

SOAH DOCKET NO. 582-12-0707
TCEQ DOCKET NO. 2011-1566-UCR

APPLICATION FROM AQUA
UTILITIES, INC., CCN NOS. 11157
AND 20453, TO PURCHASE
FACILITIES AND TO TRANSFER
AND CANCEL CCNS 13114 AND
21005 FROM TEXAS-AMERICAN
WATER COMPANY IN
BRAZORIA, HARRIS, LIBERTY,
MATAGORDA, AND
MONTGOMERY COUNTIES

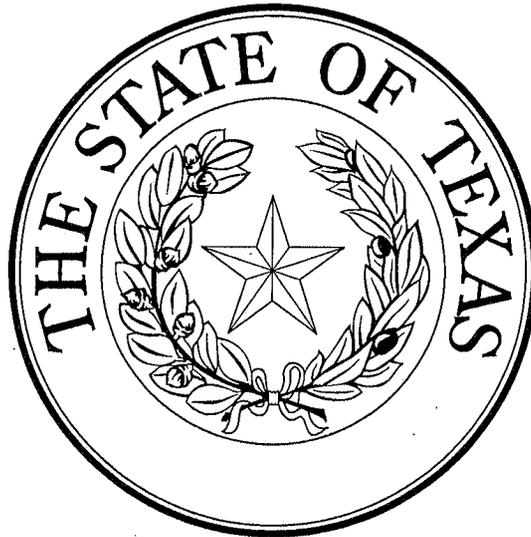
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BEFORE THE TEXAS COMMISSION

ON

ENVIRONMENTAL QUALITY

THE EXECUTIVE DIRECTOR'S RESPONSE TO EXCEPTIONS TO THE
PROPOSAL FOR DECISION AND PROPOSED ORDER



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JULY 5, 2012

can be completed²; and prevents the transaction from being completed or approved due to Aqua Texas' improper notice.³ When all subsections of Texas Water Code Section 13.301 and TCEQ rule Sections 291.109 and 291.112 are considered, it is evident that the ED cannot authorize the completion of a STM transaction when the public notice requirements have not been satisfied. Therefore, since Aqua Texas failed to provide proper public notice of its application, the Commission has the jurisdiction to ensure that the notice requirements of the Texas Water Code and the TCEQ rules have been met before it issues a final order.

II. REPLY TO AQUA TEXAS' EXCEPTIONS

In its exceptions, Aqua Texas seeks to add specific conclusions of law and ordering provisions to the ALJ's proposed order which would direct the ED to complete, and approve, the STM transaction. However, the ALJ's proposed order and Aqua Texas' proposed provisions are contrary to the Texas Water Code and the TCEQ rules and should not be adopted. Instead, the ED respectfully recommends that the Commissioners *not* adopt the PFD and proposed order and remand this matter to SOAH for a hearing on the public interest.

A. The STM transaction cannot be completed due to Aqua Texas' failure to provide proper notice.

Aqua Texas argues that changes should be made to the proposed order that would compel the Executive Director to complete the STM transaction.⁴ Aqua Texas' proposed conclusions of law and ordering provisions would require the ED to approve the STM

² TEX. WATER CODE § 13.301(a); *See also*, 30 TEX. ADMIN. CODE § 291.109(a)

³ TEX. WATER CODE § 13.301(h); *See also*, 30 TEX. ADMIN. CODE § 291.109(i)

⁴ Aqua Texas' Exceptions to the PFD at 2-3.

application even though Aqua Texas failed to provide proper notice.⁵ However, Aqua Texas' misconception that the ED can legally approve the STM transaction despite Aqua Texas' defect in notice is contrary to the Texas Water Code and the TCEQ rules.

The Texas Water Code and the TCEQ rules require an applicant to provide public notice of its STM application on or before the 120th day *before* the effective date of the transaction.⁶ Public notice is so important that the 120-day period does not begin until proper notice has been provided.⁷ Specifically, TCEQ rule Section 291.109 states that if mailed notice is required, the 120-day period begins on the last date the applicant mailed the required notices.⁸ Therefore, the STM transaction cannot be completed before the applicant provides proper public notice. Pursuant to Texas Water Code Sections 13.301(g) and (h), if the applicant fails to provide proper notice, the STM transaction cannot be completed or approved by the ED.⁹ Moreover, pursuant to TCEQ rule 50.133, the ED does not have the authority to approve a STM application¹⁰ when the public notice requirements have not been met.¹¹

In a letter dated March 16, 2011, the ED notified Aqua Texas that its STM application has been accepted for filing and that it is Aqua Texas' responsibility to provide correct notice of the application.¹² The second paragraph of that letter directs Aqua Texas to provide notice to "any utilities, cities, cities with extraterritorial jurisdiction within two miles of [the]

⁵ *Id.* at 3-4.

⁶ TEX. WATER CODE § 13.301(a); *See also*, 30 TEX. ADMIN. CODE § 291.109(a)

⁷ 30 TEX. ADMIN. CODE § 291.109(a)(2)

⁸ *Id.* Aqua Texas was required to mail notice to all retail public utilities that were entitled to receive notice pursuant to the Texas Water Code and the TCEQ rules.

⁹ TEX. WATER CODE § 13.301(g) ("...if the utility or water or sewer service corporation fails to make application as required or to provide public notice, the sale acquisition, lease, or rental may not be completed unless the commission determines that the proposed transaction serves the public interest."); TEX. WATER CODE § 13.301(h) ("A sale, acquisition, lease, or rental of any water or sewer system required by law to possess a certificate of public convenience and necessity that is not completed in accordance with the provisions of this section is void.")

¹⁰ Pursuant to TCEQ rule 50.131(b)(4), the Commission has delegated authority to the executive director to act on applications concerning certificates of convenience and necessity ("CCN"). A STM application involves transferring a CCN to the prospective buyer. Therefore, a STM application is subject to the requirements for ED approval under Chapter 50 of the TCEQ rules.

¹¹ 30 TEX. ADMIN. CODE § 50.133

¹² The ED's March 16, 2011 was previously filed as Attachment 1 to the ED's Exceptions to the PFD.

proposed service area, any city with an extraterritorial jurisdiction which overlaps the proposed service area, customers transferred, or other affected parties.”¹³ The ED’s letter also states that “the notice in [Aqua Texas’] application is deficient” and that Aqua Texas must “re-notice all affected parties as described in the second paragraph of [the] letter.”¹⁴ On March 30, 2011, Aqua Texas submitted the affidavit of Kurt Schelbelhut, Controller for Aqua Texas, which stated that he “complied with all notice requirements in the application and application acceptance letter...”¹⁵ In Reliance on Aqua Texas’ affidavit, the ED issued his June 15th letter indicting a hearing will not be requested. However, it was subsequently discovered that Aqua Texas did not provide proper public notice as its affidavit indicated. Aqua Texas failed to provide proper notice to the City of Houston, and failed to provide any notice to the cities of Hillcrest Village, Woodbranch Village, and Stagecoach. Consequently, the ED rescinded the June 15th letter and requested a hearing.

As detailed above, and in the ED’s previously filed exceptions, the Texas Water Code and the TCEQ rules prevent the ED from completing Aqua Texas’ STM transaction due to Aqua Texas’ failure to provide proper notice. In particular, Texas Water Code Section 13.301(h) expressly prohibits the STM transaction from being finalized when the applicant has not satisfied the requirements of TEX. WATER CODE § 13.301.¹⁶ By failing to provide proper notice, Aqua Texas did not satisfy all requirements of Section 13.301. Therefore, the STM transaction cannot be completed.

Additionally, Texas Water Code Section 13.301(g) states that if the utility fails to provide public notice, the Commission, not the ED, must determine if the proposed STM

¹³ Attachment 1 to the ED’s Exceptions to the PFD; *See also*, 30 TEX. ADMIN. CODE § 291.112.

¹⁴ *Id.* at 6.

¹⁵ Aqua Texas’ affidavit was previously filed as Attachment 2 to the ED’s Exceptions to the PFD.

¹⁶ TEX. WATER CODE § 13.301(h); *See also*, 30 TEX. ADMIN. CODE § 291.109(i)

transaction serves the public interest.¹⁷ As such, Aqua Texas' failure to provide proper notice removes the determination of public interest from the ED and instead requires the Commission to make the final determination. Similarly, TCEQ rule 50.133 does not allow the ED to act on Aqua Texas' STM application due to Aqua Texas' improper notice.¹⁸ The Commission has not delegated its authority to the Executive Director in matters where the applicant failed to satisfy the notice requirements.¹⁹ Therefore, in accordance with the Texas Water Code and the TCEQ rules, the ED cannot complete the STM transaction. Accordingly, the ALJ's proposed order and Aqua Texas' suggested revisions to the proposed order are contrary to the law and should not be adopted.

B. This matter should be remanded to SOAH for a hearing on public interest pursuant to the Texas Water Code and the TCEQ rules.

Aqua Texas suggests that this matter should be remanded to the ED so that Aqua Texas' STM transaction can be completed and approved.²⁰ However, due to Aqua Texas' improper notice, the Texas Water Code and the TCEQ rules require the Commission to make the final determination on whether Aqua Texas' STM transaction serves the public interest.

Texas Water Code Section 13.301(g) states that if a utility fails "to provide public notice, the sale, acquisition, lease, or rental may not be completed unless the commission determines that the proposed transaction serves the public interest."²¹ Section 13.301(g) requires the Commission, not the ED, to make the final determination on Aqua Texas' STM application. Likewise, Commission rule 50.133 states that if the public notice requirements

¹⁷ TEX. WATER CODE § 13.301(g)

¹⁸ 30 TEX. ADMIN. CODE § 50.133; *See also*, TEX. WATER CODE § 5.122

¹⁹ *Id.*

²⁰ Aqua Texas' Exceptions to the PFD at 3.

²¹ TEX. WATER CODE § 13.301(g)

have not been satisfied, the ED cannot act on the application and shall refer the application for consideration and action by the Commission.²²

Aqua Texas' failure to provide proper notice precludes the ED from acting on the STM application. In accordance with the Texas Water Code and the TCEQ rules, it is the Commission that must determine if Aqua Texas' STM transaction serves the public interest.²³ Therefore, the ED cannot approve Aqua Texas' STM transaction. The TCEQ rules list several factors that must be considered in order to determine whether the transaction serves the public interest.²⁴ The public interest factors should be considered before a final order is issued by the Commission. Typically, the Commission delegates to an administrative law judge of SOAH the responsibility to hear legal and factual matters that come before the Commission.²⁵ Therefore, the ED respectfully recommends that the Commissioners remand this case to SOAH for a hearing to determine if Aqua Texas' STM transaction serves the public interest.

III. CONCLUSION

The ALJ's PFD and proposed order ignores the public notice requirements in the Texas Water Code and the TCEQ rules and disregards the effect that Aqua Texas' failure to provide proper notice has on its STM transaction. Aqua Texas' suggested revisions to the proposed order continue to overlook the consequences of its defect in notice. The ultimate responsibility is on Aqua Texas to provide proper notice. Aqua Texas failed to perform its due diligence in determining all the entities that were required to receive notice. Aqua Texas did not provide proper notice to the cities of Houston, Hillcrest Village, Woodbranch Village,

²² 30 TEX. ADMIN. CODE § 50.133(c)

²³ TEX. WATER CODE § 13.301(g)

²⁴ 30 TEX. ADMIN. CODE § 291.109(e)(5)

²⁵ TEX. WATER CODE § 5.311

and Stagecoach. Pursuant to Texas Water Code Sections 13.301(g) and (h), Aqua Texas' failure to satisfy the notice requirements prevent the ED from approving the STM transaction. When proper notice has not been provided, it is the Commission who must make the final determination. Therefore, the Executive Director respectfully recommends that the Commissioners **not** adopt the PFD and proposed order, but instead make a finding that the Commission has jurisdiction in this case and remand this matter to SOAH for a hearing on the public interest.

Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar
Executive Director

Robert Martinez, Director
Environmental Law Division

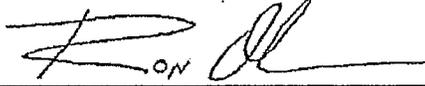
By 

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on July 5, 2012, a copy of the foregoing document was sent by first class, agency mail, electronic mail, to the persons on the attached Mailing List.

A handwritten signature in black ink, appearing to read "Ron Olson", written over a horizontal line.

Ron Olson, Staff Attorney
Environmental Law Division

Mailing List
Aqua Texas STM Application
SOAH Docket No. 582-12-0707
TCEQ Docket No. 2011-1566-UCR

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