

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

June 4, 2012

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-12-0707 Docket No. 2011-1566-UCR; In Re: Application 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

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than June 25, 2012. Any replies to exceptions or briefs must be filed in the same manner no later than July 5, 2012.

This matter has been designated **TCEQ Docket No. 2011-1566-UCR; SOAH Docket No. 582-12-0707**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Rebecca S. Smith".

Rebecca S. Smith  
Administrative Law Judge

RSS/Ls  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**Austin, Texas 78701**  
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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** AQUA UTILITIES INC / AQUA TEXAS INC  
**SOAH DOCKET NUMBER:** 582-12-0707  
**REFERRING AGENCY CASE:** 2011-1566-UCR

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**  
**ALJ REBECCA SMITH**

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AQUA UTILITIES D/B/A AQUA TEXAS, INC.

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

<b>APPLICATION 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</b>	§ § § § § § § § § §	<b>BEFORE THE STATE OFFICE          OF          ADMINISTRATIVE HEARINGS</b>
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**PROPOSAL FOR DECISION**

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 Texas Commission on Environmental Quality (TCEQ or Commission). The Executive Director (ED) of the TCEQ referred these STM applications to the State Office of Administrative Hearings (SOAH) for hearing. After this case was referred, Aqua Texas filed a motion to dismiss, which the other parties opposed.

For the reasons set forth below, the Administrative Law Judge (ALJ) issues this proposal for decision recommending that the Commission find that the waived his exclusive right to request a hearing before he referred these applications to SOAH. Upon that waiver, the transaction was authorized to be completed, meaning the applications were approved, and the Commission no longer has jurisdiction over the application. Therefore, this case should be dismissed.

**I. PROCEDURAL HISTORY AND NOTICE**

On February 28, 2011, Aqua Texas filed two STM applications with the TCEQ to acquire over 50 water and sewer systems in Brazoria, Harris, Liberty, Matagorda, and Montgomery Counties. On March 16, 2011, the ED 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. The letter emphasized that it was Aqua Texas's responsibility to provide correct notice. 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.

On June 15, 2011, Tammy Benter, the Manager of the Utilities and Districts Section of the TCEQ'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." Aqua Texas closed the transaction the next day. On June 20, 2011, Aqua Texas submitted proof of closing.

Over one month later, on July 29, 2011, Aqua Texas received another letter. In this letter, Linda Brookins, the Division Director of the TCEQ's Water Supply Division, wrote that Houston should have been provided notice if the relevant service area was within Houston's corporate limits or extra-territorial jurisdiction. Ms. Brookins stated 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. On August 23, 2011, Aqua Texas provided notice to Houston.

On September 13, 2011, the ED referred the applications to SOAH. 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. 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. Although the ED had the option to withdraw the referral, he did not do so.

The preliminary hearing was held on October 17, 2011, before ALJ Rebecca S. Smith. 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.

At the preliminary hearing, Aqua Texas objected to jurisdiction and objected to the admission of the customers as parties. The ED argued that jurisdiction exists, but contended that

remand was appropriate because the issue of notice to Houston had been resolved. OPIC and the customers both argued that jurisdiction existed and that remand was inappropriate because the scope of the hearing extended beyond notice issues.

On December 2, 2011, OPIC and the customers submitted briefs regarding jurisdiction, party status, and remand. The ED submitted his brief on December 5, 2011. Aqua Texas filed its Plea to the Jurisdiction, Motion for Final Summary Disposition, Motion to Dismiss/Remand, and Brief in Support (Motion) on December 6, 2011. Aqua Texas, the ED, OPIC, and the customers all filed reply briefs on December 16, 2011. The customers filed an additional response on December 22, 2011.

The ALJ issued an order dismissing the case for lack of jurisdiction. Based upon the ED's May 3, 2012 request, the ALJ vacated that order on May 16, 2012. This Proposal for Decision is issued in its place.

## II. JURISDICTION

Aqua Texas objects to jurisdiction on several grounds. Because the ALJ finds one issue whether the ED's review period had ended dispositive, the other objections will not be addressed.

Texas Water Code § 13.301 and 30 Texas Administrative Code § 291.109 govern STM applications. Under the statute and rule, the ED has a 120-day period to review an STM application and request a hearing on it.<sup>1</sup> Neither the statute nor the rule gives anyone but the ED a right to request a hearing. 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.<sup>2</sup> In this case, mailed notice was required.

At issue here is the end of the review period. The Water Code provides two ways for the

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<sup>1</sup> Tex. Water Code § 13.301(f); 30 Tex. Admin. Code § 291.109(f).

<sup>2</sup> 30 Tex. Admin. Code § 291.109(a).

review period to end and the proposed transaction to proceed:

Unless the executive director 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.<sup>3</sup>

On June 15, 2011, the ED sent Aqua Texas an approval letter that ended the review period. This letter said that the ED reviewed the relevant criteria and decided not to request a public hearing.<sup>4</sup> The letter also stated that Aqua Texas could complete the transaction at any time after its receipt. This approval letter met the requirements of the second method to end the review period.

Aqua Texas argues that once the ED issues an approval letter for an STM application, he no longer has the authority to request a hearing on that application. Aqua Texas contends that neither the Water Code nor the TCEQ's rules provide the ED with authority to revoke his approval and request a hearing on a transaction that has been completed. On the other hand, the ED argues that the approval letter was issued with the understanding that Aqua Texas had satisfied the relevant notice requirements. The ED suggests that the letter is invalid because it was based on an inaccurate understanding.

The ALJ agrees with Aqua Texas. The ED waived his right to a hearing when he, through Ms. Benton, sent the approval letter to Aqua Texas. Under section 13.301(f), the transaction could be completed once the ED issued a letter informing Aqua Texas that a hearing would not be requested. Nothing in the statute or the rules gives the ED authority to rescind such a letter more than one month after it is issued. Moreover, the ED had the opportunity to determine whether Aqua Texas had complied with all notice requirements before issuing his letter. There is no basis in the statute or rules for the ED to reevaluate the adequacy of the notice after he issues his approval letter.

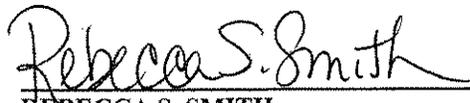
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<sup>3</sup> Tex. Water Code § 13.301(f).

<sup>4</sup> Ex. I to Aqua Texas's motion.

The ED decided not to request a hearing and informed Aqua Texas of that decision. Therefore, the ED no longer has the authority to request a SOAH hearing on these applications.<sup>5</sup> Once the ED waived his right to a hearing, the transaction was authorized to be completed. In other words, the applications were approved, and the Commission no longer has jurisdiction over them. This case should be dismissed.

**SIGNED June 4, 2012.**

  
REBECCA S. SMITH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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<sup>5</sup> The ALJ offers no opinion on any of Aqua Texas's other objections to jurisdiction, on whether Aqua Texas was actually required to provide notice to the City of Houston, or on the remand issues relating to the scope of the hearing.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER DISMISSING THE APPLICATION 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 FOR LACK OF JURISDICTION  
TCEQ DOCKET NO. 2011-1566-UCR  
SOAH DOCKET NO. 582-12-0707**

On \_\_\_\_\_, 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. 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).
4. 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).

5. 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.
6. Because the ED notified Aqua Texas that a hearing would not be requested, Aqua Texas could complete the transaction.
7. No provision in the Texas Water Code or the Texas Administrative Code permits the ED to request a hearing after he has notified the utility that a hearing would not be requested.
8. 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.
9. 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.

**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 matter is dismissed for lack of jurisdiction.
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:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman  
For the Commission**