



## Filing Receipt

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**DOCKET NO. 51738**

<b>PETITION OF THE SANCTUARY</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>TEXAS, LLC TO AMEND AQUA</b>	<b>§</b>	
<b>TEXAS, INC.’S CERTIFICATE OF</b>	<b>§</b>	<b>OF TEXAS</b>
<b>CONVENIENCE AND NECESSITY IN</b>	<b>§</b>	
<b>DENTON COUNTY BY EXPEDITED</b>	<b>§</b>	
<b>RELEASE</b>	<b>§</b>	

**AQUA TEXAS, INC.’S MOTION FOR REHEARING AND REQUEST FOR  
PROCEDURAL CLARIFICATIONS**

Aqua Texas, Inc. (Aqua or Intervenor) files this Motion for Rehearing and Request for Procedural Clarifications in response to the Public Utility Commission of Texas (Commission) Order (Order) issued July 30, 2021, granting The Sanctuary Texas, LLC’s (Petitioner) streamlined expedited release (SER) from Aqua’s water certificate of convenience and necessity (CCN) No. 13201 for certain property in Denton County (Property).<sup>1</sup> On August 19, 2021, the Commission also issued an order extending time to act (the Extension) on Aqua’s July 30, 2021 Motion for Reconsideration, treating it like a Motion for Rehearing, and Aqua requests certain procedural clarifications, including several that impact deadlines applicable to this case.<sup>2</sup> This motion is timely filed.<sup>3</sup> In support, Aqua shows as follows.

**I. POINT OF ERROR**

The Commission erred by issuing its Order granting Petitioner’s requested SER for the majority of the requested Aqua CCN area despite misapplying Texas Water Code (TWC) §§ 13.002(21), 13.2541(b), 16 TAC § 24.245(h), and applicable case law on SER and res judicata in Findings of Fact Nos. 17, 24, 25, 26, 27, 28, and 29, and in Conclusions of Law Nos. 9, 10, and 13. This resulted in erroneous Ordering Paragraph Nos. 1, 2, 3, 4, 5, 6, 7, and 8 and improper ad hoc rulemaking.

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<sup>1</sup> Order (Jul. 30, 2021).

<sup>2</sup> Order Extending Time (Aug. 19, 2021).

<sup>3</sup> TEXAS GOV’T CODE § 2001.146(a) and 16 TAC § 22.264.

The Commission issued the Order despite (1) there being no material differences between Petitioner's SER request here and that denied by the Commission in Docket No. 50405;<sup>4</sup> and (2) the fact that the Property receives water service from Aqua in various ways, including via facilities *within* the Property tract. The Order leaves those facilities certificated in part and yet omitted from the decertification area in part through post-filing gerrymandering. Further, the Order omits any discussion about Docket No. 50405, and does not implement the SER standards recently announced by the Commissioners during their May 21, 2021, open meeting.<sup>5</sup>

The Order erroneously effects the removal of the majority of the Aqua CCN area requested and begins a proceeding to determine the amount of compensation to be awarded to Aqua for the release.<sup>6</sup> The Order was issued: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other errors of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>7</sup> The Commission should rehear the Order, reverse it, and deny the Petition.

As Aqua previously pointed out in this proceeding,<sup>8</sup> the Property receives water service from Aqua under any interpretation or application of the term "service" as the TWC defines it, and

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<sup>4</sup> *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).

<sup>5</sup> *Compare Order* (Jul. 30, 2021), with *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) and *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/](http://www.adminmonitor.com/tx/puct/open_meeting/20210521/), last checked August 23, 2021); *see also* Aqua's Response to Commission Staff's Recommendation on Final Disposition (May 24, 2021).

<sup>6</sup> Order (Jul. 30, 2021).

<sup>7</sup> TEXAS GOV'T CODE § 2001.174

<sup>8</sup> Aqua Texas, Inc.'s Response to Petition of The Sanctuary Texas, LLC for Streamlined Expedited Release at 3-4 (May 3, 2021); *see also* Aqua's Response to Commission Staff's Recommendation on Final Disposition

the Property cannot be released from Aqua's CCN under TWC § 13.2541.<sup>9</sup> The Water Code broadly defines "service" 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.<sup>10</sup>

The embedded term "facilities" is defined as:

[a]ll 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.<sup>11</sup>

Actually delivering water to a property is plainly "service," but a property can also receive water service under the statute without a utility delivering "actual water" onto a property.<sup>12</sup> In the *Crystal Clear* Austin Third Court of Appeals decision, the court held that facilities or lines "used" or "committed" to providing such service might cause a property to "receive service" under the statutory and regulatory definition.<sup>13</sup> But where water lines are actually present within a tract and "committed" to the property in that manner, the tract is unquestionably "receiving service" and the Commission has determined that a streamlined expedited release petition may not be granted under *Crystal Clear* and TWC § 13.2541 when such facts are present.<sup>14</sup> In the previous version of the

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<sup>9</sup> TWC § 13.2541(b) (allowing streamlined expedited release of a tract of land that "is not receiving water or sewer service."); see also 16 TAC § 24.245(h)(1)(B).

<sup>10</sup> TWC § 13.002(21); see also 16 TAC § 24.3(33) (same definition).

<sup>11</sup> TWC § 13.002(9); see also 16 TAC § 24.3(15) (same definition).

<sup>12</sup> See *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014, pet. denied).

<sup>13</sup> *Id.*

<sup>14</sup> *Petition of Clay Road 628 Development, LP to Amend T&W Water Service Company's Certificate of Convenience and Necessity in Montgomery County by Expedited Release*, Docket No. 50261, Order Denying Streamlined Expedited Release at 2-4 (Apr. 29, 2020).

Petition under consideration here, the Commission decided to reject it for that reason and because a meter is present.<sup>15</sup>

In response to certain Commission Staff arguments, Aqua highlighted that the law focuses on the “tract of land” owned by Petitioner and whether it is receiving water or sewer service without any reference to “consuming facilities” or the locations of such facilities relative to meter locations if different.<sup>16</sup> 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*.<sup>17</sup> Per Commission rules, a CCN holder’s utility service responsibilities exist throughout a utility’s facilities and stop at each meter location regardless of where a customer takes water for consumption after it passes through a meter.<sup>18</sup>

But during the Commission’s May 21, 2021 open meeting, the new Commissioners announced a new Commission SER standard. The 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*.<sup>19</sup> 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.”<sup>20</sup> Again, while nearby facilities should be

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<sup>15</sup> See *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).

<sup>16</sup> 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); see also Aqua’s Response to Commission Staff’s Recommendation on Final Disposition at 3-4 (May 24, 2021).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see also 16 TAC § 24.163(a)(2)(A)-(B) (Service Connections).

<sup>19</sup> *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/](http://www.adminmonitor.com/tx/puct/open_meeting/20210521/), last checked August 23, 2021).

<sup>20</sup> *Id.*

sufficient, a utility line and meter *within the tract* should unquestionably meet the Commission's announced threshold for SER denial.

As shown by the affidavit of Darryl Waldock, Area Manager – North Texas: (1) Aqua has 2,930 linear feet of an active four-inch water main line located within the Property; (2) Aqua has a residential 5/8" x 3/4" meter located within the Property that *until January 29, 2020* was used to actively supply water to a billed residential connection located at 601 Garza Ln, Little Elm, TX 75068-3509 and remains on standby today; and (3) Aqua has other facilities immediately adjacent to the Property, and has performed various acts and supplied funds in furtherance of service to the Property and Aqua's CCN No. 13201 area that includes the Property, as detailed in Mr. Waldock's affidavit.<sup>21</sup> Mr. Waldock's affidavit includes a map (the same map filed in Docket No. 50405), showing the location of its Spanish Oaks Addition water system (PWS ID No. TX0610214) facilities which serve the Property and nearby areas, including the location of the four-inch line and meter within the Property, and the last bill that went to a customer at the meter location within the Property on January 31, 2020 for service through January 29, 2020.<sup>22</sup> Aqua's meter and connecting lines within the subject "tract of land" remain despite the Commission gerrymandering the release area around the meter location and part of Aqua's lines (but not all) in the Order map.

For all these reasons, Finding of Fact No. 17 should reflect that Aqua's evidence provided by Mr. Darryl Waldock shows facilities *within* the Property *and* in proximity to it, not just in proximity to the tract. Aqua's lines and meter reflected on Mr. Waldock's map clearly show the locations of those facilities within the Property tract sought for SER. Similarly, Findings of Fact Nos. 24 through 25 and 27 through 29 related to Aqua's service to the Property are not factually correct and conflict with the evidence presented to the Commission showing that the Property

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<sup>21</sup> Aqua Texas, Inc.'s Response to Petition of The Sanctuary Texas, LLC for Streamlined Expedited Release at Exhibit A – Affidavit of Darryl Waldock (May 3, 2021).

<sup>22</sup> *Id.*

receives water service from Aqua. Finding of Fact No. 26 omits that the lines also serve the Property.

Further, Conclusion of Law Nos. 9 and 10 misapply the law cited in proposed Conclusion of Law No. 9 in support of release; the cited provisions and court decision in conjunction with the Commission's recently announced standards support denial as the Commission has discretion to decide those standards within the applicable law and the standards expressed should lead to denial. Regardless, the Commission is engaging in improper ad hoc SER rulemaking in a situation where there is no need.<sup>23</sup> The Commission has had jurisdiction over SER for seven years now and continues to set evolving standards for the same CCN issue without a focused rulemaking. This is particularly problematic in the SER context because CCN holders are given no evidentiary hearing rights under the Texas Administrative Procedures Act.<sup>24</sup>

The Order also fails to consider the Commission's prior order in Docket No. 50405 and res judicata in the context of this case. The decision here should be denial of the Petition as it was in Docket No. 50405 just last Fall. There have been no changes in the law since that decision within the PUC rules or otherwise—except for the discussion by the Commissioners during their May 21, 2021, open meeting.<sup>25</sup> Further, Conclusion of Law No. 13 ignores the broad definition of “service” found both in the Texas Water Code and its rules.<sup>26</sup>

Finally, Ordering Paragraphs 1 and 3 through 8 unlawfully approve the release of the Property from Aqua's water CCN service area. The problem with Ordering Paragraph No. 2 in the context of the remaining Ordering Paragraphs is that it leaves Aqua facilities certificated within

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<sup>23</sup> See *Texas State Bd. of Pharm. v. Witcher*, 447 S.W.3d 520, 535-544 (Tex. App.—Austin 2014, pet denied).

<sup>24</sup> See 16 TAC § 24.245(h)(7).

<sup>25</sup> *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/](http://www.adminmonitor.com/tx/puct/open_meeting/20210521/), last checked August 23, 2021).

<sup>26</sup> TWC § 13.002(21); see also 16 TAC § 24.3(33) (same definition).

land that is taken away from Aqua's service territory. This means a new water provider and development will ultimately appear and operate on property that contains Aqua facilities. This is likely to create operational and safety problems for Aqua's facilities and customers by inviting cross-bores, easement encroachments, and other interference into the area. If the Commission intends to incorporate this approach (decertifying the land while retaining the certification on facilities located on the land) into SER standard policy without rulemaking or formal notice to CCN holders,<sup>27</sup> Aqua would prefer it direct SER petitioners to work with CCN holders and pay for removal of their facilities if desired. But Aqua implores the Commission to reconsider its approach which puts invested capital facilities throughout Aqua's CCN areas at risk for similar treatment. The Commission's Order should have found that the existence of facilities within the Property means the Property receives service from Aqua warranting Petition denial. Leaving uncertificated areas ripe for new development by another water provider on top of Aqua facilities is not a compromise of positions or a benefit to the decertified CCN holder or its customers. The Commission should reverse the Order and deny the Petition.

## **II. REQUEST FOR PROCEDURAL CLARIFICATIONS**

The Order states, "The proceeding to determine the amount of compensation to awarded to the CCN holder, if any, commences with the filing of this Order in accordance with the schedule adopted in Order No. 3. Any decision on compensation will be made by a separate order."<sup>28</sup> Thus, the Order represents a final decision on CCN release, but not compensation and leaves this docket unresolved. Previously, in Order No. 3, the presiding Administrative Law Judge stated, "[A]n order granting approval for streamlined expedited release is interim in nature and, in the event the

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<sup>27</sup> See *Texas State Bd. of Pharm. v. Witcher*, 447 S.W.3d 520, 535-544 (Tex. App.—Austin 2014, pet denied).

<sup>28</sup> Order at 6 (Jul. 30, 2021) (discussing the compensation phase in Ordering Paragraph No. 7); see also 16 TAC § 24.245(i) (stating, "The amount of compensation, if any, will be determined after the commission has granted a petition for streamlined expedited release filed under subsection (h) of this section. The amount of compensation, if any, will be decided in the same proceeding as the petition for streamlined expedited release.").



requested release is approved, the docket will continue for the purpose of determining the issue of compensation.”<sup>29</sup>

The Commission rules do not permit motions for rehearing on interim orders, but, instead, permit motions for reconsideration which have a deadline of five working days.<sup>30</sup> Collectively, the Texas Administrative Procedure Act and Commission rules permit motions for rehearing on final Commission decisions or orders, but the deadline is 25 days from the date of same.<sup>31</sup>

Aqua is unclear whether the Commission views SER orders in advance of compensation decisions as interim or final, and thus filed both a motion for reconsideration and this motion for rehearing. But the Commission treated Aqua’s motion for reconsideration filing as a motion for rehearing and extended the time to act on it, which indicates the Commission considered the Order final, but it is now subject to rehearing.<sup>32</sup> The Commission did not otherwise act on Aqua’s Motion for Reconsideration.

This raises questions about Aqua’s rights and obligations going forward in this proceeding relative to the Order for which Aqua respectfully requests clarification, particularly given the Extension. Specifically, Aqua respectfully requests the Commission clarify: (1) whether the Commission views the proper pleading for taking a second look at CCN release orders or decisions in SER matters in advance of a compensation decision a motion for reconsideration or a motion for rehearing; (2) whether the Order was an interim or final Commission order or decision; (3) whether the Extension applies to both Aqua’s Motion for Reconsideration and this Motion for Rehearing; (4) whether the deadline for Aqua’s obligation to make the county recording required by TWC § 13.257(r)-(s) began with the Order or is now tolled by the Extension;<sup>33</sup> and (5) whether

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<sup>29</sup> Order No. 3 at 1 (Apr. 19, 2021).

<sup>30</sup> 16 TAC § 22.123(b)(1)-(2).

<sup>31</sup> TEX. GOV’T CODE § 2001.146(a) and 16 TAC § 22.264.

<sup>32</sup> Order Extending Time (Aug. 19, 2021).

<sup>33</sup> Order at Ordering Paragraph No. 6 (Jul. 30, 2021).

the compensation proceeding procedural deadlines set forth in Order No. 3 began with the Order or are now tolled by the Extension.<sup>34</sup> With respect to items (4) and (5) above, Aqua respectfully requests those deadlines be tolled for now in advance of Commission action on Aqua's motions to the extent they are not automatically tolled by the Extension.

### **III. CONCLUSION AND PRAYER**

The Commission should not remove CCN areas when the facts do not justify release and should provide CCN holders a clear standard for preventing release through formal rulemaking. Yet, granting SER petitions through evolving standards seems to have become automatic at the Commission. This case presents facts that should preclude SER, particularly since the Commission just decided an identical SER request by the same Petitioner for the same tract in Aqua's favor last year. Allowing a gerrymandered CCN release post-filing or leaving facilities certificated within removed CCN land (which the proposed CCN map included with the order does not even show) does not help the situation.<sup>35</sup> Further, if the Commission is trying to exclude Aqua's facilities from the released area as opposed to generally leaving Aqua's facilities certificated, the Order map does not accurately implement that effort because it leaves a stretch of line to the northeast of the gerrymandered area within the removed land.<sup>36</sup> Administering the SER process in this manner makes it extremely difficult for retail public utilities to plan service for developing areas, undermines regionalization efforts, and is unjust.

For all these reasons, the Order is unjustified and improper. Intervenor Aqua Texas, Inc. respectfully requests that the Commission: (1) grant rehearing; (2) reverse its Order in line with the discussion herein and consistent with recent standards announced by the Commissioners; (3)

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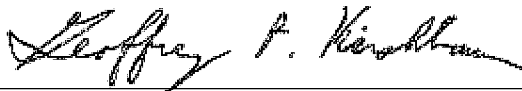
<sup>34</sup> Order at Ordering Paragraph No. 7 (Jul. 30, 2021); *see also* Order No. 3 (Apr. 19, 2021).

<sup>35</sup> *See* Aqua's Response to Petition (May 3, 2021), Affidavit of Darryl Waldock, Attachment 1 (showing facilities extending through the northeast quadrant of the Property and not just from the south into the middle where Aqua's meter is located),

<sup>36</sup> *Id.*

find that the Petition does not meet the streamlined expedited release requirements under Texas Water Code § 13.2541 or 16 TAC § 24.245(h)(1); (4) find the Petition cannot be granted because of the Commission's prior decision in Docket No. 50405; (5) deny the Petition, and discontinue ad hoc rulemaking in SER proceedings. Further, Aqua respectfully requests the Commission provide the procedural clarifications requested herein with respect to this SER proceeding.

**Respectfully submitted,**

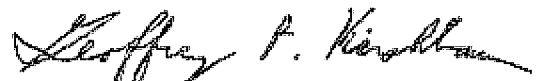
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**ATTORNEY FOR AQUA TEXAS, INC.**

### **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 August 24, 2021, in accordance with the Orders Suspending Rules filed in Project No. 50664.

  
Geoffrey P. Kirshbaum