

LAW OFFICES OF

JACKSON, SJOBERG, MCCARTHY & WILSON, L.L.P.

711 WEST 7TH STREET
AUSTIN, TEXAS 78701-2785
(512) 472-7600
FAX (512) 225-5565

DAVID E. JACKSON*
JOHN MATTHEW SJOBERG*

EDMOND R. MCCARTHY, JR.
ROBERT WILSON

ELIZABETH A. TOWNSEND†
OF COUNSEL
†LICENSED IN TEXAS AND
TENNESSEE

*BOARD CERTIFIED IN OIL,
GAS AND MINERAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY
JUL 9 9 3:01 AM
CLERKS OFFICE

July 8, 2008

The Honorable Craig R. Bennett & Travis Vickery
Administrative Law Judges
State Office of Administrative Hearings
300 West Fifteenth Street
Austin, Texas 78701

via Fax and Regular Mail

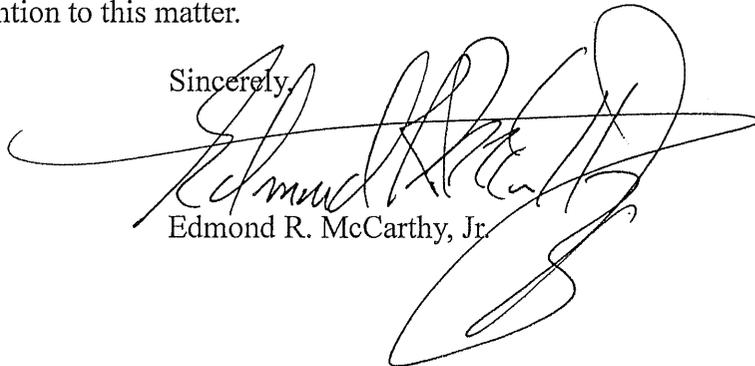
Re: SOAH Docket Nos. 582-05-2770, 582-05-2771
TCEQ Docket Nos. 2004-1120-UCR, 2004-1671-UCR

Dear Judges:

Enclosed please find two copies of the SE Region's and SW Regions' Response to Order Number 51 and the Separate Responses filed by Applicant Aqua Texas and the TCEQ's Executive Director. Please file-stamp the copy and return to this office via the enclosed, self-addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,



Edmond R. McCarthy, Jr.

ERM/tn
Encl.

cc: Mailing List

SOAH DOCKET NOS. 582-05-2770, 582-05-2771

TCEQ DOCKET NOS. 2004-1120-UCR, 2004-1671-UCR

APPLICATION BY AQUA UTILITIES, §
INC., d/b/a AQUA TEXAS, INC. TO §
CHANGE ITS WATER AND SEWER §
TARIFFS AND RATES IN VARIOUS §
COUNTIES, AND APPEAL OF RATE- §
MAKING ACTIONS OF VARIOUS §
MUNICIPALITIES DENYING §
REQUESTED CHANGES TO WATER §
AND SEWER TARIFFS AND RATES §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

2004 JUL -9 PM 3:01
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**SOUTHEAST REGION'S AND SOUTHWEST REGION'S
RESPONSE TO ORDER NUMBER 51, AND THE
SEPARATE RESPONSES FILED BY APPLICANT
AQUA TEXAS AND THE TCEQ'S EXECUTIVE DIRECTOR**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COME NOW, the Southeast Region Homeowners Group (and Numerous Individual Customers, including Crighton Ridge Homeowners Association) (the "SE Region") and Southwest Region Homeowners Group (the "SW Region"), and file this, their Response to Order No. 51, and the Separate Responses Filed by Applicant Aqua Texas and the TCEQ's Executive Director.¹

1. Connections:

In the summer of 2004 when the Applicant filed its application to increase its rates, Aqua Texas identified 49,986 "connections" as being the number of connections subject to the rate increase. At the time the application was filed, pursuant to the Commission's rules, Aqua Texas

¹ SE Region and SW Region continue to believe the Application should be denied for all of the reasons previously briefed; however, this response is limited to the issues raised by Order 51 and the responses thereto. See 30 TEX. ADMIN. CODE 291.12 (burden of proof is on retail utility to establish that the proposed rates will be "just and reasonable."); cf., 30 TEX. ADMIN. CODE § 80.17(b), (30 TEX. ADMIN CODE § 291.12 governs burden of proof in retail rate proceedings).

was supposed to be prepared to go to hearing on its application “as filed.” Throughout the hearing, Aqua Texas maintained that its application was accurate and complete and, therefore, the 49,986 total connections should have been a “true and correct number” to be relied upon by Staff.

In fact, the 49,986 connections is the number that Staff relied upon from the summer of 2004 until the summer of 2008. Staff conducted a meeting with the representatives of the Applicant and the SE and SW Regions in February, 2008, for the purpose of discussing the number of connections over which (i) the revenue requirement to be recovered through the new rates should be distributed, as well as (ii) calculation of the surcharge on a per-connection basis and the payment of that surcharge to be recovered from those connections.

At that meeting, Aqua Texas sought to reduce the total number of connections by approximately ten percent to a total number of 45,871 “active connections.” During the February, 2008 meeting, TCEQ Staff, led by Mr. Doug Holcomb, continued to maintain that the traditional methodology relied upon by Staff was to use the total number of connections identified in an applicant’s rate application, *i.e.*, 49,986. At the end of that meeting, it appeared that Staff was going to maintain its traditional posture, and rely upon the number of total applications reflected in the application, *i.e.*, 49,986, and not reduce by ten percent the number of connections to the Aqua Texas’ requested number of 45,871.

Since the February, 2008 meeting, Aqua Texas has continued to lobby the Staff to grant them a ten percent reduction in the total number of connections over which the revenue requirement will be recovered and the surcharge allocated. Apparently, TCEQ Staff has again thrown away its rule book with respect to the Aqua Texas application, and is now recommending that the total number of connections should be reduced by ten percent to 45,871. This change is

material to all of the rate payers subject to the Aqua Texas rate increase. By reducing the number of connections, that smaller number of connections will each be required to bear a larger portion of the revenue requirement to be recovered by Aqua Texas, as well as absorb a larger portion of the burden of the surcharge to be recovered by Aqua Texas. Accordingly, the SE Region and the SW Region request that the ALJs deny Aqua Texas' request to ignore the number that it used in its application and to seek a lower number thereby increasing the burden on the rate payers.

2. Over Collections:

Based upon information presented during the hearing and post-hearing, Aqua Texas collected surcharges from the prior rate case in an amount which exceeds the amount of the surcharge TCEQ authorized to be recovered by Aqua Texas. Aqua Texas knowingly continued to over collect that surcharge and, based upon the SE and SW Regions' understanding and belief now holds the same in escrow. The Commission should order Aqua Texas to either refund the over collected surcharges from the prior rate case to the rate payers who paid the same or, alternatively, apply the over collections to the surcharge to be assessed in this case.

Additionally, in light of the fact that Aqua Texas has been collecting higher rates through its "Phased Rates" program, than now have been authorized by the Commission, Aqua Texas should be required to refund the revenue which has been collected to date which exceeds the amount of revenue (approximately \$3 Million) that would have been generated by the un-phased rates authorized by the Commission in these proceedings. Those over collections should be applied to reduce the revenue requirement in this case, including a reduction to the surcharge to be ordered by the Commission in these proceedings.

Finally, with respect to surcharges that will be ordered to be paid by the rate payers in this case, the Commission should be specific in its order with respect to the amount that Aqua Texas is authorized to lawfully collect. The Commission should also specifically order that the surcharge is to be terminated automatically without further Commission action on the earlier of (i) a "date certain" to be ordered by the Commission or (ii) on the date at which Aqua Texas has recovered an amount equal to the amount that the surcharge is based upon such that there will not be a continuing recovery of surcharges and a resulting over collection of the surcharge amount in this rate case too.

3. Additional Rate Case Expenses:

The Commission has ordered that Aqua Texas be allowed to recover rate case expenses in these proceedings through February, 2007 in the amount of \$2,492,403.50. The Commission also authorized Aqua Texas to recover additional costs incurred between February, 2007 and June 18, 2008. Aqua Texas seeks \$433,249.90 in additional costs.

During the 15 ½ month period since February, 2007 there has been significantly less activity in this matter than occurred in the three and a half years from the time that Aqua Texas began developing its application, filed its application in June of 2004 and through February of 2007. During this post-February 2007 period the ALJs issued their Proposal for Decision and the parties prepared exceptions and responses to exceptions. The parties also were required to (i) submit supporting documentation for development of a rate base from the evidence developed and presented in the hearing, as well as (ii) participate in two proceedings before the TCEQ in March of 2008 and again in June of 2008. Despite the fact that during this post-February 2007 period there should have been a significant drop off in the amount of activity and associated costs in this case, and there should have been no further development of new or revised evidence

following the closure of the record in these proceedings, Aqua Texas asserts that it is entitled to recover almost \$450,000.00 in additional rate case expense. The amount requested for this 15 ½ month period of “little activity,” as compared to the intensive preparation for and prolonged rate case proceedings that predate February 2007, reflects an amount equal to almost twenty percent (20%) of the total rate case costs (\$2.5 Million) already authorized for recovery. SE and SW Regions would urge the ALJs to find and, thereafter, to recommend that the requested additional rate case expense of \$212,700.42 for additional attorneys’ fees and an additional \$220,547.48 for additional “consulting and other rate case expenses” (including in excess of \$161,000.00 to Richard Hugus individually) is excessive, unacceptable, unreasonable and, therefore, unrecoverable in these proceedings.

Moreover, the SE and SW Regions would assert that if, in fact, Aqua Texas was required to expend such significant amounts of time and sums of money after the closure of the hearing record in order to get its rate case in order, that fact on its face demonstrates (i) that Aqua Texas was not prepared to go to hearing on the application it filed in the summer of 2004, (ii) that application should not have been declared administratively complete and should not have been processed, and (iii) the application and evidence of record is not capable of sustaining Aqua Texas’ burden of proof to justify the rate increases being recommended by the ALJs and the Commission in these proceedings.²

4. Additional Findings of Fact and Conclusions of Law:

The following additional findings of fact and conclusions of law are proposed for inclusion in the Final Order issued by the Commission. The proposed findings and conclusions are consistent with the current PFD as directed by the ALJs, and are based upon comments and

² See Footnote 1 for citations of authority regarding Aqua Texas’ burden of proof in these proceedings.

discussions by and between the ALJs and the Commissioners during the Commission Agenda presentations in March and June of 2008:

A. Findings of Fact.

1. Aqua Texas' application in these proceedings evidenced the existence of 49,986 connections.
2. The evidence of record upon which the Executive Director's Staff relied and made its recommendations is 49,986 connections.
3. Aqua Texas did not conduct cost of service studies for any of its individual systems within the proposed regions proposed to be consolidated under the single tariff approved by the Commission.
4. Based upon the information available today, individual systems within the separate regions to be consolidated under the single tariff are not substantially similar in terms of facilities, quality of service and cost of service within the meaning of Section 13.145, Texas Water Code.
5. Aqua Texas could not sustain the burden of establishing that the individual systems to be consolidated under the single tariff are substantially similar if Texas Water Code Section 13.145 requires that in order to consolidate more than one system under a single tariff the requirements have to be satisfied as of the date of the Commission's Order.
6. By consolidating the multiple dissimilar utility systems under a single consolidated tariff the Commission believes that Aqua Texas in the future will be able to demonstrate in the future that the systems under the tariff are substantially similar in terms of facilities, quality of service, and cost of service.

7. Aqua Texas continued to charge and collect the surcharge from the last rate beyond the date on which Aqua Texas had recovered the amount intended to be collected through that surcharge.

8. Aqua Texas' Phased Rates, which have been charged and collected since the inception of this rate case, have over collected the revenue requirement authorized in this rate case by approximately \$3 Million.

9. The Commission finds that Aqua Texas should not be allowed to continue to collect surcharges beyond the date at which the amount recovered pursuant to the surcharge equals the amount ordered to be surcharged.

10. The \$433,247.90 in additional rate case costs sought by Aqua Texas for the post-hearing period of February 2007 through June 18, 2008, is excessive and unreasonable.

B. Conclusions of Law.

1. The number of connections to be used for rate making purposes is 49,956.

2. Section 13.145, Texas Water Code, does not require that systems placed under a consolidated tariff be substantially similar in terms of facilities, quality of service or cost of service at the time the Commission grants an Order consolidating multiple dissimilar systems under a single tariff.

3. Section 13.145, Texas Water Code, contemplates that dissimilar systems consolidated under a single tariff may become substantially similar prospectively.

4. Aqua Texas is ordered to refund the entire amount of the over collected surcharge from the prior rate case by paying the same to the customers who paid it, or to the extent the whereabouts of those customers is unknown, by applying the balance to reduce the revenue requirements authorized in this rate case.

5. Aqua Texas' authority to charge and collect a surcharge authorized by this Order terminates on the earlier of December 31, 20__ or the date Aqua Texas recovers through the surcharge an amount equal to \$ _____.

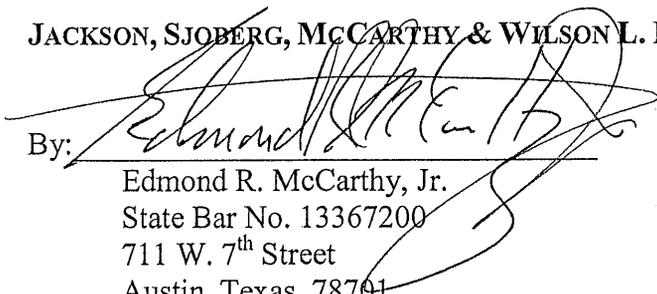
6. The \$3 Million in over collected rates should be credited against the surcharges to be collected by Aqua Texas and, to the extent of any excess, against Aqua Texas' revenue requirements.

WHEREFORE, PREMISES CONSIDERED, the SE and SW Regions pray that:

- (1) Aqua Texas be ordered to refund the over collections to date both from the surcharge in the prior rate case, and the Phased Rates charged in this case;
- (2) Aqua Texas be ordered to terminate without further Commission action the charging and/or the collection of any surcharge authorized in this rate case on the earlier of a "date certain" or the date on which Aqua Texas collects the total amount of revenue intended to be recovered through the surcharge(s);
- (3) Aqua Texas' request to recover an additional \$433,257.90 in "rate case expenses" allegedly incurred since February, 2007, including \$212,700.42 in attorneys' fees and \$220,547.48 in "consulting and other rate case expenses" be denied as being excessive, unwarranted and unreasonable and, therefore, uncollectible, or, in the alternative, the total amount to be recovered severely reduced; and
- (4) That the additional "Findings of Fact" and "Conclusions of Law" offered herein be included in the final order issued by the Commission.

Respectfully submitted,

JACKSON, SJOBERG, MCCARTHY & WILSON L. L. P.

By: 

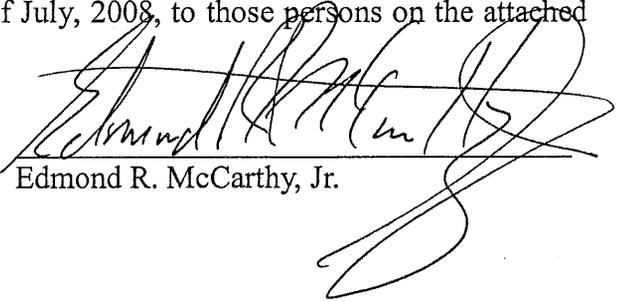
Edmond R. McCarthy, Jr.
State Bar No. 13367200
711 W. 7th Street
Austin, Texas 78701
(512) 225-5607
(512) 225-5565 (fax)

**Attorneys for Southeast Region Homeowners Group
(and Numerous Individual Customers, including**

**Crighton Ridge Homeowners Group) (the "SE Region")
and The Southwest Region (the "SW Region")**

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of the above "Response" was forwarded via telecopier, e-mail where available, and regular, U.S. mail, postage prepaid, as indicated, on this the 8th day of July, 2008, to those persons on the attached service list.



Edmond R. McCarthy, Jr.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 JUL -9 PM 3:01
CHIEF CLERKS OFFICE

SERVICE LIST

**SOAH DOCKET NOS. 582-05-2770, 582-05-2771
TCEQ DOCKET NOS. 2004-1120-UCR, 2004-1671-UCR**

Parties	REPRESENTATIVE/ADDRESS
State Office of Administrative Hearings	Craig R. Bennett, Travis Vickery Administrative Law Judges State Office of Administrative Hearings 300 West Fifteenth Street, Suite 502 Austin, TX 78701 512-475-4993 512-936-0730 fax
Texas Commission on Environmental Quality	Todd Galiga Texas Commission on Environmental Quality, MC-175 PO Box 13087 Austin, TX 78711-3087 512 239-3578 512 239-0606 (Fax) Les Trobman, General Counsel Texas Commission on Environmental Quality, MC-101 PO Box 13087 Austin, TX 78711-3087 512 239-5525 512 239-5533 (Fax)
Office of the Public Interest Counsel of the Texas Commission on Environmental Quality	Scott Humphrey Office of the Public Interest Counsel Texas Commission on Environmental Quality MC-103 PO Box 13087 Austin, TX 78711-3087 512 239-0574 512 239-6377 (Fax)
Aqua Texas, Inc.	Paul Terrill, Attorney 810 W. 10 th Street Austin, TX 78701 512-474-9100 512-474-9888 (Fax)

Southwest Region Homeowners Group	Dr. Victoria Harkins c/o Espey Consultants, Inc. 3809 South 2nd Street Austin, Texas 78704 (512) 326-5659 (512) 326-5723 (FAX)
Southeast Region Homeowners Groups (and Numerous Individual Customers, including Crighton Ridge Homeowners Group)	Gayle Pierce* Southeast Region Homeowners Group 14188 Shadow Bay Drive Willis, TX 77318-7405 936 890-2152 Judith B. Weidner* 13231 Ridgewater Way Conroe, TX 77302-3468 936-494-1104
Eagle Creek Ranch HOA	Linda Lamberth 912 Eagle Creek Dr. Floresville, TX 78114 830-393-3373 210-524-8501 (Fax)
Docket Clerk, Office of the Chief Clerk	Ms. La Donna Castanuela TCEQ, Office of the Chief Clerk 12100 Park 35 Circle Building F, 1 st Floor Austin, TX 78711-3087 512-239-3311 (Fax)

* Regular Mail