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DOCKET NO. 51400

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PETITION OF RCR HEMPSTEAD  
RAIL, LP TO AMEND G&W WATER  
CERTIFICATE OF CONVENIENCE  
AND NECESSITY  
IN WALLER COUNTY BY EXPEDITED  
RELEASE

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BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

PUBLIC UTILITY COMMISSION  
FILING CLERK

**G & W WATER SUPPLY CORPORATION'S**  
**RESPONSE TO RCR HEMPSTEAD RAIL'S PETITION**  
**DEEMED ADMINISTRATIVELY COMPLETE**

COMES NOW, G & W Water Supply Corporation ("G & W") and files its Response to RCR Hempstead Rail's Petition Deemed Administratively Complete ("Response") as required by Order No. 3 in this docket. In support hereof, G & W respectfully shows the following:

**I. PROCEDURAL BACKGROUND**

The Petition of RCR Hempstead Rail, LP ("Petitioner"), seeks to avail itself of the streamlined expedited release ("SER") process under Texas Water Code section 13.2541 and 16 Texas Administrative Code section 245(h) to extract 137.04 acres ("the SER Property") from a portion of the water utility service area G & W serves under certificate of convenience and necessity ("CCN") No. 12391. The Petition was filed with the Public Utility Commission ("PUC") by Petitioner's consultant on October 7, 2020. Respondent did not receive notice until October 20, 2020. G & W has adequate facilities to provide service within a reasonable time from receiving a request for service, as this standard has been applied by caselaw and the PUC and is providing water service to SER Property, as that requirement has been interpreted in PUC regulations and in caselaw.

Under the October 13, 2020 Order No. 1, on November 6, PUC Staff filed its recommendation regarding the administrative completeness of the Petition. Staff recommended that the Petition be deemed administratively incomplete. Under Order No. 2, issued the same day, the Petition was deemed incomplete and additional time was given for completing the Petition and for additional Staff review. Subsequently,

Staff recommended a finding that the Petition is administratively complete and Order No. 3 accepted that recommendation.

Order No. 3 additionally set a deadline of January 27, 2021 for G & W to file a response to the administratively complete Petition. Thus, this response is timely filed.

Order No. 4 granted G & W's November 2, 2020 Motion to Intervene.

## **II. BACKGROUND**

G & W Water Supply Corporation provides water service in Waller County and Grimes County, Texas, under CCN No. 12391. G & W has structured its debt, infrastructure construction, and planning based on providing water service to undeveloped areas within its CCN, including the SER Property as further described below.

## **III. THE PETITION MUST BE DENIED BECAUSE TO DO OTHERWISE WOULD VIOLATE 7 U.S.C. 1926(b)**

In 2005, G & W commissioned a 20-year water supply plan to ensure that future development and growth within its certificated area could be served when called upon by future customers. JF Fontaine and Sean Conner were instrumental in creating the plan.<sup>1</sup> G & W, with its consultant's assistance, obtained a loan of \$4,992,500 from the U.S.D.A. to pay for the improvements covered by what is referred to in the water supply plan as "Phase 5."<sup>2</sup> Phase 5 of the plan called for building infrastructure in the service area where growth and development are anticipated.<sup>3</sup> Considering the entire service area of CCN No. 12391, one can see the area considered and addressed by Phase 5. The drawing provided as Attachment 4 to the Affidavit of Sean Conner shows the Phase 5 area in reference to the entire CCN and also shows the SER Property in reference to both.<sup>4</sup>

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<sup>1</sup> See Exhibit A, Affidavit of Sean Conner, at Item 6.

<sup>2</sup> See Exhibit A, Affidavit of Sean Conner, at Item 7 and Affidavit Attachment 3, USDA Letter of Conditions.

<sup>3</sup> See Exhibit A, Affidavit of Sean Conner, at Item 8.

<sup>4</sup> See Exhibit A, Affidavit of Sean Conner, at Item 8 and Affidavit Attachment 4, CCN Map.

Phase 5 of the water supply plan included the following infrastructure, which is shown on a different map, Affidavit Attachment 2. Plant No. 4 was built with the intent of serving the SER Property and other areas G & W expected would be developed in the vicinity. Plant No. 4 water system facilities include: one water well capable of serving 650 customers; an elevated storage tank that has the capacity to serve up to 1,000 customers; and a 10-inch water line extending approximately 12,850 linear feet for conveying water from Plant No. 4 toward the SER Property and other areas in the vicinity. The 10-inch water line is located approximately 2.6 miles from the SER Property and the plant is approximately 5 miles from the SER Property as shown on the map, Affidavit Attachment 2.<sup>5</sup>

In the recent decision *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 475 - 477 (5<sup>th</sup> Circuit, 2020), the Fifth Circuit made a paradigm shift in interpretation of 7 United States Code section 1926(b) and whether it shields a CCN holder from decertification by the Public Utility Commission of Texas. While its decision to overrule *North Alamo Water Supply Corporation v. City of San Juan* (5<sup>th</sup> Cir. 1996) is significant, the *Green Valley* case does not repeal section 1926(b) or the benefits it provides to a CCN holder in protecting its service area. What *Green Valley* accomplishes is a change to the standard by which such protection is judged. The new standard is a physical capability test. Under *Green Valley*, the questions the Public Utility Commission should ask are as follows: Does the borrower CCN holder have (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made, and (2) the legal right to provide service. G & W's legal right to provide service to the SER Property is not in dispute; the SER Property falls inside G & W's certificated area. Thus, the issue is whether G & W has adequate facilities.

So what does this mean to the SER being considered in this docket? The Petitioner has never requested service from G & W; however, the utility has adequate facilities to provide service and could provide water service to the SER Property as soon as a request for service is made by Petitioner. After such a request is received, the next step under the G & W tariff would be for Petitioner to pay for improvements needed to hook up its water service taps to the 10-inch line.<sup>6</sup> Unlike the utility in the *Green Valley* case,<sup>7</sup> G & W has much more than an intention and plan to serve the area to be decertified; G & W has adequate

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<sup>5</sup> See Affidavit of Sean Conner, at Items 9 and 10 and Affidavit Attachment 2.

<sup>6</sup> See Affidavit of Sean Conner, at Item 13.

<sup>7</sup> See *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 465 (5<sup>th</sup> Circuit, 2020).

facilities to provide service to the area within a reasonable time after request for service is made. For these reasons, the Petition must be denied.

#### **IV. PETITION MUST BE DENIED BECAUSE PETITIONER IS “RECEIVING WATER SERVICE” FROM G&W**

In the alternative, the Commission must deny the Petition because the requested SER cannot lawfully be granted under Texas Water Code section 13.2541 and 16 Texas Administrative Code section 24.245 because the SER Property is “receiving water service” from G & W and is not eligible for such a release. That is, even if the PUC applies the *Green Valley* standard to support the Petition, the Petition must be denied under the Texas Water Code and implementing regulations.

Only property “that is not receiving water service” may be released under Texas Water Code section 13.2541.<sup>8</sup> A determination of whether the SER Property receives water service from G & W is a fact-specific inquiry and the lack of active water taps or facilities on the SER Property itself is not determinative.<sup>9</sup> An analysis of the facts begins with the definitions of “service” and “facilities” in the Texas Water Code. “Service” is defined as:

any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties...to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

Tex. Water Code § 13.002(21); *see also*, 16 TAC § 24.3(33) (same definition). The term “facilities” is defined as:

the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

Tex. Water Code § 13.002(9); *see also*, 16 Tex. Admin. Code § 24.3(15) (same definition).

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<sup>8</sup> See Tex. Water Code § 13.2541(b).

<sup>9</sup> See *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 - 141 (Tex. App.- Austin 2014, pet. denied).

Contrary to the Petitioner's claim that "these tracts are currently undeveloped and do not receive water or sewer service from" G & W,<sup>10</sup> under the quoted statutory definitions, a property can "receive water service" even before development and delivery of water to active water taps.<sup>11</sup> In the *Crystal Clear* decision, the court stated that facilities or lines "used" or "committed" to providing such service might cause a property to "receive service" under the statutory and regulatory definitions.<sup>12</sup> G & W has constructed infrastructure and developed water supply "committed" to the SER Property; therefore, the SER Property is "receiving service."

The attached affidavit of G & W's engineering consultant, Sean Conner ("Conner Affidavit"),<sup>13</sup> supports a finding that the SER Property receives water service from G & W as summarized here. G & W began planning for service to the area, including the SER Property in its 20-year plan commissioned in 2005.<sup>14</sup> G & W obtained a loan of nearly \$ 5 million from the U.S.D.A. for infrastructure in Phase 5 of the 20-year plan, which called for building infrastructure in the service area where growth and development is expected and this area includes the SER Property.<sup>15</sup> Phase 5 of the plan and funding of approximately \$1,069,000 included construction of a new water plant, Plant No. 4, which was completed in 2014.<sup>16</sup> Plant No. 4 was built with the intent of serving the SER Property and other properties in the general vicinity of the service area. It includes installation of a new well capable of serving 650 customers; an elevated tank capable of serving 1,000 customers, and a 10-inch water line extending approximately 12,850 linear feet from the plant toward the SER Property. The 10-inch line is located approximately 2.6 miles from the SER Property and Plant No. 4 is approximately 5 miles from the SER Property, as shown on the map attached to the Conner Affidavit.<sup>17</sup> These facilities were designed and built with capacity that exceeds immediate need to respond quickly to anticipated new development with the SER Property and other properties in the vicinity.<sup>18</sup> G & W obtained the required groundwater production permit to include the water supply well

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<sup>10</sup> See Hempstead Rail Park Development Request for Streamlined Expedited Release, dated September 22, 2020, at p. 1.

<sup>11</sup> See *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 - 141 (Tex. App.- Austin 2014, pet. denied).

<sup>12</sup> *Id.*

<sup>13</sup> See Exhibit A, Affidavit of Sean Conner.

<sup>14</sup> See Exhibit A, Affidavit of Sean Conner, at Item 6.

<sup>15</sup> See Exhibit A, Affidavit of Sean Conner, at Items 7 & 8 and Affidavit Attachments 3 & 4.

<sup>16</sup> See Exhibit A, Affidavit of Sean Conner, at Item 11.

<sup>17</sup> See Exhibit A, Affidavit of Sean Conner, at Item 10 and Affidavit Attachment 2.

<sup>18</sup> See Exhibit A, Affidavit of Sean Conner, at Item 12.

that is part of Plant No. 4.<sup>19</sup> G & W has not received a request for water service from Petitioner, but if Hempstead Rail requests service from G & W, all facilities are in place to deliver water to active water taps on the SER Property once Hempstead Rail pays for improvements needed to hook up its water service taps to the 10-inch line.<sup>20</sup>

Thus, G & W has performed various acts and supplied funds in furtherance of service to the SER Property and G & W's CCN No. 12391 area that includes the SER Property, including obtaining approval from the Texas Commission on Environmental Quality for the new well, PWS ID No. 2370085.<sup>21</sup> These acts and funding are detailed in the Conner Affidavit and the map appended to the Affidavit.<sup>22</sup> These facilities - and the acts planning, funding, installing, and maintaining them - are all plainly "committed" or "used" by G & W in the performance of its duties to supply water service to the SER Property as part of G & W's CCN area.<sup>23</sup> The SER Property "receives water service from G & W" through its commitments to serve, and its existing facilities and capacity sized to serve, the SER Property. Mr. Conner's affidavit describes all the different ways G & W has served the SER Property through its various service acts and funds supplied. Under these facts, the Commission should deny the Petitioner's request to release the SER Property from G & W's CCN No. 12391 because such a release would violate Texas Water Code section 13.2541.

#### **V. G & W MUST BE COMPENSATED IF THE SER PROPERTY IS REMOVED FROM G & W'S CCN AREA.**

In the further alternative, if the Commission releases the SER Property despite the facts and arguments set out in Sections III and IV, above, G & W is entitled to just and adequate compensation.

G & W is entitled to a determination of just and adequate compensation if its CCN area is reduced.<sup>24</sup> Under the Texas Water Code and the PUC's implementing regulations, "the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set

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<sup>19</sup> See Exhibit A, Affidavit of Sean Conner, at Item 14.

<sup>20</sup> See Exhibit A, Affidavit of Sean Conner, at Item 13.

<sup>21</sup> See Exhibit A, Affidavit of Sean Conner, at Item 15.

<sup>22</sup> See Exhibit A, Affidavit of Sean Conner, *passim*, and Affidavit Attachment 2.

<sup>23</sup> See Exhibit A, Affidavit of Sean Conner, at Item 15.

<sup>24</sup> See Tex. Water Code §§13.254(d), (g), and 13.2541(a), (h). See also, 16 Tex. Admin. Code § 254(j).

forth in Chapter 21, Property Code, governing actions in eminent domain,” and compensation for personal property is to be based on several factors, including the following: the amount of the retail public utility's “debt allocable for service to the area in question; . . . the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; . . .any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; . . .necessary and reasonable legal expenses and professional fees; and other relevant factors.”<sup>25</sup>

If the SER Property is removed from G & W's CCN No. 12391, G & W would be entitled to compensation under several of these factors including, but not limited to, the costs of obtaining permits, planning, design, and construction of facilities, and the necessary and reasonable legal expenses and professional fees that are incurred as a result of the decertification Petition.<sup>26</sup> G & W would also be compelled to spend time and resources to make the filing required by Texas Water Code section 13.257(r)-(s).<sup>27</sup> Further, G & W would need compensation for the oversizing of Plant No. 4 and the 10-inch line attributable to future development of the SER Property. Further, G & W's CCN and groundwater production permits have value, which purchasers of utilities will pay for when acquiring a utility because of the rights to serve the public that they provide and because of the time and expense that went into acquiring these authorizations.<sup>28</sup> If required, the monetary amount shall be determined by an appraiser, either one agreed upon by the retail public utilities involved, or one hired by each retail public utility, and a third appointed by the Commission.<sup>29</sup>

### **CONCLUSION AND PRAYER**

G & W respectfully requests the Commission to deny the Petition because it cannot lawfully be granted under the Fifth Circuit's *Green Valley* standard or, in the alternative, under Texas Water Code section 13.2541. Alternatively, if the Commission approves the Petition, G & W seeks just and adequate compensation for the decertification of portions of its water CCN No. 12391. G & W also seeks all and further relief to which it may be justly entitled at law or in equity.

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<sup>25</sup> See Tex. Water Code §§13.254(g), 13.2541(h). See also, 16 Tex. Admin. Code § 254(j).

<sup>26</sup> See Exhibit A, Affidavit of Sean Conner, at Items 16, 17, & 18.

<sup>27</sup> See Tex. Water Code § 13.257 (r) [filing amended CCN description and maps in county real property records] and (s) [filing must be accomplished within 31 days after the order amending the CCN]. See also, Exhibit A at Item 18.

<sup>28</sup> See Exhibit A, Affidavit of Sean Conner, at Item 16.

<sup>29</sup> See Tex. Water Code § 13.2541(g), (i). See also, 16 Tex. Admin. Code § 254(i).



Respectfully submitted,

*Mary K. Sahs*

**MARY K. SAHS, P.C.**

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**ATTORNEY FOR G & W WATER  
SUPPLY CORPORATION**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of foregoing G & W Water Supply Corporation's Response to RCR Hempstead Rail's Petition Deemed Administratively Complete was served on all parties of record in this proceeding on January 27, 2020 by electronic mail.

*Mary K. Sahs*

Mary K. Sahs