

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN INTERIM ORDER** concerning the Applications from Aqua Utilities, Inc. dba Aqua Texas, 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; TCEQ Docket No. 2011-1566-UCR; SOAH Docket No. 582-12-0707

On November 14, 2012, the Texas Commission on Environmental Quality (Commission) considered the Proposal for Decision (PFD) presented by Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

## **I. FINDINGS OF FACT**

1. On February 28, 2011, Aqua Utilities, Inc. d/b/a Aqua Texas, Inc. (Aqua Texas) and Texas-American Water Company filed two Sales, Transfer or Merger (STM) applications with the Commission to acquire over 50 water and sewer systems in Brazoria, Harris, Liberty, Matagorda, and Montgomery Counties.
2. On March 16, 2011, the Executive Director (ED) of the Commission mailed Aqua Texas a letter accepting the application for filing and providing a list of utilities that Aqua Texas was required to notify. The City of Houston (Houston) was not included in this list.

3. On March 23, 2011, Aqua Texas provided notice to the utilities listed in the March 16, 2011 letter and submitted proof of notice on March 30, 2011.
4. On June 15, 2011, Tammy Benter, the Manager of the Utilities and Districts Section of the Commission's Water Supply Division sent Aqua Texas a letter stating that the ED had reviewed the relevant criteria and decided not to request a public hearing. The letter also informed Aqua Texas that "[y]ou may complete your proposed transaction as scheduled, or any time after you receive this notification."
5. Aqua Texas closed the transaction the next day. On June 20, 2011, Aqua Texas submitted proof of closing.
6. On July 29, 2011, Linda Brookins, the Division Director of the Commission's Water Supply Division wrote Aqua Texas a letter stating that if Houston should have received notice, but did not, the ED would rescind the June 15, 2011 approval letter and refer the applications to SOAH for hearing.
7. On August 23, 2011, Aqua Texas provided notice to Houston.
8. On September 13, 2011, the ED referred the applications to SOAH for hearing.
9. On September 22, 2011, Ms. Brookins wrote Aqua Texas that the ED might withdraw his hearing request if Houston confirmed its receipt of notice and did not raise any substantive issues about the applications.
10. On October 4, 2011, a Houston assistant city attorney informed the ED and Aqua Texas that Houston had no issue with notice and did not intend to attend the hearing.
11. Although the ED had the option to withdraw the referral, he did not do so.
12. The Commission issued a notice of hearing on September 21, 2011.

13. On October 17, 2011, a preliminary hearing was held at SOAH in Austin, Texas. Aqua Texas appeared through its attorney Geoffrey Kirshbaum. The ED appeared through attorney Erin Selvera. The Office of Public Interest Counsel (OPIC) appeared through attorney Eli Martinez. Four customers, Jesse Parker, Sandra Hyde, Richard T. Hyde, and Rafael Alcala, appeared at the hearing and sought party status. These customers were represented by attorney Jim Boyle. Aqua Texas objected to jurisdiction and to the party status of the customers.

## **II. CONCLUSIONS OF LAW**

1. The Commission and SOAH have jurisdiction to determine whether the Commission has jurisdiction to decide the issues presented by the customers.
2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law. Tex. Gov't Code Ann. ch. 2003.
3. The Commission's rules implementing Tex. Water Code § 13.301 that cover the STM for facilities/transaction are under 30 Tex. Admin. Code § 291.109.
4. The statute and rule for STMs for facilities/transactions allow the Commission to determine whether the transaction will serve the public interest without a hearing. Tex. Water Code § 13.301(d); 30 Tex. Admin. Code § 291.109(d).
5. Under Tex. Water Code § 13.301(f) and 30 Tex. Admin. Code § 291.109(f), the ED has a 120-day period to review an STM application and request a hearing on it. This review period begins on the latest of the date the application is filed; the last date the applicant mailed the required notices as stated in the applicant's affidavit of notice, if mailed notice

is required; or the last date of publication, if newspaper notice is required. 30 Tex. Admin. Code § 291.109(a).

6. Unless the ED requests that a public hearing be held, the sale, acquisition, lease, or rental may be completed as proposed: (1) at the end of the 120-day period; or (2) at any time after the executive director notifies the utility or water supply or sewer corporation that a hearing will not be requested. Tex. Water Code § 13.301(f).
7. Only the ED has a right to request a hearing on an STM application, although others may be admitted as parties to a hearing that the ED has requested.
8. Because the ED notified Aqua Texas that a hearing would not be requested, Aqua Texas could complete the transaction.
9. Once the ED notified Aqua Texas that he would not request a hearing, the applications were approved concerning the sale and transfer of the facilities, the transaction could be completed, and the Commission no longer had authority to refer the applications concerning the STM for facilities/transaction for a contested case hearing at SOAH.
10. Because he ended the review period by notifying Aqua Texas that a hearing would not be requested, the ED waived his right to a hearing on the STM applications.
11. Once the ED waived his right to a hearing, the applications were approved, the transaction could be completed, and the Commission no longer has jurisdiction over the applications.
12. The statutory provisions dealing with the portion of the STM for CCN/service area provide that a utility may not sell, assign, or lease a CCN unless the Commission has determined that the purchaser, assignee, or lessee is capable of rendering adequate and

continuous service to every consumer within the certified area. Tex. Water Code § 13.251.

13. The Commission's rules implementing Tex. Water Code § 13.251 that cover the STM transfer of any CCN rights are under 30 Tex. Admin. Code § 291.112.
14. The rule for STMs for CCN/service area provides that a STM applicant for CCN/service rights "shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are located within two miles of the requested service area boundaries, and any city with an ETJ which overlaps the proposed service area boundaries." 30 Tex. Admin. Code § 291.112(c)(3).
15. If the ED does not request a hearing on the CCN transfer, the Commission may approve the transfer by order at a regular meeting of the Commission. 30 Tex. Admin. Code § 291.112(c)(4).
16. The Commission's corresponding rules provide that the Commission may approve a sale, acquisition, lease or rental, or merger or consolidation and/or transfer of a CCN if it determines that the transaction is in the public interest, including the new or amended CCN application criteria. 30 Tex. Admin. Code § 291.112(c)(5).

### **III. EXPLANATION OF CHANGES**

1. The Commission determined to adopt the ALJ's proposed Order without the amendments proposed by the ALJ in her reply to exceptions; but instead include the following amendments:

- (i) The Commission added the following new conclusions of law between the ALJ's proposed Conclusion of Law Nos. 2 and 3:

New Conclusion of Law No. 3: The Commission's rules implementing TWC § 13.301 that cover the STM for facilities/transaction are under 30 TAC § 291.109.

New Conclusion of Law No. 4: The statute and rule for STMs for facilities/transactions allow the Commission to determine whether the transaction will serve the public interest without a hearing. TWC § 13.301(d); 30 TAC § 291.109(d).

The ALJ's proposed Conclusion of Law Nos. 3 through 9 became the Commission's Conclusion of Law Nos. 5 through 11.

- (ii) The Commission replaced the ALJ's proposed Conclusion of Law No. 9 with the following:

Amended Conclusion of Law No. 11: Once the ED notified Aqua Texas that he would not request a hearing, the applications were approved concerning the sale and transfer of the facilities, the transaction could be completed, and the Commission no longer had authority to refer the applications concerning the STM for facilities/transaction for a contested case hearing at SOAH.

- (iii) The Commission added the following new conclusions of law after the ALJ's proposed conclusions:

New Conclusion of Law No. 12: The statutory provisions dealing with the portion of the STM for CCN/service area provide that a utility may not

sell, assign, or lease a CCN unless the Commission has determined that the purchaser, assignee, or lessee is capable of rendering adequate and continuous service to every consumer within the certified area. TWC § 13.251.

New Conclusion of Law No. 13: The Commission's rules implementing TWC § 13.251 that cover the STM transfer of any CCN rights are under 30 TAC § 291.112.

New Conclusion of Law No. 14: The rule for STMs for CCN/service area provides that a STM applicant for CCN/service rights "shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are located within two miles of the requested service area boundaries, and any city with an ETJ which overlaps the proposed service area boundaries." 30 TAC § 291.112(c)(3).

New Conclusion of Law No. 15: If the ED does not request a hearing on the CCN transfer, the Commission may approve the transfer by order at a regular meeting of the Commission. 30 TAC § 291.112(c)(4).

New Conclusion of Law No. 16: The Commission's corresponding rules provide that the Commission may approve a sale, acquisition, lease or rental, or merger or consolidation and/or transfer of a CCN if it determines that the transaction is in the public interest, including the new or amended CCN application criteria. 30 TAC § 291.112(c)(5).

- (iv) The Commission replaced the ALJ's proposed Ordering Provision No. 1 with the following:

Amended Ordering Provision No. 1: The applications concerning the STM for facilities/transaction are dismissed for lack of jurisdiction from SOAH's docket. The matter concerning the CCN transfer is remanded to the Executive Director for further processing to allow Aqua Texas to provide additional notice to the Cities of Hillcrest Village, Woodbranch Village, and Stagecoach and to allow the ED to recommend to the Commission whether the CCN transfer would be in the public interest after considering the factors in 30 TAC § 291.112(c)(5)(A) – (E).

2. The Commission determined to instruct Aqua Texas to send additional notice of its applications to the Cities of Hillcrest Village, Woodbranch Village, and Stagecoach and to allow for a 30 day comment period. The Commission further instructed that, following the supplemental comment period, the ED shall evaluate whether the CCN transfer would be in the public interest after considering the factors in 30 TAC § 291.112(c)(5)(A) – (E). The Commission further instructed the ED to submit written recommendations concerning whether to approve the transfer of the CCNs and, if so, proposed CCN maps to the Commission for consideration at a future Agenda if the ED does not request a hearing.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The applications concerning the STM for facilities/transaction are dismissed for lack of jurisdiction from SOAH's docket. The matter concerning the CCN transfer is remanded to the ED for further processing to allow Aqua Texas to provide additional notice to the Cities of Hillcrest Village, Woodbranch Village, and Stagecoach and to allow the Executive Director to recommend to the Commission whether the CCN transfer would be in the public interest after considering the factors in 30 Tex. Admin. Code § 291.112(c)(5)(A) – (E).

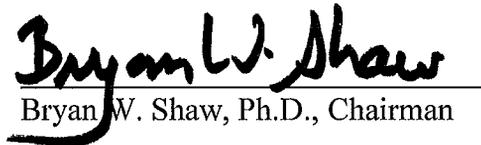
Aqua Texas is instructed to send additional notice of its applications to the Cities of Hillcrest Village, Woodbranch Village, and Stagecoach and a 30 day comment period is allowed. Following the supplemental comment period, the ED is instructed to evaluate whether the CCN transfer would be in the public interest after considering the factors in 30 Tex. Admin. Code § 291.112(c)(5)(A) – (E). The ED shall submit written recommendations concerning whether to approve the transfer of the CCNs and, if so, proposed CCN maps to the Commission for consideration at a future Agenda if the ED does not request a hearing.

2. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
3. The effective date of this Order is the date the Order is final, as provided by 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code Ann. § 2001.144.

4. The Commission's Chief Clerk shall forward a copy of this Order to Aqua Texas, the customers, the ED, and the Office of Public Interest Counsel.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED: **NOV 26 2012**

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

  
Bryan W. Shaw, Ph.D., Chairman