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BEFORE THE PUBLIC UTILITY
COMMISSION OF TEXAS

PETITION OF THE SANCTUARY §
TEXAS, LLC TO AMEND AQUA §
TEXAS, INC.'S CERTIFICATE OF §
CONVENIENCE AND NECESSITY IN §
DENTON COUNTY BY EXPEDITED §
RELEASE §

**AQUA'S RESPONSE TO COMMISSION STAFF'S
RECOMMENDATION ON FINAL DISPOSITION**

Aqua Texas, Inc. (Aqua) files this Response to the Petition of The Sanctuary Texas, LLC (Applicant or Petitioner) to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Denton County by Expedited Release (the Petition).¹ In support, Aqua shows as follows.

I. PROCEDURAL BACKGROUND

On January 20, 2021, Applicant filed the Petition seeking streamlined expedited release (SER) for 69.133 of 70.149 acres of property in Denton County (Property) from Aqua certificate of convenience and necessity (CCN) No. 13201. The area requested for SER release is identical to area the Commission declined to release in a previous docket on October 16, 2020.² Aqua received the Commission's final recommendation in this matter on May 17, 2021.³ This response is timely filed.⁴

Rather than simply recommending denial because the Property is receiving water service as in the prior docket, Commission Staff has unfairly suggested two alternative approaches.⁵ Neither are tenable under applicable law or the Commission's recently expressed "bright line" service commitment test. The Commission should simply deny the Petition.

¹ For purposes of this proceeding, the Petition is considered the Application as defined in the Commission's Procedural Rules under 16 TAC § 22.2(6).

² *Petition of the Sanctuary Texas, LLC to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 50405, Order (Oct. 16, 2020).

³ Commission Staff's Final Recommendation on Final Disposition (May 17, 2021).

⁴ 16 TAC § 22.78(a).

⁵ Commission Staff's Final Recommendation on Final Disposition (May 17, 2021).

II. ARGUMENTS AND AUTHORITIES

Aqua reiterates that res judicata should operate to deny the requested SER here because the Commission already decided as a matter of law that the Property is receiving service from Aqua and not eligible for SER under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245.⁶ The facts relevant to that decision have not changed. Recently, the Commission declared new standards going forward which would also prevent release, and Commission Staff's alternative approaches defy those standards too. The Commission should deny the Petition.

A. Res Judicata Prevents Grating SER

Commission Staff does not dispute either that Aqua has a water line and a meter *within* the tract or that the prior SER matter initiated by Petitioner was denied based on those facts.⁷ Res judicata should apply to effect denial.⁸ Yet, Commission Staff offers alternative approaches without recommending denial because “the precedent regarding streamlined expedited release is continually evolving.”⁹ Commission Staff seems to be bending over backward to assist the Petitioner in seeking SER instead of applying facts based on the filed Petition and the applicable law.

If adopted, Staff's recommended approach is to ignore res judicata in favor of other approaches. That is very unfair to Texas CCN holders who deserve a clear way to protect their CCN areas without facing moving goalposts at the Commission. CCN holders should not be expected to build a “bridge to nowhere” by installing all the facilities any future landowner may

⁶ *Petition of the Sanctuary Texas, LLC to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 50405, Order (Oct. 16, 2020).

⁷ Commission Staff's Final Recommendation on Final Disposition at 4 & n.14 (May 17, 2021).

⁸ *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652-53 (Tex. 1996) (applying res judicata to bar second action based on same claims that were raised or could have been raised in the first action).

⁹ Commission Staff's Final Recommendation on Final Disposition at 4 & n.14 (May 17, 2021).

want for uncertain development just to protect CCN territory. Cost sharing or reimbursement agreements for such development projects are standard in the industry to minimize impact on existing ratepayers prior to active construction. Sometimes, developers do not even complete their planned projects. Investments in nearby facilities should be enough to prevent SER, but that is not even this case. Plainly, a line and a meter located *within* a subject “tract of land” should warrant denial under applicable law as the Commission previously decided.¹⁰

B. Alternative Approaches Defy Law and Policy Standards

Commission Staff recommends one of two approaches as an alternative to denial: (1) direct the Petitioner to exclude “consuming facilities” from the SER area proposed for removal, which Staff apparently believes is the house located outside Aqua’s CCN and Aqua’s water meter; or (2) approve SER for the land but leave Aqua facilities within the tract certificated.¹¹ Neither are supportable under applicable law or policy and seem to be conjured as end run.

First, the law focuses on the “tract of land” owned by Petitioner and whether it is receiving water or sewer service.¹² Excluding Aqua facilities from Petitioner’s request or releasing the land without releasing the facilities does not mean the “tract of land” is not receiving service under either the broad “service” definition in the Texas Water Code or the application of that standard in *Crystal Clear*.¹³ These approaches simply defy reality and the law.

¹⁰ *Petition of the Sanctuary Texas, LLC to Amend Aqua Texas, Inc.’s Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 50405, Order (Oct. 16, 2020); *see also* TWC § 13.2541(b) (setting forth eligibility requirements for SER of CCN area from a “tract of land”), 16 TAC § 24.245(h)(1) (same), and 16 TAC § 24.3(38) (defining “tract of land” for Chapter 24 purposes (which includes the SER rule) as: “An area of land that has common ownership and is not severed by other land under different ownership, whether owned by government entities or private parties; such other land includes roads and railroads. A tract of land may be acquired through multiple deeds or shown in separate surveys.”) Aqua believes a distribution line in or near a tract without a meter should be enough too, but here there is both a line and meter within the tract.

¹¹ Commission Staff’s Final Recommendation on Final Disposition at 3-5 (May 17, 2021).

¹² TWC § 13.2541(b) (setting forth eligibility requirements for SER of CCN area from a “tract of land”), 16 TAC § 24.245(h)(1) (same), and 16 TAC § 24.3(38) (defining “tract of land” for Chapter 24 purposes).

¹³ TWC § 13.002(21); 16 TAC § 24.3(33) (same definition); *see also Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014, pet. denied).

Second, the applicable SER statute and rules do not reference “consuming facilities” at all, and yet Commission Staff seems to think this is important. That term is not defined in the Texas Water Code or Commission rules. To the extent it needs defining, Aqua would urge the Commission to review its own rules that specify respective service connection facility responsibilities between utilities and customers.¹⁴ With respect to water service connections, those rules say that customers are responsible for their service lines from the meter to “the place of consumption.”¹⁵ In contrast, utilities are responsible for facilities up to and including the meter.¹⁶ In short, utility service stops at the meter and customers control where the water goes from there. Here, the consuming facilities begin with the customer service line attached to Aqua’s meter well inside the tract and the requested SER area, but those facilities do not include Aqua’s meter, the referenced house, or anything in between.¹⁷

Finally, during the Commission’s May 21, 2021 open meeting, the new Commissioners considered an unrelated SER matter involving no physical service facilities and discussed a “bright line on commitment” test for other SER matters based on legal precedent, such as *Crystal Clear*.¹⁸ The Commissioners said they would grant SER in situations where there are “no tangible commitments” made by a utility or there is not “reliable service in a timely manner.”¹⁹ Again, while nearby facilities should be sufficient, a utility line and meter *within the tract* should unquestionably meet the Commission’s announced threshold for SER denial. Here, the facts

¹⁴ 16 TAC § 24.163 (Service Connections).

¹⁵ 16 TAC § 24.163(a)(2)(B).

¹⁶ 16 TAC § 24.163(a)(2)(A)).

¹⁷ Commission Staff seems to suggest there is a meter located at the house outside Aqua’s CCN area and Aqua is now aware of any such meter. Aqua’s map included with its response shows the location of Aqua’s meter. Aqua Texas, Inc.’s Response to Petition of The Sanctuary Texas, LLC for Streamlined Expedited Release at Attachment 1 (May 3, 2021, Item No. 14).

¹⁸ *Petition of Carnegie Development, LLC to Amend James A. Dyche d/b/a Crest Water Company Certificate of Convenience and Necessity in Johnson County by Streamlined Expedited Release*, Docket No. 51352, Petition (Sep. 21, 2020) and May 21, 2021 Open Meeting Discussion of Item No. 34 at 45:15 – 47:17 (http://www.adminmonitor.com/tx/puct/open_meeting/20210521/, last checked May 24, 2021).

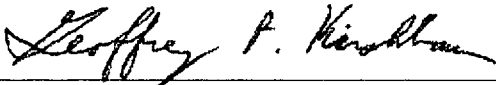
¹⁹ *Id*

justify the Commission applying those standards to deny the Petition and the Petitioner has not shown otherwise.

CONCLUSION AND PRAYER

Aqua respectfully requests the Commission deny the Petition because the Commission already decided the Petition cannot lawfully be granted under TWC § 13.2541 and the Petitioner has not met its burden to prove the Property is not receiving service from Aqua. Aqua also seeks all and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,

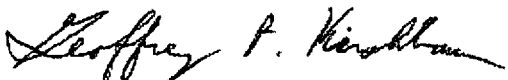
By: 

Geoffrey P. Kirshbaum
State Bar No. 24029665
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
gkirshbaum@terrellwaldrop.com

ATTORNEY FOR AQUA TEXAS, INC.

CERTIFICATE OF SERVICE

I 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 May 24, 2021 in accordance with the Order Suspending Rules filed in Project No. 50664.


Geoffrey P. Kirshbaum