

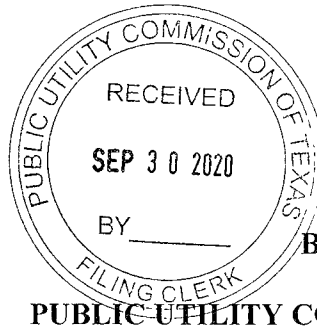


Control Number: 51352



Item Number: 4

Addendum StartPage: 0



DOCKET NO. 51352

**PETITION OF CARNEGIE
DEVELOPMENT, LLC TO AMEND
JAMES A. DYCHE D/B/A CREST WATER
COMPANY'S CCN NO. 12037 IN
JOHNSON COUNTY BY STREAMLINED
EXPEDITED RELEASE**

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**BEFORE THE
PUBLIC UTILITY COMMISSION**

OF TEXAS

**JAMES A. DYCHE D/B/A CREST WATER COMPANY'S MOTION TO INTERVENE
AND MOTION TO DISMISS**

James A. Dyche d/b/a Crest Water Company ("Crest") files this Motion to Intervene and Motion to Dismiss in the above-docketed matter, and in support, respectfully shows the following:

I. INTRODUCTION

On September 17, 2020, Carnegie Development, LLC ("Carnegie") petitioned the Public Utility Commission of Texas ("Commission") for streamlined expedited release from Crest's Certificate of Convenience and Necessity ("CCN") area. The petition stated that Carnegie requested a streamlined expedited release under Texas Water Code ("TWC") § 13.2541 but it also cited Commission rule 16 Tex. Admin. Code ("TAC") § 24.245(l) which relates to additional conditions for decertification. Specifically, Carnegie's petition seeks to remove 195.47 acres from Crest's existing CCN area. The petition has not been declared administratively complete and, as such, Crest filed this Motion timely.¹

II. ARGUMENT

A. Facts

Crest does not dispute that the property Carnegie seeks to remove from its CCN area is at least 25 acres, is located in a qualifying county, and is within Crest's existing water CCN. However, in Docket No. 48405, the Commission already found that Carnegie has requested service from Crest to serve the very same 195-acre tract.² Moreover, the Commission found that Crest

¹ 16 TAC § 24.245(h)(6).

² *Application of Crest Water Company to Amend a Certificate of Convenience and Necessity in Johnson*

had the financial, managerial and technical ability to serve the Carnegie tract.³ Therefore, Carnegie is ineligible for streamlined expedited release, and the Commission should dismiss the petition immediately.

Under the Commission's streamlined expedited release process at 16 TAC § 24.245(h), a petitioner must provide a notarized affidavit providing certain information. Exhibit D to the petition is an affidavit of Carnegie's president, Tim Barton, who attests that Carnegie Development, LLC, "has not requested any retail water service from Crest Water Company, has not paid any service reservation or standby fees, nor does it have any agreements with Crest Water Company to provide retail water service to the above-referenced real property."⁴ This statement is untrue. Carnegie's request for retail water service from Crest was included in Crest's application for amendment to the Commission and was the sole reason Crest filed its application in Docket No. 48405 in the first place.⁵ That request for service demonstrates an agreement between Crest and Carnegie for provision of retail water service to the 195-acre tract. While Mr. Barton attests that his statements are true and correct in the current matter, his sworn statement is plainly false and at odds with Carnegie's earlier request for service from Crest. The inaccuracy of Carnegie's supporting affidavit is grounds to prevent declaration of administrative completeness of the petition and warrants denial and dismissal of the petition.

Carnegie has no ability to serve the tract. Furthermore, any system providing service other than Crest would violate State policy on regionalization, and Carnegie cannot demonstrate that regionalization is economically infeasible.⁶

County, Docket No. 48405, Finding of Fact No. 22 (Mar. 25, 2019).

³ Docket No. 48405, Notice of Approval, Finding of Fact No. Nos. 25-30 and 32-34; Conclusion of Law No. 5 (Mar. 25, 2019).

⁴ Petition of Carnegie Development, LLC to Amend Crest Water Company's Certificate of Convenience and Necessity No. 12037 in Johnson County by Streamlined Expedited Release Pursuant to Texas Water Code § 13.2541 and 16 TAC § 24.245(l) (hereinafter "Petition"), Exhibit D at 1-2 (Sep. 21, 2020).

⁵ Docket No. 48405, Finding of Fact No. 22 (Mar. 25, 2019); see *also* Carnegie Letter Requesting Service from Crest Water Company, Application for Amendment of Crest Water Company CCN to include Carnegie Tract, Docket No. 48405, at 56 (May 31, 2018), a copy is attached as **Exhibit A** (emphasis added).

⁶ TWC § 13.241(d).

Carnegie also stated that it was petitioning for streamlined expedited release under 16 TAC § 24.245(l); however, subsection (l) does not apply to this proceeding. Rather, as the title indicates, 16 TAC § 24.245(i) applies to decertification that expressly excludes streamlined expedited releases.⁷ Under this misconstruction alone, the petition should not be declared administratively complete.

B. Motion to Intervene

The intent of the streamlined expedited release process is to allow service on larger tracts by the landowner's provider of choice, but only under limited circumstances -- not simply whenever a developer changes his mind. Crest has a justiciable interest and therefore standing to intervene in this docket because its certificated area would be significantly reduced causing it to suffer substantial financial harm if Carnegie's petition is granted.⁸ Crest is also entitled to intervene to seek compensation from the landowner in accordance with 16 TAC § 24.245(i). Furthermore, the agreement in place provides a further basis for compensation of Crest pursuant to 16 TAC § 24.245(i) should the Commission fail to rightly dismiss the Carnegie petition.

C. Motion to Dismiss

Upon the motion of any party, the Commission may dismiss, with or without prejudice, any proceeding for any reason specified in 16 TAC § 22.181.⁹ The Commission may dismiss this proceeding without hearing if the facts necessary to support dismissal are uncontested or are established as a matter of law.¹⁰ The Commission's procedural rules include the following reasons for dismissal: lack of jurisdiction, moot question or obsolete petition, res judicata, and collateral estoppel.¹¹ A party's motion for dismissal must specify at least one of the reasons identified in § 22.181(d).¹² The motion must include a statement that explains the basis for the dismissal and, if

⁷ 16 TAC § 24.245(b)(4).

⁸ 16 TAC § 22.103(b)(2).

⁹ 16 TAC § 22.181(a).

¹⁰ 16 TAC § 22.181(c).

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¹² 16 TAC § 22.181(e)(1).

necessary, a statement of the material facts that support the motion and an affidavit that supports the motion and that includes evidence that is not found in the then-existing record.¹³

1. Facts Uncontested or Established as a Matter of Law

The following facts are uncontested or established as a matter of law:

- Carnegie is the owner of a 195.47-acre tract in Johnson County Texas;¹⁴
- The 195.47-acre tract is within the Crest CCN;¹⁵
- Carnegie requested service from Crest;¹⁶
- In Docket No, 48405, the Commission found that Carnegie requested service from Crest;¹⁷
- Carnegie president Tim Barton made a false attestation that Carnegie had not “requested any retail water service from Crest Water Company, has not paid any service reservation or standby fees, nor does it have any agreements with Crest Water Company to provide retail water service to the above-referenced real property.”¹⁸

2. Reasons for Dismissal

The Commission lacks jurisdiction to grant a streamlined expedited release pursuant to TWC § 13.2541, because the Commission previously found that Carnegie requested service from Crest. Thus, Carnegie’s petition fails to meet the statutory requirements for a streamlined expedited release. Carnegie’s petition is also moot, because the Commission already found Crest able to provide service to Carnegie’s 195.47-acre tract. Collateral estoppel precludes Carnegie from now arguing that it has not requested service from Crest. Res judicata prevents Carnegie from proceeding with this streamlined expedited request against Crest, because the Commission

¹³ *Id*

¹⁴ Petition, at Exhibit A, Special Warranty Deed with Vendor’s Lien (Sep. 21, 2020).

¹⁵ Petition, at 2 (Sep. 21, 2020); Petition, Exhibit B (Sep. 21, 2020).

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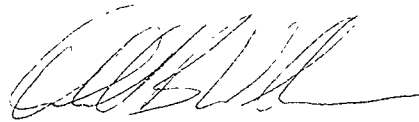
has already adjudicated the matter and found that Carnegie requested service for this 195.47-acre tract from Crest. A supporting affidavit of Mr. Dyche is attached as **Exhibit B**.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, James A. Dyche d/b/a Crest Water Company respectfully prays that the Commission dismiss Carnegie’s petition requesting streamlined expedited release from CCN No. 12027. James A. Dyche d/b/a Crest Water Company further prays that the Commission grant its Motion to Intervene and for such other relief as justice may require.

Respectfully submitted,

Randall B. Wilburn
State Bar No. 24033342
Helen S. Gilbert
State Bar No. 00786263
GILBERT WILBURN PLLC
7000 N. MoPac Expwy, Suite 200
Austin, Texas 78731
Telephone: (512) 535-1661
Telecopier: (512) 535-1678

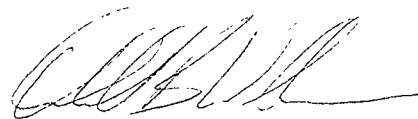


By: _____
Randall B. Wilburn

**ATTORNEYS FOR JAMES A. DYCHE
D/B/A CREST WATER COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that I have or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on the 30th day of September 2020.



Randall B. Wilburn

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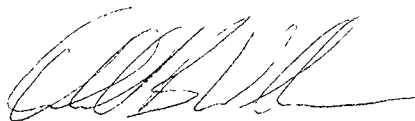
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Respectfully submitted,

Randall B. Wilburn
State Bar No. 24033342
Helen S. Gilbert
State Bar No. 00786263
GILBERT WILBURN PLLC
7000 N. MoPac Expwy, Suite 200
Austin, Texas 78731
Telephone: (512) 535-1661
Telecopier: (512) 535-1678

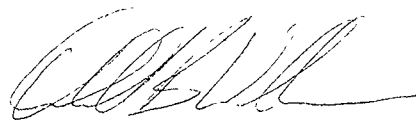


By: _____
Randall B. Wilburn

**ATTORNEYS FOR JAMES A. DYCHE
D/B/A CREST WATER COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that I have or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on the 30th day of September 2020.



Randall B. Wilburn

EXHIBIT A

Carnegie Development

1755 Wittington Place, Suite 340
Dallas Texas 75243

Jim Dyché
Crest Water Co.
840 N Old Betsy Rd
Cleburne, TX 76031

Mr. Dyché:

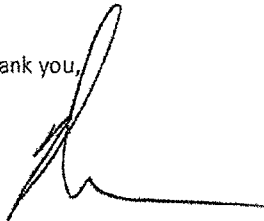
As we have discussed, the Venus, Texas area is experiencing exponential growth and Carnegie Development is proposing approximately 128 1-acre plus lots at the corner of FM 157 and CR 506. The 195-acre tract is immediately south of Crest Water's CCN and we formally request Crest Water to supply the development with water services.

There are currently 33 1-acre lots under construction along CR 501 to the south with another 700 50' builder lots proposed at the corner of FM 157 and CR 501. This is in addition to hundreds of completed homes and lots under construction by LGI along US 67 just east of Venus.

I have attached a preliminary lot layout. A similar preliminary plat is underway for approval by Johnson County. The tract is in City of Venus ETJ, but will not be annexed.

Please let me know if you need any additional information.

Thank you,

A handwritten signature in black ink, appearing to read 'Michael Matthews', with a long horizontal flourish extending to the right.

Michael Matthews
Carnegie Development

EXHIBIT B

STATE OF TEXAS

§

JOHNSON COUNTY

§

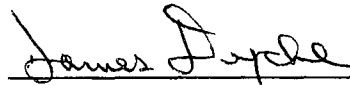
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AFFADAVIT OF JAMES DYCHE

Before me, the undersigned notary, on this day personally appeared James Dyche, a person whose identity is known to me. After I administered an oath to James Dyche, upon his oath, he said:

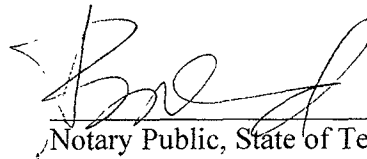
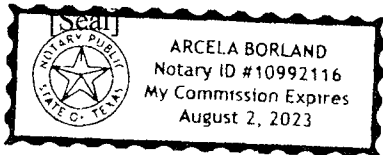
“My name is James Dyche. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I am the owner of James A. Dyche d/b/a Crest Water Company (“Crest”), holder of water Certificate of Convenience and Necessity (“CCN”) No. 12037 in Johnson County, Texas. I applied for an amendment to the CCN to the Public Utility Commission of Texas (“PUC”) in May 2018 to add approximately 195 acres to the existing CCN area. This acreage is owned by a real estate development company, Carnegie Development, LLC (“Carnegie”) who approached me asking Crest to provide the tract with retail water service. Carnegie’s request was made in writing that we incorporated into our CCN amendment application in accordance with PUC rules. The sole reason Crest sought the CCN amendment was to serve the Carnegie tract that Carnegie specifically requested. Through multiple emails, we discussed how the tract would be served, including what infrastructure was needed. The PUC granted the requested amendment in March 2019 in Docket No. 48405, finding both that Crest had the financial, managerial, and technical ability to serve the tract and that Carnegie requested service. Carnegie’s request for a streamlined expedited release from our CCN was a complete and unexpected surprise, which we oppose.”



James Dyche

Given under my hand and seal of office on September 29, 2020.



9/29/20
Notary Public, State of Texas