



Control Number: 52004



Item Number: 12

Addendum StartPage: 0

DOCKET NO. 52004

PETITION OF D.P.S.F.L.P. LTD TO	§	BEFORE THE PUBLIC UTILITY
AMEND AQUA TEXAS, INC.'S	§	
CERTIFICATE OF CONVENIENCE	§	COMMISSION OF TEXAS
AND NECESSITY IN MONTGOMERY	§	
COUNTY BY EXPEDITED RELEASE	§	

2021 JUN -7 PM 2:05
FILED
CLERK OF COURT
MONTGOMERY COUNTY TEXAS

**AQUA TEXAS, INC.'S RESPONSE TO PETITION OF D.P.S.F.L.P. LTD. FOR
STREAMLINED EXPEDITED RELEASE**

Aqua Texas, Inc. (Aqua) files this Response to the Petition of D.P.S.F.L.P. Ltd. (Applicant or Petitioner) to Amend Aqua Texas, Inc.'s Certificate of Convenience and Necessity in Montgomery County by Expedited Release (the Petition).¹ In support, Aqua shows as follows.

I. PROCEDURAL BACKGROUND

On April 9, 2021, Applicant filed the Petition seeking streamlined expedited release (SER) to extract approximately 343.097 of property in Montgomery County (Property) from Aqua certificate of convenience and necessity (CCN) No. 13203. The presiding Commission Administrative Law Judge (ALJ) deemed the Petition administratively complete on May 18, 2021 and set a deadline of June 7, 2021 for Aqua to file its response to same.² Therefore, this pleading is timely filed. The Commission must deny the Petition because the Petitioner did not follow the applicable procedural rules with its Petition filing and the Property receives water service from Aqua.

II. ARGUMENTS AND AUTHORITIES

The Commission should deny the Petition because the SER requested cannot lawfully be granted under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC)

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 Order No. 3 Finding Petition Administratively Complete, Notice Sufficient, and Establishing Procedural Schedule (May 18, 2021).

§ 24.245. The Petitioner did not provide a copy of the Petition to Aqua via certified mail on the day it was filed with the Commission as required by Commission rules.³ Further, the Property receives service from Aqua and is not eligible for SER.⁴ Alternatively, if the Commission releases the Property despite these facts, Aqua is entitled to just and adequate compensation.

A. Petitioner Failed to Comply with SER Rule

There are very few requirements for an applicant seeking SER approval. But the Commission rules specifically require an applicant seeking SER to provide “proof that a copy of the petition was mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission.”⁵

The record is clear that Petitioner failed to comply with this requirement. The first notice Aqua received about the Petition was via Order No. 1 provided by the Commission and not the Petitioner.⁶ It turns out, the Petition did not even address the notice requirement, and the Petitioner did not bother to send a copy to Aqua by certified mail or otherwise.⁷ Aqua raised this issue in its initial comments.⁸ Only then did the Petitioner decide to send a copy to Aqua by certified mail and file proof of notice.⁹ The affidavit included with that filing shows the mailing took place on May 11, 2021, not the “day the landowner filed the petition with the commission.”¹⁰ Petitioner has not presented any good cause for its failure to comply with the SER notice requirement on the day it filed the Petition.

³ 16 TAC § 24.245(h)(3)(F).

⁴ 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).

⁵ 16 TAC § 24.245(h)(3)(F).

⁶ Order No. 1, Requiring Comments on Administrative Completeness, Notice, and Other Matters, and Establishing Procedural Schedule (Apr. 12, 2021).

⁷ Petition (Apr. 9, 2021).

⁸ Aqua’s Motion to Intervene, Request for Response Deadline, and Initial Comments at 4 (May 6, 2021).

⁹ Petitioner’s Proof of Notice to Aqua Texas at May 18, 2021 Affidavit of Pam Steward in Support of Petition (May 27, 2021).

¹⁰ *Compare* Petitioner’s Proof of Notice to Aqua Texas at May 18, 2021 Affidavit of Pam Steward in Support of Petition (May 27, 2021), *with* 16 TAC § 24.245(h)(3)(F).

Consequently, the result here should be that the Petition is denied. The Petitioner cannot cure the Commission's SER notice requirement after the fact. CCN holders are not even granted the opportunity for a contested case hearing in these expedited SER proceedings, so the least the Commission can do is ensure SER applicants properly comply with the SER rules. In contrast, on May 10, 2021, Commission Staff identified the above-described deficiency in its initial recommendation, but recommended the Petition be deemed administratively complete anyway, which it was.¹¹ Then, on June 1, 2021, Commission Staff filed a supplemental recommendation characterizing Petitioner's notice "materially sufficient" after Petitioner filed the aforementioned proof of notice even though the required notice was performed over a month after filing.¹²

Aqua objects to how processing for the Petition was handled. Respectfully, Aqua requests the Commission deny the Petition for failure to comply with the SER rule notice requirement.

B. Petitioner's Property Receives Service from Aqua

The Property receives water service from Aqua under any interpretation or application of the term "service" as the TWC defines it and the Property cannot be released from Aqua's CCN under TWC § 13.2541.¹³ 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.¹⁴

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,

¹¹ Commission Staff's Comments on Administrative Completeness, Notice, and Proposed Procedural Schedule (May 10, 2021); Order No. 3 Finding Petition Administratively Complete, Notice Sufficient, and Establishing Procedural Schedule (May 18, 2021).

¹² Commission Staff's Supplemental Recommendation on Proof of Notice (June 1, 2021).

¹³ 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).

¹⁴ TWC § 13.002(21); *see also* 16 TAC § 24.3(33) (same definition).

furnished, or supplied for, by, or in connection with the business of any retail public utility.¹⁵

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.¹⁶ 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.¹⁷ Recently, 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 This case presents the opposite of those facts.

Where water distribution lines and other facilities are present immediately adjacent to and made available for a subject tract within the targeted CCN holder’s CCN service area, they are “committed” to the property and the tract is “receiving service” under the applicable standards described such that SER should not be granted. A policy of releasing CCN areas despite these facts disregards the TWC definition of “service,”²⁰ the legislative intent to not release property that is receiving service,²¹ and undermines any incentive for retail public utilities to invest in

¹⁵ TWC § 13.002(9); *see also* 16 TAC § 24.3(15) (same definition).

¹⁶ *See Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014, pet. denied).

¹⁷ *Id.*

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 June 7, 2021).

¹⁹ *Id.*

²⁰ TWC § 13.002(21); *see also* 16 TAC § 24.3(33) (same definition).

²¹ 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).

service planning efforts within their CCN service areas before someone decides to actively undertake development within an area. Such a policy also disincentivizes efforts to provide regional service and take advantage of economies of scale benefits. For all these reasons, Aqua respectfully requests the Commission expand its view of “service” in SER matters such as this one and deny release.

Here, the Petition’s only proof regarding service is a self-serving affidavit from Pam Steward that claims the “tract does not receive water utility service from Aqua Texas, Inc.”²² In contrast, as detailed in the attached affidavit of Chris A. Garcia, Area Manager – Southeast Texas, Aqua has water system facilities immediately adjacent to and with excess capacity available to the Property.²³ Aqua has also performed various acts and supplied funds in furtherance of service to the Property and Aqua’s CCN No. 13203 area that includes the Property.²⁴ Mr. Garcia’s affidavit includes a map showing the location of its Crystal Forest Subdivision water system (PWS ID No. 1700096) facilities which serve the Property and nearby areas in relation to the Property.²⁵

Here, these facilities—and the acts planning, creating, and maintaining them—are all plainly “committed” or “used” by Aqua in the performance of its duties to supply water within the targeted CCN area. The Property receives water service from Aqua through its commitments to, and its existing facilities and capacity adjacent to, the Property. Mr. Garcia’s affidavit describes all the different ways Aqua has served the Property through its various service acts and funds supplied, but there should be no question that the Property receives water service from Aqua.²⁶ Under these

²² Petition at Exhibit 3 (Affidavit of Pam Steward) (April 9, 2021).

²³ See **Exhibit A** – Affidavit of Chris A. Garcia.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

facts, the Commission should deny the Petitioner's request to release the Property from Aqua's CCN No. 13203 because that would violate TWC § 13.2541.

C. Aqua Must Be Compensated If the Property Is Removed from Aqua's CCN Area.

Alternatively, Aqua is entitled to a determination of just and adequate compensation if its CCN area is reduced.²⁷ 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 value of the service facilities of the retail public utility located within 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; the amount of the retail public utility's contractual obligations allocable 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; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors.²⁸

If the Property is removed from Aqua's CCN No. 13203, Aqua would be entitled to compensation under several of these factors, including but not necessarily 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 (including the costs incurred to make the recording required by TWC § 13.257(r)-(s)).²⁹ 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.³⁰

²⁷ TWC §§13.254(g) and 13.2541(f)-(h).

²⁸ TWC §§13.254(g) and 13.2541(h); *see also* 16 TAC § 24.245(j).

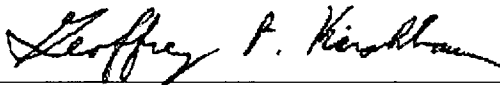
²⁹ *See Exhibit A.*

³⁰ TEX. WATER CODE §13.2541(g), (i).

CONCLUSION AND PRAYER

Aqua respectfully requests the Commission deny the Petition because the Petitioner has not followed the Commission SER rules and because the Property receives water service from Aqua precluding SER under TWC § 13.2541. Alternatively, if the Commission approves the Petition, Aqua seeks just and adequate compensation for the decertification of a portion of its water CCN No. 13203. Aqua also seeks all and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,

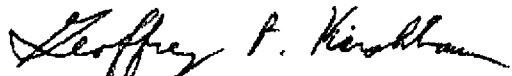
By: 

Geoffrey P. Kirshbaum
State Bar No. 24029665
TERRILL & WALDROP
810 West 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
gkirshbaum@terrillwaldrop.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 June 7, 2021 in accordance with the Order Suspending Rules filed in Project No. 50664.


Geoffrey P. Kirshbaum

DOCKET NO. 52004

PETITION OF D.P.S.F.L.P. LTD TO	§	BEFORE THE PUBLIC UTILITY
AMEND AQUA TEXAS, INC.'S	§	
CERTIFICATES OF CONVENIENCE	§	COMMISSION OF TEXAS
AND NECESSITY IN MONTGOMERY	§	
COUNTY BY EXPEDITED RELEASE	§	
	§	

AFFIDAVIT OF CHRIS A. GARCIA

THE STATE OF TEXAS §
 §
 COUNTY OF HARRIS §

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

My name is Chris A. Garcia. I am over the age of 18 years and reside in Harris 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.

I am the Southeast Texas Area Manager for Aqua Texas, Inc. dba Aqua Texas ("Aqua"), Intervenor in the above styled and numbered case, and I am authorized to make this affidavit on behalf of Aqua.

The attached map, **Attachment 1**, shows the property tract ("Property") that the Petition filed by D.P.S.F.L.P. Ltd. ("Petitioner") in Docket No. 52004 seeks to remove through streamlined expedited release ("SER") from an area for which Aqua holds water certificate of convenience and necessity ("CCNs") No. 13203. I am familiar with Aqua's facilities in the vicinity of the Property and their location in relation to same. **Attachment 1** shows the Property and the location of Aqua's water facilities immediately adjacent to the Property. Those facilities comprise Aqua's Crystal Forest Subdivision water system (PWS ID No. 1700096) which serves the Property and the adjacent Crystal

Forest Subdivision. The Crystal Forest Subdivision water system facilities were originally built with the intent of serving both the Property and the adjacent Crystal Forest Subdivision.

Specifically, Aqua's Crystal Forest Subdivision water system facilities include: three water wells that produce 40 gallons per minute ("GPM"), 30 GPM, and 185 GPM, respectively; two ground storage tanks that hold 30,000 gallons each; a hydro tank that holds 10,000 gallons; two 15 horsepower ("HP") service pumps that pump 375 GPM each and two 5 HP pumps that each pump 125 GPM; 208 active 5/8" x 3/4" meter water customers with corresponding service lines, plus 7 additional inactive 5/8" x 3/4" water meters; and over 22,000 linear feet of water lines.

Aqua has constructed its Crystal Forest Subdivision water system facilities with capacity that exceeds immediate need in order to respond quickly to anticipated new development within the Property. Aqua's Crystal Forest Subdivision water system facilities have the capacity to provide water to approximately 41 additional equivalent single-family connections and Aqua is capable of expanding the system to accommodate even more connections. 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 and Aqua could respond to a water service request from the Property developer within a reasonable amount of time.

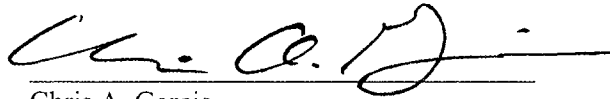
Aqua has provided water service to the Property in several ways: (1) performing acts and supplying funds to permit, plan, design, construct, own, and operate the Crystal Forest Subdivision water system facilities located within and adjacent to the Property; (2) performing acts and supplying funds necessary to obtain, transfer, and maintain the water CCN No. 13203 service area covering the Property under prevailing regulations; (3) performing acts and supplying funds necessary to obtain, transfer, renew, and maintain permits for the Crystal Forest Subdivision water system so that it may be used to serve the Property and CCN No. 13203 area that includes the Property; (4) maintaining a

regional office in Spring, Texas with personnel specifically dedicated to operations within Aqua's geographic Southeast Texas Region water CCN No. 13203 service areas, including the Property and CCN No. 13203 area that includes the Property; and (5) analyzing and responding to past service inquiries and service requests for the Property.

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 accord and because the time and expense to acquire the CCNs and permits has already been spent. Decertification of the Property will prevent Aqua from using these rights within the Property.

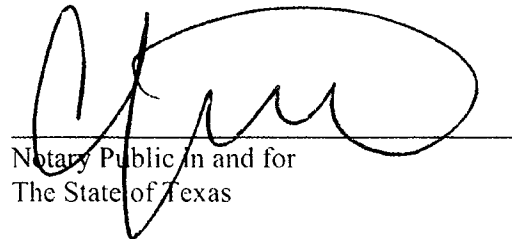
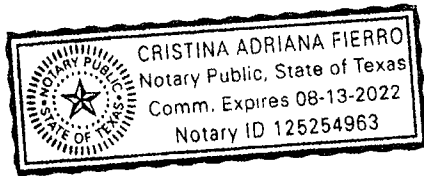
In sum, Aqua has performed numerous acts, supplied funds, and committed facilities to the Property. Aqua has also performed acts, supplied funds, and committed facilities to an area immediately adjacent to the Property in CCN No. 13203. Aqua is incurring legal expenses and is likely to incur other professional expenses as a result of the decertification and Petition. If the decertification is approved, Aqua will be compelled to spend time and resources to make the filing required by TWC § 13.257(r)-(s). Aqua is actively supplying water services to the Property and nearby properties. The Property receives water service from Aqua through these acts, supplied funds, and facilities. Aqua stands ready to perform additional acts of service and commit additional facilities to the Property as necessary.

Further Affiant sayeth not.

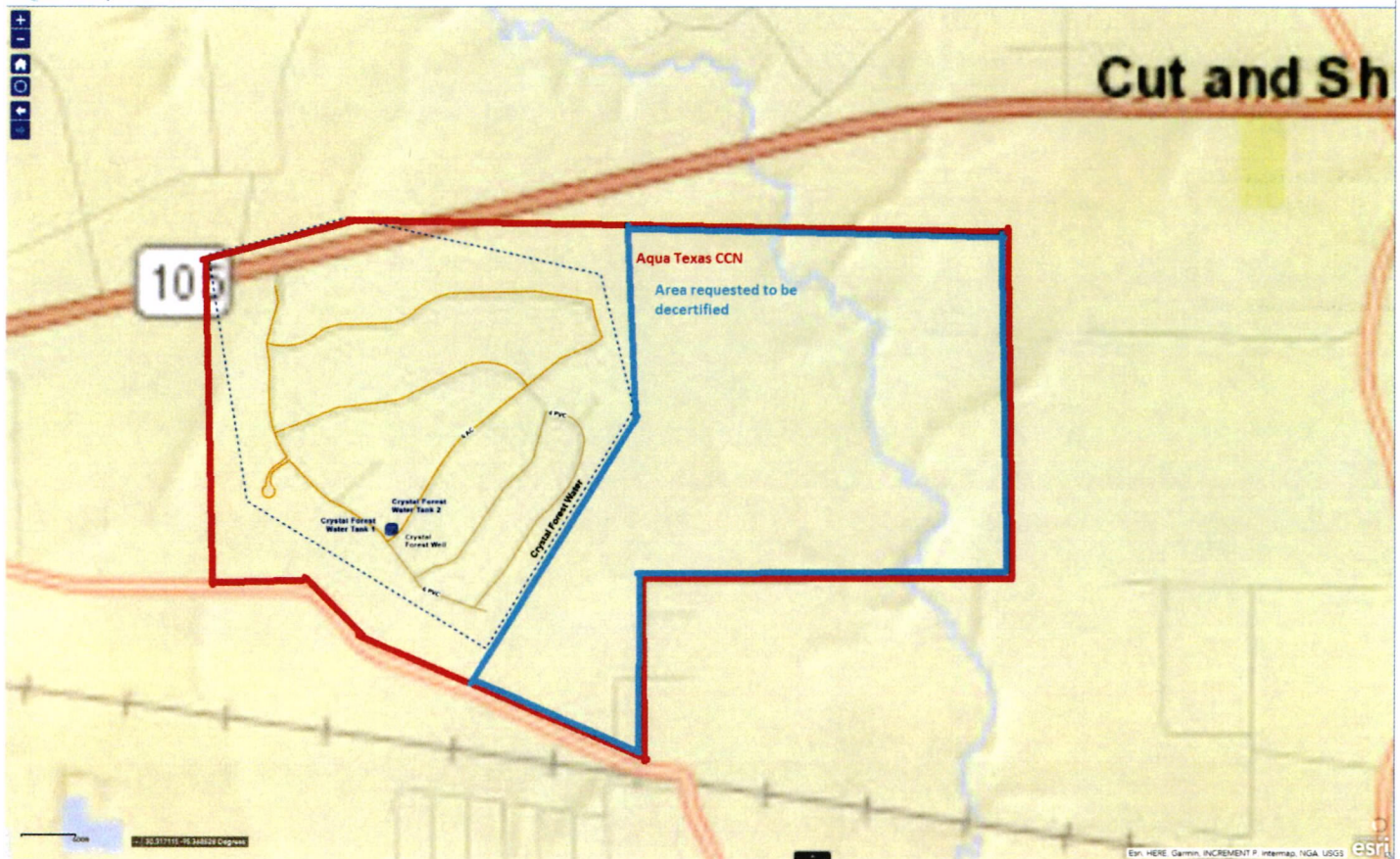


Chris A. Garcia
Southeast Texas Area Manager
Aqua Texas, Inc.

SUBSCRIBED AND SWORN TO BEFORE ME on this the 7th day of June, 2021, to which
witness my hand and official seal.



Notary Public in and for
The State of Texas



Attachment

1