



Control Number: 51114



Item Number: 9

Addendum StartPage: 0

PUC DOCKET NO. 51114



PETITION BY IMPERIAL HEIGHTS, §
LTD. FOR STREAMLINED EXPEDITED §
RELEASE FROM WATER CCN NO. 13203 §
AND SEWER CCN NO. 21065 HELD BY §
AQUA TEXAS INC. §

PUBLIC UTILITY COMMISSION
BY _____
OF TEXAS

IMPERIAL HEIGHTS LTD'S EXCEPTIONS TO PROPOSED ORDER

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, Imperial Heights, Ltd. ("Imperial Heights or Petitioner") and files these Exceptions to Proposed Order, and in support thereof, would respectfully show as follows:

I. INTRODUCTION

On October 6, 2020, the Administrative Law Judge (ALJ) issued the Proposed Order in the above-referenced docket in anticipation of the consideration of this docket at the Public Utility Commission of Texas ("PUC") open meeting on November 5, 2020. Corrections or exceptions were requested to be filed on or before Tuesday, October 27, 2020. Accordingly, these exceptions are timely filed.

Imperial Heights files these exceptions to the Proposed Order, in particular the conclusion that Imperial has failed to demonstrate that the 37.8-acre tract of land ("Property") that it seeks to decertify by streamlined expedited release is not receiving water service and sewer service under the standards of Texas Water Code (TWC) §§ 13.002(21) and 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(h), as interpreted in *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W. 3d 130 (Tex. App. Austin 2014, pet. denied). Imperial respectfully requests that the Commission review Commission Staff's Final Recommendation of approval that was filed on September 25, 2020, along with the additional items presented below and approve Imperial Heights' petition.

9

II. FACTS

On July 24, 2020, Imperial Heights filed its petition under TWC §13.2541 and 16 TAC §24.245(h) seeking to remove the Property in Harris County from Aqua Texas' water and sewer CCN numbers 13203 and 21065 (the "Petition"). The Petition included an affidavit from Louis Trapolino, Development Manager for Imperial Heights, attesting, among other things, that Imperial Heights never requested water or sewer service from Aqua Texas, the tract is not receiving water or sewer service from Aqua Texas, Imperial Heights has never paid Aqua Texas anything to initiate or maintain water service, and there are no billing records or other documents evidencing an existing account with Aqua Texas for the Property.¹

On August 21, 2020, Aqua Texas filed a Motion to Intervene and on August 31, 2020 the ALJ filed Order No. 2 granting the Motion to Intervene and specifying the procedural schedule. Aqua Texas filed a Supplemental Response to Petition on September 18, 2020. In Aqua Texas' Supplemental Response, Aqua Texas included an affidavit from Chris A. Garcia, Aqua Texas' Southeast Texas Area Manager. Mr. Garcia states that the Property receives water and sewer service from Aqua Texas and an aerial photograph of the Property and surrounding area was attached to Mr. Garcia's affidavit.²

On September 25, 2020, Commission Staff filed its Final Recommendation, in which it recommended granting the Petition. However, on October 6, 2020, the ALJ filed a Proposed Order, in which the ALJ recommended denial of the Petition based on the facts provided in Mr. Garcia's affidavit.

III. ARGUMENTS AND AUTHORITIES

a. Requirements for Streamlined Expedited Release

¹ Petition at Exhibit A, Affidavit of Louis Trapolino (Jul. 23, 2020).

² Aqua Texas' Supplemental Response to Petition at Exhibit A, Affidavit of Chris A. Garcia (Sep. 17, 2020).

i. Not Receiving Service

Pursuant to TWC § 13.2541, the tract of land sought to be released from a CCN must not be receiving water or sewer service. Service is defined as “any act performed, anything furnished or supplied, and any facilities or lines committed or used by the retail public utility in the performance of its duties...”³ In *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, the court held:

The mere existence of water lines or facilities on or near a tract would not necessarily mean that a tract was ‘receiving water service.’ Rather...such a determination is essentially a fact-based inquiry requiring the Commission to consider whether the retail public utility has facilities or lines committed to providing water *to the particular tract* or has performed acts or supplied anything *to the particular tract* in furtherance of its obligation to provide water to that tract pursuant to its CCN.⁴

The court in *Crystal Clear* further states that a tract of land would not be considered to be receiving service “simply because the retail public utility has performed an act, such as entering into a contract to secure water supply, unless the act was performed in furtherance of providing water to the tract seeking decertification.”⁵

ii. CCN, Acreage, Ownership and Qualifying County

The petitioner must aver that the tract of land sought to be released is located within the CCN sought to be decertified, located within a qualifying county, and that it is at least 25 contiguous acres and that it is owned by the same property owner(s).⁶

³ TWC § 13.002(21); see also 16 TAC § 24.3(33)

⁴ 449 S.W.3d 130 (Tex.App.—Austin 2014, pet. denied).

⁵ *Id.*

⁶ See TWC § 13.2541; 16 TAC § 24.254(h); *Petition of SLF IV—114 Assemblage L.P. to Amend Aqua Texas Inc’s Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 44667, Memo from Commissioner Anderson (Sept. 10, 2015); Final Order, Docket No. 44667 (Sept. 11, 2015).

b. Parties' Proof

In this proceeding, the issue is whether the Property owned by Imperial Heights is receiving water and sewer service from Aqua Texas. Mr. Garcia claims that Aqua Texas constructed the Imperial Valley water and sewer facilities with the intent of serving the Property and the adjacent subdivision Aqua Texas currently serves next to the Property.⁷ According to Mr Garcia, approximately 1,000 feet of an eight-inch water line runs through the Property and there are numerous sewer collection lines, gravity lines, and force main lines, including a four-inch sewer force main line. Mr. Garcia further asserts in his affidavit that Aqua's Imperial Valley water and sewer system facilities have the capacity to provide water to approximately 136 additional equivalent single-family connections and sewer services to approximately 140 additional equivalent single-family connections.⁸ Mr Garcia concludes his affidavit with a statement that Aqua Texas has also performed acts, supplied funds, and committed facilities to areas adjacent to the Property.

The facilities described by Aqua Texas in Mr. Garcia's affidavit are not "committed" or "used" by the Property. The 1,000 feet of an eight-inch water line on the Property is located within an easement granted twenty years ago to Aqua Texas, so that Aqua Texas could run a line from the water plant located outside the northwest corner of the Property in order to provide service to a third party tract located directly south of the Property. Aqua Texas' sewer lift station and sewer treatment plant located just outside the southern boundaries of the Property were constructed and "committed" to provide service to the same third party tract located directly south of the Property.

⁷ *Id.*

⁸ *Id.*

By way of background, the only area adjacent to the Property that Aqua Texas can legally provide service to is located south of the Property. Aqua Texas does not provide water or sewer service to the remaining areas shown in the aerial photograph included with Mr. Garcia's affidavit. See Affidavit and Vicinity Exhibit of Steven Perez, P.E., Project Manager for the Property attached as Exhibit A. As shown on the attached Vicinity Exhibit, the adjacent areas that are not located south of the Property are within the boundaries of Harris County Municipal Utility District No. 154 ("HCMUD 154"). The anticipated development for the Property will require 238 equivalent single-family connections. Pursuant to the information provided by Mr. Garcia, Aqua Texas does not currently have the 238 equivalent single-family connections and is incapable of providing service to the Property without improvements to the Aqua Texas facilities.

However, HCMUD 154, which is located on three sides of the Property currently has the excess capacity to provide service to the Property according to HCMUD 154's audit that is filed for public record. In addition to HCMUD 154's audit, representatives from Imperial Heights have met with representatives for HCMUD 154 and HCMUD 154's engineer has provided written confirmation to Imperial Heights that there is excess capacity and current ability to serve the Property.

In the *Crystal Clear* Austin Third Court of Appeals decision, the court held that a tract of land is not necessarily "receiving" water service simply because there are facilities or water lines near, or even on that tract if, for example, such facilities are used to provide water only to other tracts.⁹ In this proceeding, Aqua Texas has described facilities that are used to provide water and sewer service to a third party tract located directly south of the Property. The summary of

⁹ See *Tex Gen Land Office v Crystal Clear Water Supply Corp.*, 449 S.W.3d, 139 (Tex. App.—Austin 2014, pet. denied).

facilities and lines provided by Aqua does not rise to the level of “committed or “used” by the Property under *Crystal Clear* or TWC §13.2541 when such facts described above are present. The Property is not receiving water service, and the Petition should be granted.

IV. CONCLUSION AND PRAYER

For the reasons set out above, Imperial Heights respectfully requests the Commission replace Findings of Fact Nos. 13 through 19, and add new Findings of Fact 20; Conclusions of Law No. 8 and add new Conclusion of Law No. 10; replace Ordering Paragraph No. 1, add new Ordering paragraphs Nos. 2 through 8 and renumber Ordering paragraph No. 2 as No. 9 and attach to the Order the revised service area maps for Aqua Texas water and sewer as new certificates. The revisions are as follows:

New Findings of Fact Nos. 13 through 19.

13. Aqua Texas’ water and sewer facilities in the area were built with the intent of serving the adjacent subdivision located to the south of the Imperial Heights tract.
14. An eight-inch water main line owned and operated by Aqua Texas runs through the Imperial Heights tract for approximately 1,000 feet in order to serve the subdivision that is located south of the Imperial Height tract.
15. A four-inch sewer force main line owned and operated by Aqua Texas runs through the Imperial Heights tract for approximately 400 feet.
16. Aqua Texas’ water plant is located outside the northwest corner of the Imperial Heights tract and the water plant provides service to the subdivision located south of the Imperial Heights tract
17. An Aqua Texas lift station is located just outside the south corner of the Imperial Heights tract and the lift station is for its sewer treatment operations for the subdivision located south of the Imperial Heights tract.
18. Aqua Texas has a sewer treatment plant located just outside the southeast corner of the Imperial Heights tract and the sewer treatment plant is for its sewer treatment operations for the subdivision located south of the Imperial Heights tract.
19. Aqua Texas has not committed or dedicated facilities or lines providing water or sewer services to the tract that Imperial Heights seeks to decertify.

20. The tract that Imperial Heights seeks to decertify is not receiving water or sewer service from Aqua Texas.

New Conclusions of Law Nos. 8 and 10.

8. The land that Imperial Heights seeks to decertify by streamlined expedited release is not receiving water service or sewer service under the standards of TWC §§13.002(21) and 13.2541 and 16 TAC § 24.245(h), as interpreted in *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet.denied).
10. Under TWC §13.257(r) and (s), Aqua Texas is required to record a certified copy of the approved certificates and maps, along with a boundary description of the service area, in the real property records of each county in which the service area or a portion of the service area is located, and submit to the Commission the evidence of recording.

New Ordering Paragraph Nos. 1-9

1. The Commission grants the petition of Imperial Heights and removes the approximately 37.8-acre tract of land from Aqua Texas' water CCN number 13203 and sewer CCN number 21065 in Harris County.
2. The Commission amends Aqua Texas' water CCN number 13203 and sewer CCN number 21065 in accordance with this Order.
3. The Commission's official service boundary maps for Aqua Texas' water CCN number 13203 and sewer CCN number 21065 will reflect this change as shown on the attached maps.
4. The Commission grants the certificates attached to its Order.
5. Aqua Texas must comply with the recording requirements of TWC §13.257(r) and (s) for the area in Harris County affected by the petition and submit to the Commission evidence of the recording no later than 31 days after receipt of this Order.
6. The amount of compensation owed by Imperial Heights to Aqua Texas, if any, will be determined by separate order.
7. The procedural schedule specified in Order No. 2 will remain in effect.
8. A copy of this Order will be provided to Aqua Texas.

9. The Commission denies all other motions and any other request for general or specific relief, if not expressly granted.

Respectfully submitted,

WINSTEAD PC

By: Scott W. Eidman / s

Scott W. Eidman
State Bar No. 24078468
seidman@winstead.com

Vincent L. Marino
State Bar No. 12984000
vmarino@winstead.com

2728 N. Harwood Street
Suite 500
Dallas Texas 75201
Telephone: (214) 745-5484
Facsimile: (214) 745-5390

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby 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 October 26, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

Scott W. Eidman / s
Scott W. Eidman

EXHIBIT A

PETITION BY IMPERIAL HEIGHTS, § PUBLIC UTILITY COMMISSION
LTD. FOR EXPEDITED RELEASE FROM §
WATER CCN NO. 13203 AND SEWER § OF TEXAS
CCN NO. 21065 HELD BY AQUA TEXAS, §
INC. §

AFFIDAVIT OF STEVEN PEREZ, P.E.

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned notary, personally appeared Steven Perez, P.E. the affiant, a person who is known to me. After administering an oath, the affiant testified that:

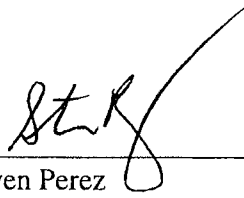
1. “My name is Steven Perez, P.E., I am over the age of eighteen years, of sound mind, and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and to the best of my knowledge are true and correct.

2. I am a professional engineer employed with LJA Engineering, Inc. (“LJA”). I am the Project Manager responsible for providing engineering planning and design services in connection with water and wastewater services for the 37.8-acre Imperial Heights tract. LJA has prepared a vicinity map dated June 2019 (Vicinity Exhibit) analyzing the boundaries of the retail water and sewer providers adjacent to the Imperial Heights tract. Aqua Texas currently provides service to the south of the Imperial Heights tract. The Vicinity Exhibit is attached hereto as **Attachment 1**.

3. The Imperial Heights tract will require 238 equivalent single-family connections in order to serve full development of the 37.8-acre tract. Aqua Texas does not have adequate available capacity to provide water and sewer service to the Imperial Heights tract. Aqua Texas will need to construct new facilities and install upgrades to the sewer treatment plant located outside the southeast corner of the Imperial Heights tract. New facilities and upgrades to the sewer treatment plant will need approvals from the Texas Commission on Environmental Quality in order to provide water and sewer service for the Imperial Heights tract.

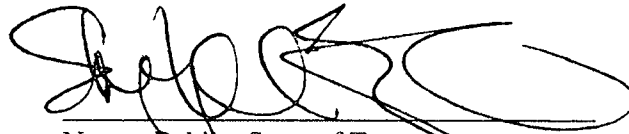
4. The boundaries of Harris County Municipal Utility District No. 154 (HCMUD 154) are depicted in **Attachment 1**. HCMUD 154 is located on three sides of the Imperial Heights tract and currently has existing facilities with adequate available capacity to provide water and sewer service for full development of the Imperial Heights tract.”

FURTHER AFFIANT SAYETH NOT.



Steven Perez

SWORN TO AND SUBSCRIBED TO BEFORE ME by Steven Perez on
October 21, 2020



Notary Public, State of Texas

(SEAL)

