8. On January 22, 2021, SOAH Order No. 2 denied Aqua's Motion to Dismiss and required Complainants to file an amended complaint.

9. On February 1, 2021, Complainants filed a First Amended Formal Complaint.

10. On February 2, 2021, Complainants filed a Second Amended Formal Complaint.

11. On March 2, 2021, a second prehearing conference was held. The ALJ concluded that the Second Amended Formal Complaint complied with SOAH Order No. 2.

12. The amended complaint asserts that Complainants have experienced repeated instances of

low water pressure and the loss of service since at least 2018.

13. The amended complaint alleges that Aqua's Rio Ancho system facilities are inadequate to meet the reasonable requirements of the residents of the subdivision and that Aqua improperly imposed water use restrictions under its drought contingency plan (DCP) to reduce consumption and avoid making necessary capital and operational improvements to its Rio Ancho plant.

14. On March 11, 2021, SOAH Order No. 4 adopted the parties' agreed procedural schedule and set the hearing on the merits for September 7-8, 2021.

15. On April 16, 2021, Complainants filed direct testimony and exhibits.

16. On April 30, 2021, Aqua filed objections and a motion to strike portions of Complainants' direct testimony and exhibits.

17. On May 20, 2021, SOAH Order No. 6 overruled in part and sustained in part Aqua's objections to portions of Complainants' direct testimony and exhibits and granted in part Aqua's motion to strike.

18. On May 21, 2021, Aqua filed direct testimony and exhibits.

19. On June 28, 2021, Commission staff (Staff) filed direct testimony and exhibits.

20. On July 21, 2021, Staff filed errata to its direct testimony and exhibits.

21. On August 6, 2021, Complainants filed rebuttal testimony and exhibits.

22. On August 6, 2021, Aqua filed rebuttal testimony and exhibits, and errata to the direct testimony and exhibits of Brian R. Tolle.

23. On September 1, 2021, the parties filed a status report requesting that the hearing on the merits proceed as scheduled.

24. The hearing on the merits was conducted on September 7-8, 2021, via Zoom videoconference before SOAH ALJ Christiaan Siano.

25. On September 9, 2021, SOAH Order No. 7 set the deadlines for post-hearing briefs and the record close date.

26. On October 15, 2021, the parties each filed initial post-hearing briefs.

27. On November 10, 2021, the parties filed reply briefs. The record closed on this date.

Background

28. Aqua is a Class A retail public utility providing water and sewer service to over 370 public water systems in 53 counties in Texas.

29. Aqua's service territory is divided into four regions (North, Southeast, Southwest, and Ingram), and the systems within those regions have been consolidated for rate purposes.

30. The Rio Ancho subdivision is within the Southwest Region, which was consolidated in Aqua's last rate case at the Texas Commission on Environmental Quality (TCEQ) before retail water rate jurisdiction was transferred to the Commission.

31. In consolidating the systems within the Southwest Region, TCEQ determined that the systems were substantially similar to other regional water systems in terms of facilities, quality of service, and cost of service, and that its tariff provides for rates that promote water conservation.

32. Regional rates allow Aqua to spread capital costs over a larger customer base, reducing the per customer impact of projects in a given community.

33. Aqua owns and operates the Rio Ancho water system (Public Water System Identification number 0270141), located within Aqua's certificate of convenience and necessity number 13254.

34. The Rio Ancho subdivision is a gated community that straddles the boundary between Williamson and Burnet counties, south of State Highway 29 between Liberty Hill and Bertram.

35. The Rio Ancho subdivision is in a semi-arid region of Central Texas.

36. Within Burnet County, the Rio Ancho subdivision is in the Central Texas Groundwater Conservation District.

37. The Rio Ancho subdivision is platted for 207 homes at full build-out but is currently composed of approximately 170 connections on lots averaging an acre in size.

38. Many of the Rio Ancho lots have landscaping and pools.

39. The Rio Ancho subdivision deed restrictions require all yards, including trees and plantings of all types, to be well maintained and kept neat, trim, and free of debris at all times.

40. The Rio Ancho subdivision deed restrictions do not require well-maintained grass.

41. The Rio Ancho subdivision design standards state a watering ethic that recognizes water as a precious natural resource and encourages water conservation.

42. The watering ethic is not enforced.

The Rio Ancho System (P.O. Issue No. 5):

43. Aqua serves the Rio Ancho subdivision through a dedicated system.

44. The water is sourced from groundwater produced from three water wells that draw from the Trinity Aquifer, and their combined rated capacity is 125 gallons per minute (gpm).

45. Two wells are located in Burnet County in the Central Texas Groundwater Conservation District and are permitted at a total of 81.65 acre-feet (26,605,730 gallons) annually—the maximum production limit allowed by the district. This quantity allows for a half-acre foot of production per acre of controlled area.

46. The district considers the permitted amount to be the amount of groundwater needed per surface acre of land to allow reasonable beneficial use of groundwater without waste, encourage conservation, and support continued economic growth in the district.

47. The third well, in Williamson County, is not in the district, but draws from the same aquifer and is subject to similar hydrogeologic limitations as the other two.

48. The Rio Ancho system has two ground storage tanks with a capacity of 42,000 gallons each; three booster pumps that can produce over 600 gpm; and two hydropneumatic tanks that have a total volume of 6,000 gallons.

49. The Rio Ancho system production, treatment, storage, transmission, and distribution facilities were of sufficient size and capacity to provide a continuous and adequate supply of water to customers for all reasonable customer uses during the relevant time period from July 20, 2018, through July 20, 2020.

50. The Rio Ancho system plant exceeds the TCEQ minimum capacity requirements set forth in 30 Texas Administrative Code (TAC) §§ 290.38-.275.

51. The Rio Ancho system capacity exceeds the TCEQ minimum requirements for well capacity by 124%, for storage by 250%, and for booster pumps and hydro tanks by 179%.

52. Between July 20, 2018, and July 20, 2020, the customers of the Rio Ancho system experienced low water pressure or loss of service.

53. Service outages caused by excessive outdoor watering demand were resolved after demand dropped and the Rio Ancho system storage tanks refilled after each event.

54. Outside use is reasonable if it does not exceed the pro-rata capacity of the source (or as mandated by regulatory agency) and is used in a responsible and non-wasteful manner so

that the source is maintained.

55. The local demand characteristics of the Rio Ancho subdivision included unreasonably high demand, including unreasonable quantities for outside usage between April and September in 2018, 2019, and 2020.

56. Between July 20, 2018 to July 20, 2020, Rio Ancho system customers used in excess of 50,000 gallons per month, and some used over 120,000 gallons in a month, whereas typical residential usage for Aqua retail customers is around 7,000 to 10,000 gallons per month.

57. For Aqua retail customers, typical usage for a large-lot single family residential subdivision like the Rio Ancho subdivision is between 14,000 and 15,000 gallons per month. During July 2019, 50% of Rio Ancho system customers used more than 20,000 gallons, and during August 2019, 75% of the Rio Ancho system customers used more than 20,000 gallons.

58. The average usage of Rio Ancho system customers as measured by customer monthly readings was 1.8 to 1.9 times the average for all residential systems in Aqua's Central Texas Area, West Austin Division, during 2018-2020 and was more than twice the average at times.

59. Rio Ancho subdivision customers' average consumption during 2018-2020 was 465 gallons per day per connection compared to 204 gallons per day per connection statewide during 2018 and 2019.

60. The Rio Ancho system has sufficient capacity to provide 1,523 gallons per lot per irrigation day for outdoor watering. This is sufficient to meet a reasonable demand level for outside watering in the Rio Ancho subdivision.

61. Rio Ancho subdivision customers do not consistently adhere to twice-per-week water-use restrictions imposed by Aqua pursuant to its DCP.

62. Regional cost and rate impact, natural resource conservation, physical/regulatory limitations, and actual lawn watering needs are proper factors to consider in making decisions for public drinking water system capital improvements and reasonableness of local demand characteristics.

63. As of May 2021, all Rio Ancho system facilities exceeded the minimum TCEQ capacity requirements and provided sufficient additional capacity to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage, for approximately 170 current connections, and could do so for the 207 connections at full buildout.

64. The usage levels for Rio Ancho customers advocated by Complainants do not comport with the state's water conservation policies embedded in chapter 13 of the Water Code, the State or Regional Water Plans, or the subdivision's own watering ethic.

65. The Rio Ancho system plant was adequate to provide a continuous and adequate supply ofwater to customers from July 20, 2018, through July 20, 2020.

66. Ordering the specific system improvements Complainants request could result in a regulatory authority finding that the improvements were imprudent, that the Rio Ancho system rate is violative of the law, and that the system is no longer substantially similar to other Aqua Southwest Region water systems.

67. If Aqua's rates were set for the Rio Ancho subdivision as a stand-alone system, Rio Ancho customers could not afford the cost of the service Complainants request. Regionalized rates help distribute high capital costs of individual systems.

68. No additional system improvements are necessary to serve the reasonable local demand levels of the Rio Ancho subdivision.

Daily and Monthly Peak Demand (P.O. Issue No. 4)

69. From July 20, 2018, through July 20, 2020, the peak monthly demand for Rio Ancho system customers was 4,319,000 gallons in July 2019, equating to 1,035 gallons per day per connection.

70. From July 20, 2018, through July 20, 2020, the peak daily reading occurred in August 2019 with usage of 172,571 gallons per day, equating to 1,150 gallons per day per connection.

71. From 2018 to 2019, average daily usage per connection increased by 29% and the peak day use per connection increased by 44%.

72. For the remainder of 2020 after July 20, 2020, the peak monthly demand was 4,003,000 gallons in August 2020, equating to 872 gallons per day per connection.

73. For the remainder of 2020 after July 20, 2020, the peak daily reading was approximately 132,570 gallons per day, equating to 875 gallons per day per connection, the week of August 10-17, 2020.

Water-Use Restrictions (P.O. Issue Nos. 6, 7, and 8)

74. Aqua has a DCP in compliance with TCEQ requirements.

75. The DCP is part of Aqua's tariff.

76. Aqua imposed water-use restrictions on Rio Ancho system customers between July 20, 2018, and July 20, 2020, pursuant to its DCP.

77. The bases for each period of water-use restrictions Aqua imposed between July 20, 2018, through July 20, 2020, were drought, drought stages declared by the Central Texas Groundwater Conservation District calling for periods of water-use reductions, periods of abnormally high usage, or a combination of these conditions as authorized in Aqua's DCP.

78. Aqua complied with the notice requirements of its applicable DCP each time it imposed Rio Ancho system water-use restrictions from July 20, 2018, through July 20, 2020.

79. TCEQ personnel reviewed Aqua's DCP practices and confirmed they were an acceptable means to reduce peak demand.

80. Because of consolidation, the Rio Ancho customers are somewhat insulated from the normal rate signals to conserve water.

81. It is reasonable to expect customers to adhere to a reasonable standard of outdoor watering, daytime restrictions to reduce their overall water consumption level. Central Texas utilities impose water use restrictions.

82. Aqua encouraged voluntary customer compliance with Aqua's water-use restrictions between July 20, 2018, through July 20, 2020, but Aqua did not enforce any penalty or consequence for violation of water-use restrictions on any system customer in the Rio Ancho subdivision during that time.

83. Aqua has not used its DCP in lieu of providing facilities which meet the minimum capacity requirements of 30 TAC §§ 290.38-.275, or reasonable local demand characteristics during normal use periods, or when Aqua is not making all immediate necessary efforts to repair or replace malfunctioning equipment under 16 TAC § 24.205(2).

84. Aqua has not directly or indirectly demanded, charged, or collected any rate or charge, or imposed any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the Commission under 16 TAC § 24.25(a).

85. No relief from the Commission is warranted with respect to Aqua's DCP implementation.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Water Code (TWC) §§ 13.041, .250, .253 and 16 TAC §§ 22.242, 24.205, .247(b).

2. SOAH has jurisdiction over the hearing in this matter under Texas Government Code chapter 2003.

3. Aqua is a retail public utility required to hold a certificate of convenience and necessity. TWC §§ 13.002(19), .242(a).

4. Retail public utilities must provide capacity in excess of the minimum standards set by the TCEQ sufficient to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock. 16 TAC § 24.205(1).

5. Reasonable local demand characteristics should be based on the usage patterns in the local area, not only usage patterns of the system at issue.

6. The Rio Ancho system capacity exceeds the TCEQ minimum standards sufficient to meet the reasonable local demand characteristics of the Rio Ancho subdivision water service area under 16 TAC § 24.205(1).

7. Unless specifically authorized by TCEQ, retail public utilities may not use water use restrictions in lieu of providing facilities which meet the reasonable local demand characteristics during normal use periods. 16 TAC § 24.205(2).

8. Aqua did not use water use restrictions in lieu of providing facilities which meet the reasonable local demand characteristics during normal use periods.

9. Aqua's usage and implementation of its DCP within the Rio Ancho subdivision water service area has complied with 16 TAC § 24.205(2).

10. The Commission may order a utility to make specified improvements in its service in a defined area if service in that area is inadequate or is substantially inferior to service in a comparable area and it is reasonable to require the retail public utility to provide the improved service. TWC § 13.253(1)(A).

11. If the service in an area is inadequate as set forth in 16 TAC § 24.205 or substantially inferior to service in a comparable area, the Commission may order a retail public utility to make specific improvements if it is reasonable to do so. 16 TAC § 24.247(b)(1)(A).

12. Aqua's service to the Rio Ancho subdivision is not inadequate or substantially inferior to service in a comparable area.

13. Requiring Aqua to make the improvements sought by Complainants is not reasonable.

14. Aqua is providing continuous and adequate service within the Rio Ancho subdivision as required by TWC § 13.250 and 16 TAC § 24.247.

15. Aqua has not violated its DCP requirements or approved water utility tariff provisions.

VIII. PROPOSED ORDERING PARAGRAPHS

1. The Commission adopts the proposal for decision, including findings of fact and

conclusions of law, to the extent provided in this Order.

2. Complainants' requested relief is denied.

3. The Commission denies all other motions and any other requests for general or specific relief that have not been expressly granted.

4. This complaint matter is closed.

SIGNED January 7, 2022.

CHRISTIAAN SIANO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: **Public Utility Commission of Texas (PUC)**

STYLE/CASE: **RIO ANCHO HOMEOWNERS ASSOCIATION AND DAVID AND DOREEN MYERS & AQUA TX INC**

SOAH DOCKET NUMBER: **473-21-0246.WS**

REFERRING AGENCY CASE: **51091**

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