



Control Number: 51787



Item Number: 9

Addendum StartPage: 0

DOCKET NO. 51787

COMPLAINT OF NUECES BAY
TRACTS, LLC AGAINST RINCON
WATER SUPPLY CORPORATION

§
§
§
§

FILED
2021 MAY 26 PM 3:01
BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

**NUECES BAY TRACTS, LLC FIRST AMENDED COMPLAINT AGAINST RINCON
WATER SUPPLY CORPORATION**

COMES NOW, Nueces Bay Tracts, LLC (“NBT” or “Complainant”) and submits this First Amended Complaint Against Rincon Water Supply Corporation (“Amended Complaint”) in the above-docketed proceeding. In support thereof, NBT would show the following:

I. BACKGROUND

1. On March 6, 2015, NBT¹ filed a Notice and Agreement of Proposed Public Utility Pipeline and/or Main Activity within San Patricio County Right of Way, the first regulatory step in securing water for 90 acres of undeveloped farmland intended for residential development outside the corporate boundaries of the City of Portland and, as of May 6, 2019, inside the extraterritorial jurisdiction (“ETJ”) of the City of Portland (hereinafter the “NBT site”).
2. On December 31, 2015, Rincon Water Supply Corporation (“Rincon”) filed an application with TxDOT to bore under FM 893 to extend water service to the NBT site, which approval was granted February 7, 2017.
3. On July 11, 2016, NBT delivered a check for \$26,000 for the purchase of pipe ordered by Rincon’s general manager so its waterline could be extended to the NBT site. The check was cashed, this money has not been returned, and the pipe remains sitting unused at the NBT site.

¹ NBT is owned by Jim and Paulette Fay and two other family members who also have an individual membership with Rincon with 1 tap. Mr. Fay, NBT president, is a developer to the extent he is attempting to turn raw farmland into developed residential lots as well as a service applicant who is seeking service from Rincon.

4. On February 19, 2017, NBT paid a \$1,625 fee to Rincon to reserve taps for 13 connections within the NBT site. On July 17, 2017, \$1,300 was refunded to NBT since the original \$1,625 included a non-refundable portion of the fee.
5. On December 8, 2017, NBT paid Rincon \$21,000 for engineering costs, none of which has been refunded or reimbursed.
6. On February 26, 2018, based on NBT's request for service, Rincon applied to the Public Utility Commission of Texas ("Commission") to expand its water certificate of convenience and necessity ("CCN"), CCN No. 11440 in order to serve the NBT site.²
7. The Commission issued its Notice of Approval amending Rincon's CCN on February 8, 2019 finding in pertinent part that: 1) there is currently no service in the requested area, and there are no current customers; 2) Rincon received a request from landowner Mr. Jim Fay asking for water service to his property for the purpose of residential development, and, 3) service from other providers to the proposed service-area is not presently available or economically feasible.³ The Notice of Approval also concluded that the amendment was necessary for the service, accommodation, convenience, or safety of the public as required by Tex. Water Code ("TWC") § 13.246(b) and 16 Tex. Admin. Code ("TAC") § 24.227(c).⁴
8. In the February 8, 2019 Notice of Approval, the Commission **ordered** Rincon to "provide service to every customer and applicant for service within the area certified under CCN number 11440. . .and such service must be continuous and adequate."⁵

² *Application of Rincon Water Supply Corporation to Amend Certificate of Convenience and Necessity in San Patricio County*, Docket No. 48104 (Feb. 8, 2019).

³ *Application of Rincon Water Supply Corporation to Amend Certificate of Convenience and Necessity in San Patricio County*, Docket No. 48104, Notice of Approval at Finding of Fact Nos. 26, 28 and 33 (Feb. 8, 2019).

⁴ *Id.* at Conclusion of Law No. 10.

⁵ *Id.* at Ordering Paragraph No. 3.

9. Between May and August 2019, final plans for the water line were completed and approved by Rincon and the project to extend water service to NBT was advertised for bid, which bid approval was tabled by the Rincon Board of Directors on November 19, 2019.
10. On May 13, 2020, Rincon informed NBT for the first time that it would be subject to City of Portland design standards (i.e., fire flow) after inclusion within the Portland ETJ on May 6, 2019.
11. On May 19, 2020, City of Portland City Manager Brian DeLatte, P.E stated that City approval was not needed for the NBT-Rincon water line project since the development process began before the City's ETJ was extended to include the NBT site.
12. On November 2, 2020, NBT filed informal complaint No. CP2020110111 against Rincon for refusal to provide water service which was considered resolved by Commission Staff on November 16, 2020.
13. On February 3, 2021, NBT filed a formal complaint against Rincon with the Commission for refusal to provide it water service.
14. On February 5, 2021, the Commission Administrative Law Judge ("ALJ") issued Order No. 1 requiring Commission Staff to file a statement of position.
15. On March 5, 2021, Commission Staff filed its statement of position arguing, among other things, that the Commission's requirement for informal complaint resolution should be waived in light of the fact that NBT's property is outside the corporate boundaries of any municipality.
16. On March 10, 2021, the Commission ALJ issued Order No. 2 finding good cause for waiver of the title 16 TAC § 24.242(e) informal resolution process and directing the Commission Staff to supplement its statement of position on or before June 3, 2021.
17. On April 14, 2021, NBT paid a \$2,425 fee to Rincon to reserve taps for 22 connections within the NBT site.

18. In its March 5, 2021 statement of position, Commission Staff indicated that it needed additional time to get more information from NBT about which of Rincon's rules it has violated; therefore, this Amended Complaint with the additional evidence requested by Commission Staff is timely filed.

II. LEGAL AUTHORITY

Section 24.161 requires every retail public utility to serve a qualified service applicant:

- (a) Except as provided for in subsection (e) of this section, **every retail public utility shall serve each qualified service applicant within its certificated area as soon as is practical after receiving a completed application.** A qualified service applicant is an applicant who has met all of the retail public utility's requirements contained in its tariff, schedule of rates, or service policies and regulations for extension of service including the delivery to the retail public utility of any service connection inspection certificates required by law.
- (1) Where a new service tap is required, the retail public utility may require that the property owner make the request for the tap to be installed.
- (2) Upon request for service by a service applicant, the retail public utility shall make available and accept a completed written application for service.
- (3) Except for good cause, at a location where service has previously been provided the utility must reconnect service within one working day after the applicant has submitted a completed application for service and met any other requirements in the utility's approved tariff.
- (4) A request for service that requires a tap but does not require line extensions, construction, or new facilities shall be filled within five working days after a completed service application has been accepted.
- (5) If construction is required to fill the order and if it cannot be completed within 30 days, the retail public utility shall provide a written explanation of the construction required and an expected date of service.
- (b) Except for good cause shown, the failure to provide service within 30 days of an expected date or within 180 days of the date a completed application was accepted from a qualified applicant may constitute refusal to serve, and may result in the assessment of administrative penalties or revocation of the certificate of convenience and necessity or the granting of a certificate to another retail public utility to serve the applicant.
- (c) The cost of extension and any construction cost options such as rebates to the customer, sharing of construction costs between the utility and the customer, or sharing of costs between the customer and other applicants shall be provided to the customer in writing upon assessment of the costs of necessary line work, but before construction begins. Also see §24.153(a)(1) of this title (relating to Customer Relations).⁶

⁶ 16 TAC § 24.161(a)(emphasis added).

Section 24.3(31) defines a retail public utility to include a water supply corporation (“WSC”):⁷

Retail public utility -- Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

Additionally, a retail public utility holding a CCN must provide continuous and adequate service to every customer and every qualified applicant for service:

(a) Any retail public utility which possesses or is required by law to possess a certificate of convenience and necessity or a person who possesses facilities used to provide utility service **must provide continuous and adequate service to every customer and every qualified applicant for service** whose primary point of use is within the certificated area and may not discontinue, reduce or impair utility service except for:

(1) nonpayment of charges for services provided by the certificate holder or a person who possesses facilities used to provide utility service;

(2) nonpayment of charges for sewer service provided by another retail public utility under an agreement between the retail public utility and the certificate holder or a person who possesses facilities used to provide utility service or under a commission order;

(3) nonuse; or

(4) other similar reasons in the usual course of business without conforming to the conditions, restrictions, and limitations prescribed by the commission.⁸

Finally, Texas Water Code § 13.004 vests the Commission with jurisdiction over a WSC where it operates in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation prescribed by Sections 13.002(11) and (24).⁹ That is, a WSC that operates in a manner counter to any provision of its tariff is not member-controlled because the tariff are the rules that the members adopt to manage or control the corporation and the vehicle by which the WSC is member-controlled.

⁷ 16 TAC § 24.3(31).

⁸ 16 TAC § 24.247(a)(emphasis added).

⁹ TWC § 13.004(a)(2).

III. COMPLAINT¹⁰

For more than five years, Rincon has effectively refused to serve NBT by failing to act on NBT's requests for service and/or not acting on the requests timely. In so doing, Rincon has also violated its own tariff in multiple ways, as follows:¹¹

A. Rincon Tariff, Section 3.06(iv)

In the event the general manager determines a developer has failed to timely comply with a prior written statement or commitment, a written notice, both by certified and regular mail, shall be submitted to developer within five (5) days of the determination by the Corporation's general manager that a failure to comply has occurred. The developer shall then have ten (10) days to comply with written statements/commitments and to respond to Corporation's notice.

On February 19, 2017, at the direction of Rincon general manager Ken Johnson, NBT paid a \$1,625 fee to reserve taps for 13 connections. NBT was not provided notice within five days nor provided the 10-day opportunity to cure; instead, NBT's legal counsel was informed on July 17, 2017 that the application was being returned because there was "no way for Rincon to account for the money being held." As justification for unilaterally cancelling NBT's application, Rincon insisted that each application form contain individual addresses for the locations of the requested taps. This was impossible because the property had not been platted at that time.¹²

On April 14, 2021, NBT submitted 22 applications for service, including the original 13 from 2017 and paid \$2,425 in reservation fees. As of the date of this filing, more than 30 days have passed since the completed applications were filed, but Rincon has not provided service to NBT nor shown good cause for its failure to do so. Indeed, as of its last Board meeting of May 18 2021, NBT was informed by Rincon that it would not act on NBT's applications while this Complaint docket was pending.

¹⁰ This Amended Complaint incorporates NBT's prior formal complaint to the Commission of February 3, 2021 and informal complaint of November 2, 2020.

¹¹ This is not an exhaustive list but just a sample of Rincon's violations over the last five years.

¹² The NBT property was not platted until September 16, 2020.

B. Rincon Tariff, Section 3.07(a)(iv)(j)(ii)

Upon payment of all fees and estimated construction costs (as determined by the Corporation engineer) or submittal of an acceptable letter of credit RWSC will advertise and accept bids for construction of the construction of water system improvements. Following the bid deadline the bids will be opened and read aloud in public forum.

On August 15, 2019, NBT received an e-mail from Ken Johnson stating that the bid for the water line construction was “opened yesterday so I could prepare for BOD meeting Tuesday August 20, 2019.” The bid was obviously not opened and read aloud in public as required by Rincon’s tariff.

C. Rincon Tarriff, Section 3.08(a)

In addition to the above, if the development project occurs inside a City Extraterritorial jurisdiction (ETJ) or proposed Extraterritorial Jurisdiction the following will apply

- (i) Design and construction of developments are under the authority of the City.**

In past discussions with NBT, Rincon has stated that NBT’s 22 connections would require a 6” water main to provide fire flow based on the City of Portland’s code of ordinances. However, City of Portland Deputy City Manager Brian DeLatte, P.E. specifically stated that:

City of Portland **approval is not needed** for your project since it is vested under state law. Texas Local Government code Section 245.002 provides that regulation at the time the development plan IS FILED govern your project. Since your development process began before City’s extension to this property on May 6, 2019, City of Portland regulations do not apply to your construction.¹³

Thus, the City of Portland has already determined that fire flow capacity for the NBT subdivision is not required. Not only does the City of Portland lack legal authority to impose fire flow requirements on property in its ETJ, but based on TCEQ’s minimum capacity requirements, a 6” line is absurdly oversized for NBT’s proposed 22 connections.¹⁴ Regardless of the City’s own view of the limited scope of its authority, Rincon’s general manager stated that “we will design

¹³ See Attachment A, May 19, 2020 email correspondence from Brian DeLatte to Jim Fay (emphasis added). Even at final buildout, a 6” line is unwarranted.

¹⁴ 30 TAC § 290.45.

and construct water system improvements in accordance with current Tariff and City of Portland Standards.” The financial difference between a 4 and 6” line is substantial for NBT and not warranted by the number of connections to be served in the subdivision.

D. Rincon Tariff, Section 3.06(a)(vii)

The Corporation shall also have the authority to require easements for its facilities from developers developing land within Rincon WSC service area boundaries.

In an email dated May 22, 2019 to NBT, Rincon’s general manager stated that the “next step is for you to obtain easements from Hunt and Dubose (neighboring land owners to north and west of development). . . [b]oth must be dedicated easements allowing RWSC to construct water line inside the property.” Under section 3.07 of the tariff, submittal of easements is considered Stage II of project completion. To NBT’s knowledge, Rincon has not voted to withdraw this or any other stage of approval of the project.

After some research, NBT determined that a perpetual water line easement already existed along the south side of the Hunt property (for grantee Rincon), which line was constructed by Rincon personnel. When NBT and a registered professional surveyor informed Rincon just one month later on June 20, 2019 that Rincon already possessed all the necessary easements for the project to commence, the Board of Directors demanded a “fresh water line easement from Hunt and Dubose prior to construction of water line.” This unnecessary demand further delayed and constitutes refusal of service to NBT.

Despite Rincon’s insistence on water line easements that already existed, Rincon put out a Request for Bid Proposal in July 2019, received bid(s), and scheduled the bid approval for a Board meeting in November, 2019. However, at that Board meeting, Rincon voted to set aside the bids and table the project. Proceeding with bids would imply the NBT project had proceeded at least to Stage III – Construction of Project Improvements. Yet more than a year and a half later and almost five years after NBT’s purchase of \$26,000 worth of pipe at Rincon’s direction, no water service has been extended.

E. Rincon Tariff, Section 3.06(iv)

In the event the general manager determines a developer has failed to timely comply with a prior written statement or commitment, a written notice, both by certified and regular mail, shall be submitted to developer within five (5) days of the determination

by the Corporation's general manager that a failure to comply has occurred. The developer shall then have ten (10) days to comply with written statements/commitments and to respond to Corporation's notice.

At the September 15 and October 20, 2020 Rincon Board meetings, NBT modified its request for service from 13 connections to 22 and provided its Amended Plat of Nueces Bay Tracts Phase I to the Board. Without notice of non-compliance by certified mail or an opportunity to cure, Rincon told NBT that the addition of 9 taps would trigger pump station improvements, which TCEQ application process would "take two years" according to Rincon. NBT was further informed that despite paying initial reservation fees, the WSC had no additional capacity to serve the NBT site, that this Phase I process had taken too long and subsequent applicants had taken or reserved the available water. For all intents and purposes, no progress toward service has occurred since that time until NBT's April 14, 2021 submittal to which Rincon has not yet responded.

Despite requesting that the Commission expand its CCN for the sole purpose of serving Mr. Fay's small rural development, NBT, Rincon has slow-walked, delayed, changed the rules of the game and effectively refused water service to NBT for more than five years. Throughout this process, Rincon has violated the terms of its member-approved tariff and the rules of the Commission. There is no alternative source of water for NBT and Rincon is **required** to provide it service in accordance with the CCN issued by the Commission.

IV. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Nueces Bay respectfully prays that the Commission direct Rincon Water Supply Corporation without further delay to provide water service to NBT in accordance with its CCN.

Respectfully submitted,

Randall B. Wilburn
State Bar No. 24033342
Helen S. Gilbert
State Bar No. 00786263
BARTON BENSON JONES PLLC
7000 N. MoPac Expwy, Suite 200
Austin, Texas 78731
Telephone: (210) 640-9174
Telecopier: (210) 600-9796

By: Helen S. Gilbert

Helen S. Gilbert

**ATTORNEYS FOR NUECES BAY
TRACTS, LLC**

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 26th of May 2021.

Helen S. Gilbert
Helen S. Gilbert

DOCKET NO. 51787 - ATTACHMENT A

5/26/2020

Nueces Bay Tracts Phase 1

From: brian.delatte@portlandtx.com,

To: fayjpfayiii@aol.com,

Cc: rwright@portlandtx.com, halgeorge@sbcglobal.net,

Subject: Nueces Bay Tracts Phase 1

Date: Fri, May 22, 2020 9:17 am

Attachments: image011.png (7K), image012.png (1K), image013.png (1K), image014.png (2K), image015.jpg (962)

Good morning Mr. Fay,

I received your letter dated May 19, 2020 concerning Nueces Bay Tracts Phase 1. Your letter indicated that you were informed by the Rincon Water Supply Corporation that you would be required to receive City of Portland approval for your plans and follow City of Portland construction specifications since the project is now within the City of Portland's extraterritorial jurisdiction.

After reviewing with the City Attorney, this email confirms for you that City of Portland approval is not needed for your project since it is vested under state law. Texas Local Government Code Sec. 245.002 provides that regulations in effect at the time the development plan is filed govern your project. Since your development process began before the City's ETJ extended to this property on May 6, 2019, City of Portland regulations do not apply to your construction.

As I mentioned on the phone, the City of Portland and Rincon are currently negotiating for the expansion of Rincon's Certificate of Convenience and Necessity (CCN) with the Public Utilities Commission. In the event that an agreement is reached, projects within Rincon's service area that are in Portland's ETJ may be required to be constructed to Portland's standards. It is unclear whether your project could be "grandfathered" under such an arrangement.

Thanks,

Brian



[cid:image011.png@01D30639.A71DFFE0](#)

Brian DeLatte, P.E.

Deputy City Manager

1900 Billy G Webb

Portland, Texas 78374

P (361) 777-4516

F (361) 777-4502