



Control Number: 51400



Item Number: 8

Addendum StartPage: 0

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DOCKET NO. 51400

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

G & W WATER SUPPLY CORPORATION'S
RESPONSE TO RCR HEMPSTEAD RAIL'S PETITION
FOR STREAMLINED EXPEDITED RELEASE

COMES NOW, G & W Water Supply Corporation ("G & W") and files its Response to RCR Hempstead Rail's Petition for Streamline Expedited Release ("Response") as required by Order No. 1 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 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. However, notice was deficient: Respondent did not receive notice until October 20, 2020. On information and belief, it was not mailed on the same date the Petition was filed. Furthermore, the Petition is deficient and should not be deemed administratively complete. Finally, G & W is providing water service 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.



Order No. 1 also establishes a deadline of November 16, 2020 for G & W to file a response to the Petition. Order No. 2 did not extend this deadline. Thus, this response is timely filed.

On November 2, 2020, G & W filed a Motion to Intervene, which is still pending.

II. BACKGROUND

G & W Water Supply Corporation provides water service in Waller County, Texas, under CCN No. 12391. Its service area is in the vicinity of the City of Hempstead, which operates a municipal retail utility. On information and belief, the City of Hempstead desires to provide service to any residents that in the future may be built on the Property. G & W has structured its debt, infrastructure construction, and planning based on providing water service to undeveloped areas within its CCN, including the Property.

III. NOTICE OF PETITION WAS DEFECTIVE

The Petition states that it requests a streamlined expedited release under Texas Water Code section 13.2541 and 16 Texas Administrative Code section 245(h). Under 16 Texas Administrative Code section 245(h)(3)(F), the Petition must be “mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission.” This requirement is designed to give the CCN holder, in this case Respondent G & W Water Supply Corporation, due process by allowing them to fully participate in the proceedings.

According to the Petition at page 1, notice was provided to Respondent on September 22, 2020. This is not true. The Petition was filed on October 7 and notice was not received for nearly two weeks after that date. The Respondent received a copy of the Petition by certified mail on October 20, 2020.¹ This delay has reduced the time for Respondent to retain legal counsel and understand the requirements and implications of this proceeding.

For these reasons, Respondent urges the presiding officer to provide ample time for Respondent to participate in this docket to the full extent authorized by statute and regulation.

¹ See Exhibit A, Affidavit of Julie Swinney, Customer Service Representative for G & W.

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

The Commission should deny the Petition because the SER requested cannot lawfully be granted under Texas Water Code section 13.2541 and 16 Texas Administrative Code section 24.245. The Property is receiving water service from G & W and is not eligible for SER.

Alternatively, if the Commission releases the Property despite these facts, G & W is entitled to just and adequate compensation.

A. The Property Receives Water Service from G & W, thus it is not eligible for SER

Only property “that is not receiving water service” may be released under Texas Water Code section 13.2541.² A determination of whether the Property receives water service from G & W is a fact-specific inquiry and the lack of active water taps or facilities on the Property itself is not determinative.³ 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).

² *See* Tex. Water Code § 13.2541(b).

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

Under these statutory definitions, a property can “receive water service” even before development and delivery of water to active water taps.⁴ 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 definition.⁵ G & W has constructed infrastructure and developed water supply “committed” to the Property; therefore, the Property is “receiving service.” Here, the Petitioner claims, “these tracts are currently undeveloped and do not receive water or sewer service from” G & W.⁶ The Petition is not verified and in fact, includes no verified affidavit to support its contention.

As shown by the attached affidavit of Sean Conner (“Conner Affidavit”),⁷ G & W’s outside engineering consultant, contrary to the Petitioner’s unsupported statement, (1) G & W began planning for service to the area, including the Property in its 20-year plan commissioned in 2005. (2) Funding was obtained from the U.S.D.A. for infrastructure in the 20-year plan. (3) 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. (4) This included 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 Property. (5) The 10-inch line is located approximately 2.6 miles from the Property and Plant No. 4 is approximately 5 miles from the Property, as shown on the map attached to the Conner Affidavit.⁸ (6) G & W obtained the required groundwater production permit to include the water supply well that is part of Plant No. 4. 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 Property once Hempstead Rail pays for improvements needed to hook up its water service taps to the 10-inch line.⁹

Thus, G & W has performed various acts and supplied funds in furtherance of service to the Property and G & W’s CCN No. 12391 area that includes the Property, including obtaining approval from the Texas Commission on Environmental Quality for the new well, PWS ID No. 2370085. These acts and

⁴ See *Tex Gen Land Office v Crystal Clear Water Supply Corp*, 449 S.W.3d 130, 140 - 141 (Tex App - Austin 2014, pet. denied)

⁵ Id.

⁶ See Hempstead Rail Park Development Request for Streamlined Expedited Release, dated September 22, 2020, at p 1.

⁷ See Exhibit B, Affidavit of Sean Conner

⁸ See Exhibit B, Affidavit of Sean Conner at Items 6 - 11 and Attachment A, the map.

⁹ See Exhibit B, Affidavit of Sean Connor at Items 12 - 13. See also, Affidavit of Julie Swinney at Item 5.

funding are detailed in the Conner Affidavit and the map appended to the Affidavit.¹⁰ Here, 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 Property as part of G & W's CCN area. The Property "receives water service from G & W" through its commitments to serve, and its existing facilities and capacity sized to serve, the Property. Mr. Conner's affidavit describes all the different ways G & W has served the Property through its various service acts and funds supplied. Under these facts, the Commission should deny the Petitioner's request to release the Property from G & W's CCN No. 12391 because that would violate Texas Water Code section 13.2541.

Further, G & W's CCN and groundwater production permits have value that 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.¹¹

B. G & W Must Be Compensated If the Property Is Removed from G & W's CCN Area.

G & W is entitled to a determination of just and adequate compensation if its CCN area is reduced.¹² 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 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."¹³

If the 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.¹⁴ G & W would also be

¹⁰ See Exhibit B, Affidavit of Sean Conner, and Attachment A.

¹¹ See Exhibit B, Affidavit of Sean Conner, at Item 15.

¹² See Tex. Water Code §§13.254(d), (g), and 13.2541(a), (h). See also, 16 Tex. Admin. Code § 254(j).

¹³ See Tex. Water Code §§13.254(g), 13.2541(h). See also, 16 Tex. Admin. Code § 254(j)

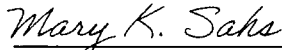
¹⁴ See Exhibit B.

compelled to spend time and resources to make the filing required by Texas Water Code section 13.257(r)-(s).¹⁵ Further, G & W would need compensation for the oversizing of Plant No. 4 and the 10-inch line attributable to future development of the Property. 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.¹⁶

CONCLUSION AND PRAYER

G & W respectfully requests the Commission to deny the Petition because it cannot lawfully be granted 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. 12391.¹⁷ G & W also seeks all and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,



MARY K. SAHS, P.C.

Mary K. Sahs

State Bar No. 17522300

P.O. Box 40970

Austin, Texas 78704

Telephone: (512) 585-1705

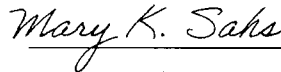
Facsimile: (512) 597-2516

Email: marysahs@sahslaw.com

**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 for Streamlined Expedited Release was served on all parties of record in this proceeding on November 16, 2020 by electronic mail.



Mary K. Sahs

¹⁵ 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 B at Item 17.

¹⁶ See Tex. Water Code § 13.2541(g), (i). See also, 16 Tex. Admin. Code § 254(i).

¹⁷ Tex. Water Code § 13.2541(g), (i)

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CERTIFICATE OF CONVENIENCE
AND NECESSITY
IN WALLER COUNTY BY EXPEDITED
RELEASE

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BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

AFFIDAVIT OF JULIE SWINNEY

THE STATE OF TEXAS §
 §
COUNTY OF WALLER §

BEFORE ME, the undersigned official, on this day personally appeared Julie Swinney, who is personally known to me and first being duly sworn according to law, upon his oath deposed and said:

1. My name is Julie Swinney. I am over the age of 18 years and reside in ~~Grimes~~ County, Texas. I am of sound mind and fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are true and correct.
2. I am an employee of G & W Water Supply Corporation ("G & W"), the Intervenor in this matter, and I am the Customer Service Representative for the utility. I have been in that position for 9 years.
3. I am authorized to make this affidavit on behalf of G & W in Docket 51400 in support of its response to RCR Hempstead Rail, L.P.'s ("Petitioner") request to release 137.04 acres ("the Property") from areas for which G & W holds water certificate of convenience and necessity ("CCN") No. 12391.
4. The Petition was received by G & W on October 20, 2020. It had been sent by certified mail.
5. G & W has not received a request from Petitioner to provide water service to the Property.

FURTHER AFFIANT SAYETH NOT.


Julie Swinney

SUBSCRIBED AND SWORN TO BEFORE ME the undersigned authority on this the 12
day of November, 2020 to certify which witness my hand and seal of office.

Laura Elizabeth Yates

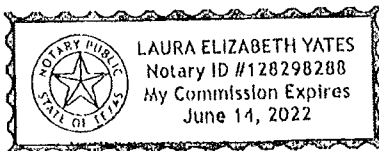
Notary Public

In and for the State of Texas

Laura Elizabeth Yates

Printed Name of Notary Public

SEAL:



My Commission Expires: June 14, 2022

DOCKET NO. 51400

**PETITION OF RCR HEMPSTEAD
RAIL, LP TO AMEND G&W WATER
CERTIFICATE OF CONVENIENCE
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**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

AFFIDAVIT OF SEAN CONNER

THE STATE OF TEXAS §
 §
COUNTY OF ANDERSON §

BEFORE ME, the undersigned official, on this day personally appeared Sean Conner, who is personally known to me and first being duly sworn according to law, upon his oath deposed and said:

1. My name is Sean Conner. I am over the age of 18 years and reside in Anderson County, Texas. I am of sound mind and fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are true and correct.
2. I am an engineer and the employee of J.F. Fontaine & Associates, Inc. ("JF Fontaine"). The company serves as the engineering consultant for G & W Water Supply Corporation ("G & W"), the Intervenor in this matter, and I am the project engineer for the utility. I have been in that position for 7 years.
3. I am authorized to make this affidavit on behalf of G & W in Docket 51400 in support of its response to RCR Hempstead Rail, L.P.'s ("Petitioner") request to release 137.04 acres ("the Property") from areas for which G & W holds water certificate of convenience and necessity ("CCN") No. 12391.
4. The attached map, Attachment 1, shows the Property that the Petition filed by Petitioner in Docket No. 51400 seeks to remove through streamlined expedited release ("SER") from areas for which G & W holds a water certificate of convenience and necessity ("CCN") No. 12391. I prepared Attachment 1 as part of this affidavit.
5. Through the work that I and JF Fontaine have done for G & W I am familiar with G & W's facilities in the vicinity of the Property and their location in relation to the Property. Attachment 1

shows the Property and the location of G & W's water facilities built and sized to provide water to the Property. These are part of G & W's water system (PWS ID No. 2370085).

6. 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 I were instrumental in creating the plan.

7. G & W, with my help, obtained a loan of \$ 4,992,500 from the U.S.D.A. to pay for the Phase 5 of the improvements set out in the plan.

8. Phase 5 of the plan called for building infrastructure in the service area where growth and development were anticipated. The plan included the infrastructure described in Item 9, below, and shown on the map, Attachment A.

9. Plant No. 4 was built with the intent of serving the Property and other areas G & W expected would be developed in the vicinity. Plant No. 4 water system facilities include: one water well that is 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 Property and other areas in the vicinity. The 10-inch waterline is located approximately 2.6 miles from the Property and the plant is approximately 5 miles from the Property as shown on the map, Attachment A.

10. In 2014, under my direction, the facilities described in Item 9 above, were constructed. This construction project cost approximately \$ 1,069,000 million.

11. The facilities described in Item 9, above, were designed and built with capacity that exceeds immediate need to respond quickly to anticipated new development within the Property and other areas in the vicinity. There are no outstanding requests for service from the undeveloped portions of the subject CCN area that will use the remainder of the existing capacity.

12. G & W could provide water service to the Property at any time service is requested by Petitioner. Under G & W's Tariff, a request must be made, and Petitioner would be required to pay for improvements needed to hook up its water service taps to the 10-inch line.

13. G & W was required to and did obtain a groundwater production permit from Bluebonnet Groundwater Conservation District for the water well that is part of Plant No. 4.

14. G & W has provided water service to the Property in several ways: (1) performing acts and supplying funds to permit, plan, design, construct, own, and operate the facilities described in Item 9, above; (2) performing acts and supplying funds necessary to obtain and maintain the water CCN No. 12391 service area covering the Property under prevailing regulations; and (3) performing acts and

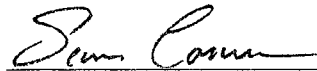
supplying funds necessary to obtain and maintain permits for PWS No. 2370085, including a groundwater production permit from Bluebonnet Groundwater Conservation District, so that it may be used to serve the Property and CCN No. 12391 area that includes the Property.

15. CCNs and groundwater permits have value that purchasers of utilities will pay for when acquiring a utility because of the rights to serve the public that they provide and because the time and expense to acquire the CCNs and permits has already been spent.

16. G & W is incurring legal and professional expenses and is likely to incur other legal and professional expenses because of the decertification and Petition.

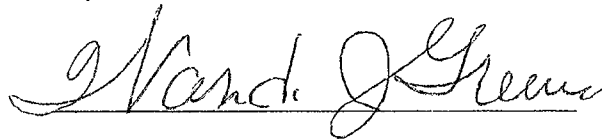
17. If the decertification is approved, G & W will be compelled to spend time and resources to make the filing required by Texas Water Code section 13.257(r)-(s), which requires it to file in county records a description and maps of its certificated area after its amendment.

FURTHER AFFIANT SAYETH NOT.



Sean Conner

SUBSCRIBED AND SWORN TO BEFORE ME the undersigned authority on this the 13 day of November, 2020 to certify which witness my hand and seal of office.

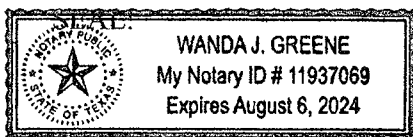


Notary Public

In and for the State of Texas

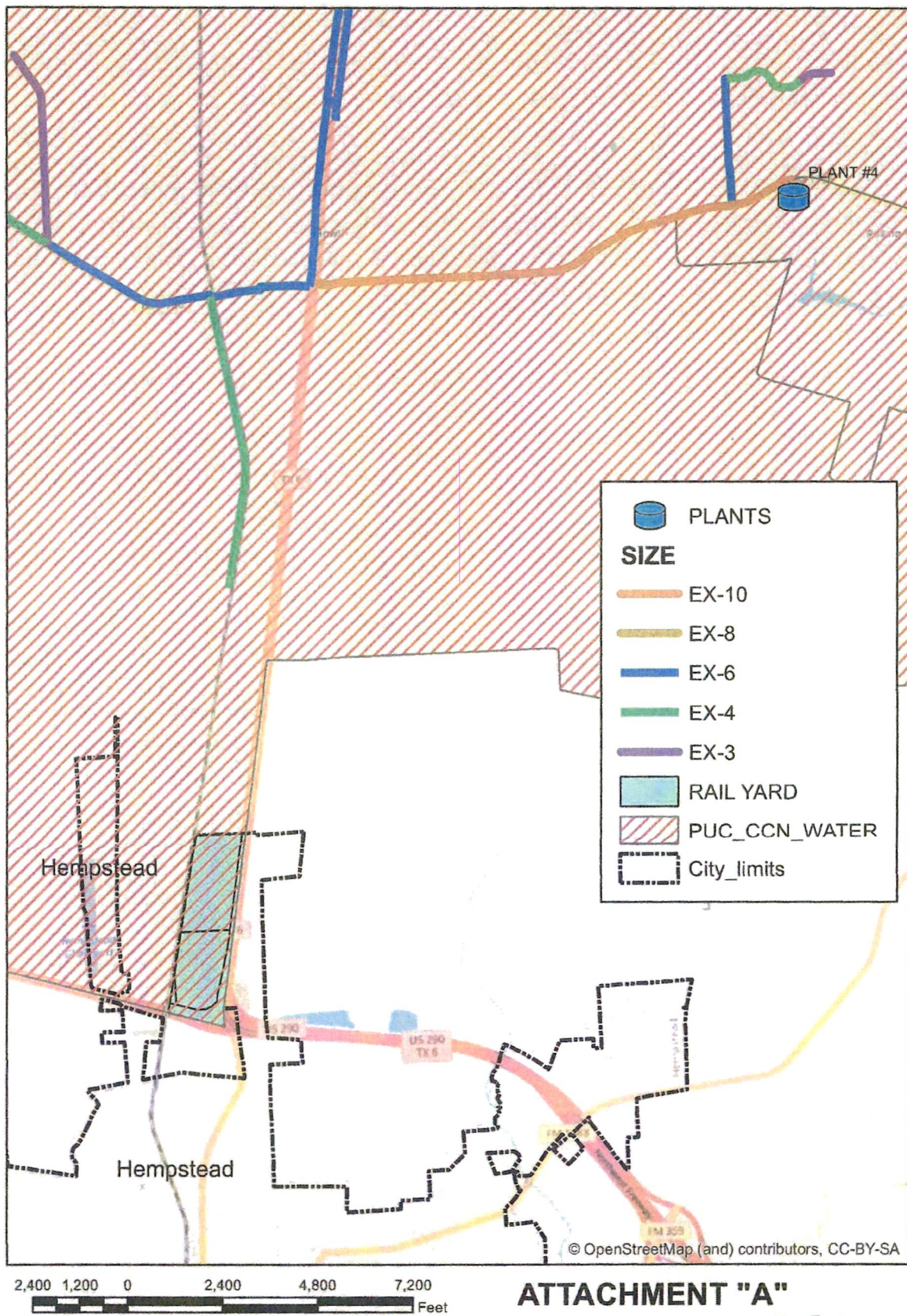
WANDA J GREENE

Printed Name of Notary Public



My Commission Expires: 8-6-24

DOCKET NO. 51400



ATTACHMENT "A"

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