

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
TYLER TO AMEND CERTIFICATE	§	
OF CONVENIENCE AND	§	OF
NECESSITY NO. 20319	§	
(APPLICATION NO. 37037-C)	§	ADMINISTRATIVE HEARINGS

CITY OF TYLER'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION AND PROPOSED ORDER
AND MOTION TO REOPEN THE RECORD

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**ATTORNEYS FOR
THE CITY OF TYLER**

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Executive Summary

Reasons Why Tyler's Application Should be Granted as the Entire Requested Area Based on the Uncontroverted Evidence

- **Tall Timbers has violated and is in violation of valid orders of Tyler's City Council regarding service inside the city limits:**
 - Tall Timbers unlawfully collected \$149,968 in fees from a customer and refuses to refund to the customer as ordered by Tyler's City Council.
 - Tall Timbers requires compliance with its Development Guide (which includes rates, fees, and design specifications) when the Development Guide has not been submitted to or approved by Tyler, as ordered by Tyler's City Council.
 - Tall Timbers' position is that it can "ignore" the orders Tyler's City Council because it "felt that" the City Council has no authority over it.
- **Tall Timbers has violated and is in violation of its TPDES permit.**
 - Tall Timbers knowingly failed to expand chlorine contact chamber as expressly required by its permit. Tall Timbers' did not notify TCEQ of this failure.
 - Tall Timbers misrepresented buffer zone compliance in its renewal application in 2006 and failed to comply with buffer zone requirements throughout permit term. Tall Timbers did not notify TCEQ of this failure
 - Tall Timbers routinely violating permit discharge limits because of lack of treatment capacity and inadequate maintenance.
- **Tall Timbers lacks sufficient treatment capacity to meet existing demand, much less anticipated future demand.**
 - Under TCEQ minimum design criteria, Tall Timbers needs 0.650 MGD of treatment capacity to meet existing demands.
 - Tall Timbers' plant only capable of treating 0.312 MGD (much less than the 0.445 MGD for which it is permitted).
 - Tall Timbers claims that it is expanding its plant, but only to 0.445 MGD, which is inadequate to meet existing demand, much less anticipated growth.
- **Retail sewer service is needed throughout the Requested Area**
 - Development not occurring because no wants service from Tall Timbers (development is occurring on borders in areas served by Tyler)
 - Multiple landowners have petitioned and been removed from Tall Timbers' service area, including most of Area 7, which the ALJ recommends against giving to Tyler.
- **Tyler has more than sufficient capacity to provide service to the entire Requested Area.**
- **Tyler has financial, managerial, and technical ability to provide service entire area.**
- **Tyler's rates are lower and its service better than Tall Timbers'.**
- **Tyler agreeable to special conditions to protect Tall Timbers' remaining customers from extra costs.**

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The City of Tyler (“Tyler”) respectfully submits its Exceptions to the Administrative Law Judge’s (“ALJ’s”) Proposal for Decision (“PFD”) and Proposed Order, and Motion to Reopen the Record, and in support would show the following:

I. INTRODUCTION

A. Summary

Tall Timbers Utility Company, Inc. (“Tall Timbers”) refuses to comply with lawful regulations imposed by Tyler and the Commission, and should, for that reason alone, be subject to competition in providing retail sewer services inside the City of Tyler. Tall Timbers has refused to comply with its tariff and to comply with valid orders of the City of Tyler since Tyler first annexed into Tall Timbers service area and became the regulatory authority. Tall Timbers is currently in violation of a number of lawful orders issued by the Tyler City Council in its role as the regulatory authority over utilities operating inside Tyler’s city limits, including an order to refund \$149,968 in fees unlawfully collected from a customer. Additionally, Tall Timbers misrepresented material facts in its 2006 wastewater discharge permit application, and has been in violation of its wastewater discharge permit since it was issued in 2006. Finally, Tall Timbers does not have sufficient treatment capacity to meet its existing demand. These facts are not in dispute. The ALJ has chosen, however, to ignore these facts in reaching its recommendation.

The PFD omits the facts relating to Tall Timbers’ refusal to comply with Tyler’s and the Commission’s valid orders. The PFD does not include these facts because the ALJ concludes

that the facts are not relevant to the statutory factors to be considered by the Commission when deciding whether to grant a CCN. The ALJ reaches this conclusion based on the recommendation of the Executive Director, who claims that these facts are not relevant to the question of whether existing service is adequate or whether additional service is needed.

Tyler respectfully disagrees with the ALJ and the Executive Director. The issue that the Commission must address is whether a utility that does not comply with its tariff and violates the orders of its regulatory authorities should be allowed to keep its monopoly protection from competition. Tyler asserts that the answer is no.

For the reasons set forth at the hearing, and herein, Tall Timbers is not providing adequate service in the requested area and additional service is needed. Tall Timbers cannot be providing adequate service if it refuses to comply with the valid orders of its regulatory authority. There is also a need for additional service in the area - landowners and homeowners in the area have requested service from Tyler. Tall Timbers' inability to provide adequate service is preventing any new development in the requested area.

When a utility refuses to comply with the orders of its regulatory authorities, and fails to provide adequate service capacity, its monopoly status should be revoked. Tyler is tired of having to constantly fight to get Tall Timbers to comply with its tariff and with Tyler's orders. Tyler is tired of the drag that Tall Timbers is placing on development in one of Tyler's prime growth corridors. Tyler, unfortunately, lacks the statutory authority to revoke a CCN issued by the Commission, even inside the city limits where Tyler has exclusive original jurisdiction. Only the Commission has this authority. What Tyler can do, with the Commission authorization, is compete directly with Tall Timbers. Competition, rather than limited regulation of a monopoly, will ensure adequate service at competitive rates to the customers in the Requested Area. Tyler requests that the Commission grant its exceptions to the PFD and grant its application in full to allow such competition to occur.

B. Background

The Requested Area includes all of the area on the southern edge of the City of Tyler, west of Broadway that was inside Tall Timbers' CCN boundary at the time the application was filed. Attachment A is a map showing the Requested Area, with the areas as discussed at the hearing (Exhibit Tyler-34). The entire Requested Area is inside Tyler's corporate boundaries. The Requested Area can be viewed as nine separate areas for purpose of this application:

Area 1 - includes The Crossing subdivision and surrounding area, which is on the northwestern edge of the Requested Area. *Tyler has been providing retail sewer service to this area since 2007 with the full knowledge, and without opposition, of Tall Timbers.* No party at the hearing objects to amending Tyler's CCN to include Area 1, and the ALJ recommends granting Tyler's application for the area. It is interesting to note that, other than for Tall Timbers' lack of objection, there is no difference between Area 1 and Areas 6 and 7.

Areas 2 - 4 - includes the areas that have been removed from Tall Timbers service area during the last year under the expedited decertification procedure set out in Texas Water Code §13.254(a-5). No party at the hearing objected to amending Tyler's CCN to include these areas as set out on Exhibit 34. The ALJ recommends granting Tyler's application as to these areas. As will be explained subsequently, this same rationale should apply to Area 7, which has also been removed from Tall Timbers' service area through the expedited decertification procedure.

Area 5 - includes areas currently actually served by Tall Timbers (the Irish Meadows and Cumberland Gap subdivisions).

Areas 6 & 7 - includes primarily the small part of the Oak Hollow development that is not in Tyler's service area. This area is not currently receiving sewer service from any provider. S&T Development is currently developing this area. Since the PFD was issued, S&T Development has filed a petition to decertify most of Area 7, which has been granted by the Executive Director. Tyler has provided notice to the Commission of its intent to serve the decertificated area.

Area 8 - includes area adjacent to the Cumberland Gap development. This area is not currently receiving actual sewer service from any provider.

Area 9 - includes the remaining portions of the Requested Area situated generally to the south of Cumberland Gap and Irish Meadows. This area is not currently receiving actual sewer service from any provider.

II. TYLER'S EXCEPTIONS

A. Violations of Tariff/Tyler Ordinances

Tall Timbers has violated and is in violation of its tariff and valid orders of the City of Tyler, the regulatory authority within the Requested Area.¹ Tyler's orders were introduced into the record and are set out in Attachment B. Documents from the record demonstrating Tall Timbers' refusal to comply are set out in Attachment C. None of the facts relating to these violations are in dispute.

Since at least early-2004, Tall Timbers has charged service extension fees not authorized by its tariff and made other unauthorized demands of developers seeking service to new

¹ TEX. WATER CODE § 13.042(a).

subdivisions located both inside and outside the city.² Tyler discovered that Tall Timbers was demanding these unauthorized fees, when ruling on an “appeal” brought by a developer (Geaux) under Tall Timbers’ tariff (Resolution R-2009-27).³ In that ruling, the Tyler Council found that the predetermined per connection capacity fee was not authorized by Tall Timbers’ tariff and that Tall Timbers’ development guides would have to be reviewed and approved by Tyler before becoming effective. Tall Timbers appealed Tyler’s order to the Commission, but withdrew the appeal before hearing.⁴ Because Tall Timbers withdrew its appeal, Tall Timbers is bound by the decision of the Tyler Council. The issue of whether this fee was authorized by the tariff or not cannot be collaterally challenged in this proceeding. Tall Timbers also never submitted its development guides to Tyler for review and approval.

Tyler subsequently discovered that Tall Timbers had demanded unauthorized capacity fee charges of other developers in the Requested Area.⁵ The Tyler City Council then adopted a series of resolutions as the regulatory authority over Tall Timbers. In Resolution No. R-2011-5 Tyler found that Tall Timbers had failed to comply with Resolution R-2009-27, failed to provide service as required by its tariff, and ordered Tall Timbers to provide service to all service locations in the affected subdivisions.⁶ The resolution also ordered Tall Timbers to reimburse Tyler in the amount of \$31,400 for Tyler’s costs associated with Tall Timbers’ appeal of Tyler’s prior order.

In Resolution No. R-2011-6 Tyler reasserted its position that Tall Timbers is not authorized to charge a predetermined “capacity fee” inside Tyler as a condition of extending service and ordered Tall Timbers to identify all such capacity fees assessed since November 13, 2002, and to refund all such capacity fees.⁷ Tyler’s City Council also expressly determined that Tall Timbers’ failure to identify and refund the unlawfully collected capacity fees would be deemed a “failure to provide continuous and adequate service,”⁸ which is a power clearly within Tyler’s authority under Texas Water Code §§ 13.042(a), 13.082(b), and 13.139(b). Tall Timbers did not appeal any of these orders of the Tyler Council to the Commission. Pursuant to Chapter

² Morgan Direct, Ex. Tyler-1 at 14 (TYLER000015).

³ Ex. Tyler-9.

⁴ Morgan Direct, Ex. Tyler-1 at 17 (TYLER000018).

⁵ *Id.*

⁶ Ex. Tyler-11 (TYLER000284).

⁷ Ex. Tyler-12 (TYLER000287).

⁸ *Id.*

13 of the Texas Water Code these orders are final and binding on Tall Timbers, and cannot be challenged in this proceeding.

Tyler provided Tall Timbers with notice of the orders,⁹ and when Tall Timbers refused to comply, Tyler followed up by issuing a notice of violation, with the opportunity for a show-cause hearing.¹⁰ To date, ***Tall Timbers has failed to comply with these orders.*** Tall Timbers has not submitted its Development Guide for Tyler's review and approval. Tall Timbers has not reimbursed Tyler for the costs of the appeal. Tall Timbers continues to assert that it can charge unauthorized fees, has failed to identify all capacity fees that were charged, and has refused to refund those unlawfully collected charges.¹¹ Tall Timbers refused to even meet with Tyler pursuant to the show-cause hearing to resolve compliance issues.¹² Worst of all, Tall Timbers unlawfully collected \$149,968 from Cumberland Gap Apartments as a precondition of providing service.¹³ Tyler's Council ordered Tall Timbers to identify and refund all such unlawful charges. Tall Timbers refused to identify the charges made, and ***Tall Timbers refused to refund the \$149,968 it unlawfully collected from Cumberland Gap Apartments.***¹⁴

Tall Timbers does not dispute that it has failed to comply with Tyler's orders. Tall Timbers admits this in its Responses to Admissions (Attachment C).¹⁵ Tall Timbers' position is that it does not have to comply with Tyler's orders.¹⁶ In prefiled testimony, Tall Timbers stated that it "felt that" Tyler did not have any authority over it, and that it "ignored" Tyler's orders.¹⁷ Tall Timbers' witnesses at hearing could only identify a single order that Tall Timbers had complied with – the refunding of overcharges,¹⁸ but even with that issue, Tall Timbers admits that it never provided sufficient information to allow Tyler to audit compliance.

At the hearing and in its briefing, the Executive Director chose to ignore the issue of Tall Timbers' non-compliance with Tyler's orders. The Executive Director limited its analysis of Tall Timbers' compliance with regulatory orders to those issued by the Commission – disregarding entirely the issue of whether Tall Timbers was in compliance with Tyler's orders.

⁹ Morgan Direct, Ex. Tyler-1 at 18 (TYLER000019).

¹⁰ Ex. Tyler-20.

¹¹ Morgan Direct, Ex. Tyler-1 at 20 (TYLER000021).

¹² Ex. Tyler-20 (TYLER000417-424); Morgan Direct, Ex. Tyler-1 at 19 (TYLER000020).

¹³ Ex. Tyler-1 at 14-20 (TYLER000015-21).

¹⁴ Tall Timbers' admission is conclusive on this issue. Tex.R.Civ.P. 198.3.

¹⁵ RFA1-13, 1-25, Ex. Tyer-13 (TYLER000293-294).

¹⁶ Ex. Tyler-19 (TYLER000410-414).

¹⁷ Sorensen Direct at 14 – 15.Ex

¹⁸ Wilkins Cross, Tr. at 268.

Dickey Direct: “I am not aware of any Commission orders against Tall Timbers relating to its service in this area. As a result, the current service in this area appears adequate.”¹⁹

According to the Executive Director’s witness, Mr. Dickey, a utility’s compliance with the orders of its regulatory authority is not relevant to the issue of whether the utility is providing adequate service.²⁰ The fact that Tall Timbers was in violation and was affirmatively disregarding Tyler’s orders was not relevant. The fact that Tyler had to implement a building moratorium in the Requested Area was also not relevant. Mr. Dickey also testified that whether or not Tall Timbers charged unauthorized fees and rates was also not important to whether Tall Timbers is providing adequate service.²¹ Most critically, Mr. Dickey testified that the fact that Tall Timbers has failed to refund \$149,968 to a customer is not important to determining whether Tall Timbers is providing adequate service.²²

The ALJ follows the Executive Director’s position regarding the relevance of Tall Timbers’ violations of its tariff and Tyler’s orders. The only reference in the PFD to these issues is on page 11, where the ALJ states the question of whether the City must approve Tall Timbers’ Development Guide is a “source of contention” between the parties.²³

The ALJ’s, and the Executive Director’s positions are contrary to law and sound policy. Whether a utility is in compliance with orders of its regulatory authority is directly related to whether the utility is providing *adequate* service.²⁴ The fact that Tall Timbers is not in compliance with Tyler’s orders relating to service should be sufficient evidence to conclude that Tall Timbers is not providing adequate service. If Tall Timbers were not in compliance with Commission orders, the Commission could revoke the CCN or allow another retail public utility

¹⁹ Dickey Direct, Ex. ED-BDD-A at 7.

²⁰ Dickey Cross, Tr. at 300/21-301/10.

²¹ Dickey Cross, Tr. at 302/6-9.

²² Dickey Cross, Tr. 305/20-25.

²³ What the ALJ fails to explain is that this “contention” has halted all development in the requested area. Tall Timbers’ position is that it will extend service only in compliance with its Development Guide.²³ Tall Timbers was ordered by Tyler to submit the Development Guide to Tyler for approval.²³ Tall Timbers refuses to submit the Development Guide to Tyler for approval, arguing that Tyler lacks the authority to review the guide. Ex. Tyler-20 (TYLER000426). Until this deadlock is resolved, Tall Timbers cannot lawfully extend service to new developments in Tyler’s city limits.

²⁴ Tex. Water Code § 13.135 (“A utility may not charge, collect or receive any rate for utility service or impose any rule or regulation other than as provided in this chapter.”); § 13.139 (The governing body of a municipality. . . may . . . fix . . . minimum service standards.”); §13.250 (“[A]ny retail public utility that possesses . . . a certificate of public convenience and necessity shall . . . render continuous and adequate service within the area.”).

to provide service. Tyler's orders should at least factor into the assessment of whether Tall Timbers is providing adequate service.

Sound public policy also suggests that the ALJ and the Executive Director are wrong. The ALJ's and Executive Director's position adversely affects the ability of municipalities to regulate public utilities operating subject to their exclusive original jurisdiction. The Commission should not tell investor owned utilities that they are free to ignore municipal regulation with impunity, which would be the result if the Commission follows the ALJ's recommendation. Investor owned utilities should follow the law, or suffer the consequences. To the extent that an investor owned utility believes that a city has exceeded its authority in an order, the utility can always appeal that decision to the Commission under Texas Water Code §13.043. Tall Timbers could have appealed Tyler's orders. Tall Timbers chose not to appeal (probably because Tall Timbers did not want an adverse ruling from the Commission).

The Commission should disregard the ALJ's conclusion in the PFD that Tall Timbers compliance with Tyler's orders is irrelevant to the determination of the adequacy of the service provided by Tall Timbers to the Requested Area. Tyler requests that the Commission modify the PFD to recognize that Tall Timbers is not in compliance with Tyler's orders and that, for that reason, Tall Timbers' service is not adequate.

If the Commission concludes that Tall Timbers' compliance with Tyler's orders is irrelevant to the question of the adequacy of the service provided by Tall Timbers, Tyler requests that the Commission provide guidance on how Tyler should proceed to enforce its orders and the assistance the Commission will provide to Tyler in that effort. Texas Water Code §13.085 directs the Commission to "advise and assist municipalities" in connection with questions arising under Chapter 13 of the Water Code. Tyler wants Tall Timbers to comply with its tariff, comply with Tyler's orders, refund the \$149,968 that it has wrongfully collected from customers, and submit its Development Guide for review and approval. Tyler respectfully requests the Commission's advice and assistance on how to obtain compliance from Tall Timbers.

B. Violations of Wastewater Permit

Tall Timbers has failed to comply with its wastewater permit. According to the Commission's definition, adequate sewer service includes the obligation to properly operate and

maintain the collection and treatment system.²⁵ These permit violations are, therefore, relevant to the issue of whether Tall Timbers is providing adequate retail sewer service in the Requested Area. Tyler asserts that these violations demonstrate that Tall Timbers is not providing adequate service.

The evidence is clear, and undisputed, that Tall Timbers has violated and is in violation of its wastewater discharge permit. The following is a summary listing of the violations established at the hearing:

- **Chlorine Contact Chamber** – Tall Timbers failed to expand its chlorine contact chamber within 18 months of permit issuance, which was required by the permit. Tall Timbers admits to this violation.²⁶ The Executive Director also admits that Tall Timbers failed to comply with this permit requirement.²⁷ Not only did Tall Timbers fail to comply with the requirement, it also did not seek authorization from the Commission to be excused from the obligation; Tall Timbers did not even bother to notify the Commission of the failure to comply.²⁸ Tall Timbers knew it had an obligation to comply but chose not to comply.²⁹ As Mr. Hicks testified, the fact that Tall Timbers knowingly refused to comply with its permit by choosing not to expand its the chlorine contact chamber, by itself, is sufficient evidence to find that Tall Timbers' is not providing adequate service.³⁰ Utilities should not get to choose which permit terms they will or will not comply with.
- **Buffer Zone Requirements** – Tall Timbers has not been in compliance with the Commission's buffer zone requirements since at least 2006 when its permit was last renewed.³¹ Again, Tall Timbers admits to this violation.³² Additionally, Tall Timbers misrepresented ownership of the necessary buffer zone in its permit renewal application filed in 2006.³³ The Executive Director provided no testimony regarding Tall Timbers' lack of compliance with the buffer zone requirements or regarding Tall Timbers' misrepresentations in its permit applications.
- **Discharge Limit Violations** – Since January 2009, Tall Timbers exceeded its permitted effluent limits for NH₃ nine times, including violations in January and February 2012.³⁴ (More recent violations may have occurred, but Tall Timbers only produced DMRs through March 2012). Tall Timbers reported that some of these violations occurred because of air system piping leaks beginning in 2009,³⁵ and at the hearing Tall Timbers'

²⁵ 30 TAC §291.94.

²⁶ RFA1-1, 1-2, 1-3, Ex. Tyler-13 (TYLER000292). Again, these admissions are conclusive under Tex.R.Civ.P. 198.3.

²⁷ Ex. Tyler-15 (TYLER000372-373).

²⁸ Sorensen Cross, Tr. at 140/15 – 141/2; Ex. Tyler-38 at 2 of 44.

²⁹ Ex. Tyler-33 (TYLER000624).

³⁰ Hicks Direct, Ex. Tyler-2 at 13 (TYLER000053).

³¹ Morgan Direct, Ex. Tyler-1 at 12 (TYLER000013).

³² RFA1-5, 1-7, Ex. Tyler-13 (TYLER000291-292)

³³ Morgan Direct, Ex. Tyler-1 at 12 (TYLER000013); Wilkins Cross, Tr. at 264/8-11; Ex. Tyler-39 and Tyler-40.

³⁴ Hicks Direct, Ex. Tyler-2 at 11 (TYLER000051).

³⁵ Ex. Tyler-18 (TYLER000401).

witness testified that these problems had only been fixed two or three months ago.³⁶ A properly operated and maintained treatment plant would not continue to suffer from the same violations over more than a two year period.³⁷ An operator that was properly operating and maintaining its treatment plant would not wait two years to fix a problem with its plant that was causing permit violations. More importantly, Tall Timbers was under a Commission order to fix this problem at the time that many of these violations occurred.³⁸

The ALJ's response to these permit violations is to, once again, follow the Executive Director's position that the permit violations are irrelevant to the issue of whether Tall Timbers is providing adequate retail sewer service. According to the Executive Director's witness, Mr. Dickey, the question of whether an area is currently receiving adequate service is determined by whether the customers are "getting bills, if they were flushing the toilet and the waste was going down and being disposed of."³⁹ On further examination, Mr. Dickey stated that a utility would be providing adequate service even if raw waste flowed directly into waters of the state without any treatment.⁴⁰ As noted by the ALJ, the Executive Director's position is that "the ability of the plant to continue to receive wastewater is the primary consideration in determining adequacy of service."⁴¹ According to the Executive Director, what the utility does with the waste after it receives it is not important.

The Executive Director's and the ALJ's positions on this issue are wrong. A sewer utility that is not complying with its wastewater discharge permit is not providing adequate utility service. The Commission's rules state:

30 TAC §291.94. Adequacy of Sewer Service

(b) Sufficiency of treatment. Each retail public utility shall maintain and operate treatment facilities of adequate size and **properly equipped to treat sewage and discharge the effluent at the quality required by the laws and regulations of the State of Texas.**

Based on the factual summary set out above, Tall Timbers is not maintaining and operating treatment facilities properly equipped to treat sewage and discharge effluent at the quality required by the laws and regulations of the State of Texas. These facts are not in dispute.

³⁶ Wilkins Cross, Tr. at 266/25.

³⁷ Hicks Direct, Ex. Tyler-2 at 11 (TYLER000051).

³⁸ Ex. Tyler-17 (TYLER000389-394).

³⁹ Dickey Cross, Tr. at 298/8-11.

⁴⁰ Dickey Cross, Tr. at 300/3-6.

⁴¹ PFD at 9.

Based on these facts, the only conclusion that can be reached is that Tall Timbers is not providing adequate sewer service to the Requested Area.

The Commission should disregard the ALJ's conclusion in the PFD that Tall Timbers compliance with its wastewater permit is irrelevant to the determination of the adequacy of the service provided by Tall Timbers to the Requested Area. Tyler requests that the Commission modify the PFD to recognize that Tall Timbers is not in compliance with its wastewater permit and that, for that reason, Tall Timbers' service is not adequate.

C. Tall Timbers Lacks Sufficient Treatment Capacity

The uncontroverted evidence in the record is clear that Tall Timbers does not have adequate existing treatment capacity to meet its existing demand, much less the anticipated growth in the short-term in the subdivisions it currently serves (Area 5). Tyler presented the only expert engineering testimony on this issue. Tyler's witness, Mr. Hicks, testified:

Based on my own analysis, Tall Timbers' treatment capacity is inadequate to meet existing demand. For Tall Timbers' collection system I would use a design flow of 300 gallons per connection per day for purposes of sizing the treatment facility. Use of this design flow rate with the existing number of connections (2,108) would require treatment capacity of at least 0.632 MGD. This is more than twice Tall Timbers' existing capacity. To be able to meet its existing demand, Tall Timbers needs at least 0.650 MGD of treatment capacity, and it needs that capacity as soon as possible. To meet short-term growth (build out of existing platted subdivisions), Tall Timbers needs at least 0.793 MGD.⁴²

Mr. Hicks' analysis was based on the application of the Commission's minimum design requirements. The minimum design requirements specify that for municipal/residential areas, minimum treatment capacity should be determined based on a design flow of 75 to 100 gallons per person per day,⁴³ which translates to 300 gallons per connection per day.

Neither Tall Timbers nor the Executive Director dispute Tall Timbers' current lack of capacity. Even the facts relied on by the ALJ do not indicate support the ALJ's proposed finding that Tall Timbers currently has sufficient capacity. Tall Timbers' position is that its treatment capacity is adequate, even though it does not meet minimum design criteria, because actual flows in recent periods have been less than design flows. The capacity of Tall Timbers' plant is 0.312

⁴² Hicks Direct, Ex. Tyler-2 at 7 (TYLER000047).

⁴³ 30 TAC § 217.32(a)(3).

MGD.⁴⁴ Tall Timbers' lay-witness, Mr. Wilkins, testified that current average daily flow at the plant is 0.300 MGD.⁴⁵ Flows at Tall Timbers' plant, however, have exceeded 0.312 MGD on at least two occasions over the last few years, with the first event as far back as July 2007.⁴⁶

Putting aside the fact that Commission rules define adequacy of sewer service as meeting minimum design requirements plus "a reasonable reserve for emergencies,"⁴⁷ Tall Timbers' current treatment capacity of 0.312 MGD is inadequate to treat Tall Timbers' actual flows. As Tyler's witness, Mr. Hick's testified:

This is a real problem. . . . The fact that the area has been in an extended drought is the only factor that has kept Tall Timbers from exceeding the design flow on a more frequent basis. Once precipitation returns to more normal levels, I would expect to see Tall Timbers' flows exceed 0.312 MGD far more frequently. With flow rates above the plant's capacity, the treatment plant will not be able to adequately treat the waste, which will lead to additional violations of Tall Timbers' pollutant discharge limits. As discussed below, Tall Timbers already is exceeding these discharge limits. These recent violations may have been caused by the lack of adequate treatment capacity in the plant.⁴⁸

Rather than arguing that current capacity is adequate, the ALJ seems to believe that Tall Timbers can add sufficient capacity in time to meet current and projected demand at some point in the future. Tall Timbers provided, non-expert, testimony that it is planning on making unspecified "improvements" at the plant to expand capacity to the currently permitted 0.445 MGD. Even if Tall Timbers makes these improvements (which Tyler very much doubts they will) the improvements will not provide Tall Timbers with sufficient capacity to meet its existing demand. Tall Timbers needs at least 0.632 MGD to meet existing demands, which is significantly more than 0.445 MGD. To get authorization to expand its plant to 0.632 MGD will take a permit amendment. Tall Timbers has not submitted an application to amend its wastewater permit, which means it will be years, at best, before Tall Timbers could provide adequate treatment capacity. Tall Timbers lack of treatment capacity is a time bomb waiting to erupt. Tyler can diffuse this situation if the Commission allows Tyler to divert at least the new demand from Tall Timbers' undersized facilities to Tyler's far more robust treatment facilities.

⁴⁴ PFD, Proposed Finding of Fact No. 28.

⁴⁵ PFD, Proposed Finding of Fact No. 29.

⁴⁶ Hicks Direct, Ex. Tyler-2 at 7 (TYLER000047).

⁴⁷ 30 TAC § 291.94(a).

⁴⁸ *Id.*

The Executive Director and the ALJ again appear to treat this lack of capacity as irrelevant to the issues of the adequacy of existing service and the need for additional service, or to the question of whether Tyler's CCN application should be granted. A sewer utility that does not provide sufficient treatment capacity is not providing adequate service. The Commission's rules plainly state:

30 TAC §291.94. Adequacy of Sewer Service

(a) Sufficiency of service. Each retail public utility **shall plan, furnish, operate, and maintain collection, treatment, and disposal facilities** to collect, treat and dispose of waterborne human waste and waste from domestic activities such as washing, bathing, and food preparation. **These facilities must be of sufficient size to meet the minimum design criteria for wastewater facilities of the commission for all normal demands for service and provide a reasonable reserve for emergencies. . . .**

The evidence in the record is clear. Tall Timbers lacks sufficient treatment capacity to meet the minimum design criteria for wastewater facilities for current demands. Moreover, Tall Timbers is taking no steps currently to provide sufficient treatment capacity to meet the minimum design criteria. Tall Timbers' existing service to the Requested Area is inadequate and additional service is needed.

The Commission should disregard the ALJ's conclusion in the PFD that Tall Timbers' failure to provide sufficient treatment capacity is irrelevant to the determination of the adequacy of the service provided by Tall Timbers to the Requested Area. Tyler requests that the Commission modify the PFD to recognize that Tall Timbers does not currently have facilities of sufficient size to meet the minimum design requirements and that, for that reason, Tall Timbers' service is not adequate.

D. Tall Timbers' Monopoly Status Should be Revoked

Based on the evidence in the record, and the findings made by the ALJ in the PFD (with the corrections set out previously), the Commission should overrule the ALJ's recommendation and grant Tyler's application for a sewer CCN in the remaining portions of the Requested Area. At the very least, the Commission should grant Tyler's application as to those areas where no utility is currently providing service (Areas 6-9).

Certificates of convenience and necessity play a specific, but limited, role in the regulation of sewer utilities in Texas. Their sole purpose is to protect the "public" (the consumers of utility services) from the adverse effects of ruinous competition between sewer

utilities. Their purpose is not to protect sewer utilities from competition when such competition would not adversely affect the public. Under Texas law, there should only a single sewer utility for a given area *only* if the public is best served by a single provider. Such a limited view of CCNs is consistent with the Texas Constitution, Article I, Section 26, which states: **“Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.”**

Most CCNs granted by the Commission allow only a single utility provide service within a particular geographical area. This is because the public is often best served by a single utility. The theory behind this preference is that the cost of utility facilities is frequently so great that two or more competing companies could not keep their rates low because the utilities might build out sufficient capacity to serve all customers, including those served by their competitor. Such provision of redundant capacity, in most cases, would be wasteful. Also, theoretically, a single utility can take advantage of economies of scale to provide service at lower costs than might be provided by competing utilities. Also, competing utilities would lack the incentive to provide anything more than the barest minimum of system capacity. Under the demands of competition, excess capacity would be a luxury that an investor owned utility could not afford. Conversely, a single utility (free of competition) would be more likely to provide the excess capacity necessary to meet peaks in consumer demand because the ability to recover these costs would be more certain.

However, there are situations where the public is better served by more than a single sewer utility serving a particular geographic area. These are very fact specific situations where the regulatory body, after weighing the factors to be considered by the Commission when deciding whether to issue a CCN, determines that the public would benefit from the presence of an additional utility service provider. One such situation would be where the existing service is so inadequate (both in terms of physical ability as well as compliance with the regulatory compact) that additional service is needed to meet the public’s needs and where the need for additional service outweighs the adverse affects on the existing utility. This is particularly true where the competing utility is municipality owned and the municipality has political as well as legal obligations to make sure that all of its citizens receive comparable utility service.⁴⁹

⁴⁹ Under Tex. Local Gov’t Code§43.056 details the services that a municipality must provide in newly annexed areas. The section requires that a municipality file a service plan that provides for the extension of “full municipal

Underlying all of Chapter 13's provisions is the doctrine of the "regulatory compact." Under this compact, a utility is granted a conditionally exclusive opportunity to provide utility services to captive customers in its defined service area. In return for this extraordinary grant of monopoly protection, the utility is required to comply with the orders of the regulatory body regarding rates and services.⁵⁰ The first part of the compact protects the utility from would-be competitors, while the second half protects the captive customers from the desire of monopolists to charge prices above the level that would prevail in a competitive market. The obligations of the compact flow both ways. When, as in this case, the utility disregards its obligations under the regulatory compact, the state should open the area to competition if such competition does not adversely affect the public.

Tall Timbers is not meeting its part of the regulatory compact. Tall Timbers is not complying with the orders of its regulatory authorities regarding its rates and services. Tall Timbers is not complying with its tariff, is in violation of Tyler and Commission orders, and is failing to provide sufficient treatment capacity to meet its existing demands. The evidence in the record shows that the existing service to the Requested Area is inadequate and that additional service is needed. The record also shows that Tyler is more than capable of providing service to the Requested Area, that Tyler's rates are lower than Tall Timbers, and that the landowners in the Requested Area would prefer to obtain service from Tyler rather than Tall Timbers.

The Commission should disregard the ALJ's recommendation in the PFD that the Commission deny Tyler's application for a sewer CCN for Areas 5-9. Tyler has satisfied the statutory criteria the Commission is required to use to judge whether to grant a CCN. Tyler requests that the Commission modify the PFD to reflect the changes recommended by Tyler herein, and to grant Tyler's CCN for Areas 5-9. To the extent that the Commission finds that customers might be harmed by the construction of duplicate facilities if Tyler is allowed to serve Area 5, Tyler requests that the Commission grant Tyler's application, but include the following special condition:

services" to the area to be annexed. "Full municipal services" are defined as "services provided by the annexing municipality in its full-purpose boundaries, including water and wastewater services and excluding gas or electrical service."

⁵⁰ The "regulatory compact" is embodied in TEX WATER CODE §13.001. The statute recognizes that utilities will be allowed some degree of exclusiveness regarding service area in exchange for having its "rates, operations, and services . . . regulated by public agencies."

Tyler may not provide service in Area 5 unless Tyler first acquires the facilities used by Tall Timbers to provide service.

Most of the service area in the Requested Area is not currently receiving any sewer service (Areas 1-4 and 6-9). Duplicate facilities will not be constructed in these areas. Also, there should be no concern that consumers in these areas will not receive adequate service when they request it because Tyler is obligated to ensure that its citizens receive comparable city services. No harm will come to Tall Timbers if Tyler is allowed to serve the currently unserved areas because Tall Timbers lacks the capacity to serve these areas, and has no plans to expand its treatment capacity to serve this area.

E. Proposed Order, Findings of Fact, and Conclusions of Law

Tyler excepts to the ALJ's proposed order, including the proposed findings of fact and conclusions of law. Tyler asserts that the evidence in the record supports granting Tyler's application as to the entire Requested Area, not just Areas 1-4. Nevertheless, the Commission needs to consider each of the areas

1. Exceptions to Proposed Findings of Fact

Adequacy of Service in the Requested Area

The following findings of fact are necessary to correct for the ALJ's determination that Tall Timbers' failure to comply with Tyler's orders and with the Commission's wastewater permit, is not relevant to the issue of the adequacy of existing service.

- ___ Tall Timbers is not providing adequate service to the requested areas because Tall Timbers has failed to comply with its tariff and refuses to comply with valid orders of the City of Tyler in its role as the regulatory authority inside the city limits.
- ___ Since at least early-2004, Tall Timbers has charged unauthorized service extension fees to and made other unauthorized demands of developers seeking service to new subdivisions located inside the city limits.
- ___ Tall Timbers is refusing to comply with Tyler Resolution No. R-2009-27, which found that Tall Timbers' capacity fee was not authorized by Tall Timbers' tariff. Tall Timbers appealed Tyler's resolution to the Commission, as authorized by the Water Code, but Tall Timbers withdrew its appeal before hearing.
- ___ Tall Timbers is failing to comply with Tyler Resolutions Nos. R-2011-5 and R-2011-6. Tall Timbers admitted that it is refusing to comply with Tyler's resolutions.

- Tall Timbers unlawfully collected \$149,968 from a customer inside the Requested Area and is in violation of Tyler's orders by failing to refund this unlawful charge.
- Tall Timbers demands that developers comply with its Development Guide, which has not been submitted to, or approved by, Tyler as the regulatory authority. Tyler has ordered Tall Timbers to stop demanding compliance with the Development Guide until the guide has been approved by Tyler.
- Tall Timbers has failed to properly operate and maintain its sewer system, including the failure to comply with its wastewater discharge permit, and Tall Timbers is in violation of Commission permits and rules regarding treatment.
- Tall Timbers failed to expand its chlorine contact chamber as required by its permit. Tall Timbers knew that it would not comply with this requirement and neither requested an exception from the Commission nor notified the Commission of the failure to expand. This failure prevents Tall Timbers' plant from having sufficient capacity to adequately treat existing flows
- Tall Timbers has not been compliance with the Commission's buffer zone requirements since at least 2006. Tall Timbers misrepresented facts to show compliance when it renewed its permit in 2006.
- Tall Timbers routinely violates the effluent limits contained in its wastewater discharge permit. The explanations offered by Tall Timbers for these violations and lack of diligence to fix the underlying cause of these violations demonstrate that Tall Timbers is not properly operating and maintaining is treatment plant.
- Tall Timbers lacks sufficient treatment capacity to meet existing and expected growth in demand, lacks sufficient collection capacity to meet expected growth in demand, and has failed to plan for future growth.
- Tall Timbers' plant was not constructed to meet its permitted flow of 0.445 million gallons per day (MGD). Tall Timbers' own analysis shows that the plant can, at most, treat 0.312 MGD, a 30% reduction in treatment capacity.
- Tall Timbers' discharges have previously exceeded 0.312 MGD and would have exceeded this amount more frequently but for the ongoing drought. Actual flows at the plant began exceeding 0.312 MGD in July 2007.
- Using Commission minimum design requirements, Tall Timbers needs at least 0.632 MGD of treatment capacity to meet its existing demand. To meet short-term growth in demand (12 to 24 months) Tall Timbers' needs at least 0.690 MGD. To be able to serve only its existing subdivisions at full build out, Tall Timbers needs at least 0.793 MGD of treatment capacity.

The following are corrections to findings made by the ALJ regarding the adequacy of existing service to the requested area:

29. ~~The current average daily flow at the TTUC wastewater treatment plant is around 0.300 MGD, which is within current capacity limitations. TTUC plans to expand the capacity of the plant's clarifiers to its permitted level, which expansion is scheduled to come on line in approximately twelve months.~~

This finding should be deleted because no competent evidence in the record supports this finding. Only Tyler offered expert opinion testimony regarding whether Tall Timbers' plant had sufficient capacity to meet its existing (much less its expected) demands. Tyler's witness Tracy Hicks testified that with treatment capacity limited to 0.312 MGD (or even at 0.445 MGD), Tall Timbers lacks sufficient treatment capacity to meet existing demand.⁵¹ Even if Tall Timbers' current average daily flow is only 0.300 MGD, having a treatment capacity of only 0.312 MGD is not sufficient. The Commission's rules define adequacy of sewer service as meeting minimum design requirements plus "a reasonable reserve for emergencies,"⁵²

32. ~~TTUC inadvertently overcharged certain of its customers living inside the city limits by charging them the rates for out-of-city customers rather than the rates authorized by its tariff with the City. These charges have been corrected.~~

Tall Timbers' overcharging of customers was not inadvertent, and Tall Timbers failed to show that the overcharges have been corrected. The evidence in the record is that Tall Timbers' rates outside of Tyler are roughly twice the rates inside the city.⁵³ Tall Timbers' practice of charging the higher rate to customers inside Tyler dates back years, and is ongoing despite Tyler's repeated efforts to curb the unlawful charges. These overcharges have occurred since at least 2004, and have continued into 2012.⁵⁴ Tyler has repeatedly asked to audit Tall Timbers' records so that Tyler can determine that Tall Timbers fully identified all customer overcharges and that all refunds were properly made, but Tall Timbers has repeatedly refused to provide access to the records.⁵⁵ Tall Timbers' own witness, Mr. Sorensen, acknowledged that when auditing compliance, verification of data is necessary.⁵⁶

⁵¹ Hicks Direct, Ex. Tyler-2, p. 7 (TYLER000047).

⁵² 30 TAC § 291.94(a).

⁵³ Sorensen Cross, Tr. 125/9.

⁵⁴ Ex. Tyler-21 and 22.

⁵⁵ Morgan Direct, Ex. Tyler-1 at 21-22 (TYLER000022-23)

⁵⁶ Sorensen Cross, Tr. at 129/16-18.

33. ~~On one occasion, TTUC charged capacity fees of \$149,968 to Cumberland Place Apartments located within the city limit, which fees were not authorized under its tariff with the City. Tyler in Resolution No. R-2011-6 ordered TTUC to refund all such unauthorized capacity fee charges in 2011. TTUC did not appeal Tyler's order. TTUC conclusively admits that it has not refunded the unauthorized capacity fees.~~

There is no question that Tall Timbers unlawfully demanded and was paid \$149,968 by Cumberland Place Apartments. There is no question that Tyler ordered Tall Timbers to identify all such capacity fee charges made, to submit a plan for refunding, to refund those overcharges, and to document those refunds.⁵⁷ There is no question that Tall Timbers never identified such overcharges, never submitted a plan for refunding those overcharges, and never documented refunds.⁵⁸ In fact, Tall Timbers admitted that it had not refunded these unlawfully collected fees.⁵⁹ Tall Timbers' admission conclusively establishes this fact.⁶⁰ Tyler's suggested changes to the finding more accurately reflect the evidence in the record.

34. In April 2009, TTUC refused to connect three newly constructed homes in Area 5 to its system until the collection systems constructed by the developer met the requirements of TTUC's Development Guide and the developer entered into a line extension agreement and paid \$1,000 per connection capacity fee, also provided for by the Guide. Subsequent to City's instituting a one-year building moratorium for the Requested Area, TTUC connected the homes to its system. ~~TTUC has not charged the capacity fee to any other developers inside City's limits.~~

There is no evidence to support the finding that Tall Timbers has not charged the capacity fee to any other developers inside the City. As expressly recognized by the ALJ in Finding of Fact No. 33, Tall Timbers charged capacity fees to Cumberland Place Apartments. Also, Tyler ordered, in Resolution R-2011-6, to identify all capacity fees charged since 2002. Tall Timbers has failed to comply with this provision by identifying such charges.⁶¹ Until Tall Timbers complies with Tyler's orders and properly identifies all persons charged the unlawful capacity fee, neither Tyler nor the Commission can know whether Tall Timbers has charged any other person inside Tyler's city limits.

⁵⁷ Ex. Tyler-12.

⁵⁸ Morgan Direct, Ex. Tyler-1 at 20 (TYELR000021).

⁵⁹ Request for Admission 1-13, Ex. Tyler-

⁶⁰ Tex.R.Civ.P. 198.3.

⁶¹ Morgan Direct at 20, Ex. Tyler-1 (TYLER000021).

Need for Service in the Requested Area

The following are corrections to findings made by the ALJ regarding the need for additional service in the requested area:

35. ~~Although some dDevelopers~~ have approached the City requesting service in the future as well as expressing their desire to not have to work with TTUC, ~~there does not~~ Based on these requests for service there appears to be a current need for service in Areas 1-4 and 6-9.

The Requested Area is a high growth area at the edge of the developed portion of the City of Tyler.⁶² Tyler has specifically targeted this area for development and growth. Tyler has planned for growth in the Requested Area⁶³ and has invested more than \$51 million in projects to serve anticipated growth in the Requested Area.⁶⁴ This growth will not occur unless adequate retail sewer service is provided in the area.

There was no dispute at the hearing regarding the need for service in Areas 1 through 4. Tyler is serving Area 1 and Areas 2-4 affirmatively petitioned the Commission to remove their property from Tall Timbers' service area so that they could receive service from Tyler.

The evidence shows that Areas 6 and 7 need additional service now. These areas are part of a single development ("Oak Hollow") owned by Steve Thornton (S & T Development).⁶⁵ About two-thirds of the development is located inside Tyler's service area about one-third is inside Tall Timbers' service area. The area served by Tyler has been fully built out; the area inside Tall Timbers' service area has not yet been developed.⁶⁶ The developer has requested service from Tyler.⁶⁷ The developer has not developed the remainder of the development because the developer does not want to take service from Tall Timbers. Tall Timbers knows that development is occurring in the area, and has not even bothered to ask the developer about service needs in the area.⁶⁸

Likewise, in Area 8 and 9, developers that have property both in Tyler and Tall Timbers' service areas have fully developed in Tyler's service area, but have not developed inside Tall Timbers' service area because of their concerns with Tall Timbers' service. This includes the

⁶² Morgan Direct, Ex. Tyler-1 at 7 (TYLER000008).

⁶³ Ex. Tyler-8 (TYLER000228, 000235, 000247).

⁶⁴ Morgan Direct, Ex. Tyler-1 at 26 (TYLER000027).

⁶⁵ Morgan Redirect, Tr. at 63-64; Ex. Tyler-35.

⁶⁶ Ex. Tyler-35; Morgan Cross, Tr. at 35/9-11, Tr. at 65-66; Morgan Rebuttal, Tr. at 322.

⁶⁷ Morgan Cross, Tr. at 34/6-7.

⁶⁸ Wilkins Cross, Tr. at 252 – 254.

“Fair Property”⁶⁹ and property owned by Tyler Blue Ridge.⁷⁰ Also, Tyler has received requests for service in these areas from the First Baptist Church, the Brady Trust and the Allen Trust.⁷¹ These areas need additional service now. Tall Timbers cannot meet that need.

36. ~~TTUC is currently undergoing an expansion that will allow it to prudently grow its treatment capacity to meet its current increase in demand in Area 5 as well as provide headroom from growth. TTUC stands ready to meet any need that may arise in the future.~~

___ Tall Timbers lacks sufficient treatment capacity to meet existing and expected growth in demand, lacks sufficient collection capacity to meet expected growth in demand, and has failed to plan for future growth.

___ Tall Timbers’ plant was not constructed to meet its permitted flow of 0.445 million gallons per day (MGD). Tall Timbers’ own analysis shows that the plant can, at most, treat 0.312 MGD, a 30% reduction in treatment capacity. Actual flows at the plant began exceeding 0.312 MGD in July 2007.

___ Tall Timbers’ discharges have previously exceeded 0.312 MGD and would have exceeded this amount more frequently but for the ongoing drought.

___ Using Commission minimum design requirements, Tall Timbers needs at least 0.632 MGD of treatment capacity to meet its existing demand. To meet short-term growth in demand (12 to 24 months) Tall Timbers’ needs at least 0.690 MGD. To serve the existing subdivisions only (Cumberland Gap and Irish Meadows), Tall Timbers needs at least 0.793 MGD.

As explained previously, the evidence in the record is clear that Tall Timbers does not have adequate treatment capacity to meet its existing demand, much less the anticipated growth in the short-term in the subdivisions it currently serves (Area 5). Additional service is needed even in the subdivisions currently served by Tall Timbers (Area 5).

Effect of Granting the CCN Amendment on the Recipient, Landowners and Other Retail Public Utilities

37. If the CCN amendment is granted to City for Area 5, it would need to install collection system infrastructure that duplicates that already existing or purchase the existing infrastructure from TTUC. City may immediately be required to extend such service systems to Area 5 if the amendment is granted.

40. ~~If the CCN amendment is granted to City for Area 5, it could result in significant adverse effects for TTUC by potentially disrupting the reliability of TTUC’s customer based, thereby reducing its ability to generate capital and potentially resulting in an increase in rates to its existing customers.~~

⁶⁹ Morgan Cross, Tr. at 35/12-13.

⁷⁰ Boudreaux Cross, Tr. at 99.

⁷¹ Morgan Direct, Ex. Tyler-1 at 25 (TYLER000026).

Tyler notes, initially, that these findings only suggest that Tyler's application should not be granted as to Area 5. These findings do not support the ALJ's recommendation that Tyler's application should not be granted to Areas 1-4 and 6-9.

Tyler does not except to Finding of Fact No. 37 but would like to point out that Tyler understands the obligation it is undertaking in seeking to serve the Requested Area. Tyler has the capability to extend service throughout the Requested Area immediately. The evidence in the record clearly shows that Tall Timbers lacks this capability.

Tyler excepts to Finding of Fact No. 40 because the evidence in the record does not support the finding. This finding is entirely based on the testimony of the Executive Director that Tall Timbers could, theoretically, be harmed because granting the amendment could affect Tall Timbers' ability to obtain loans or attract capital, could result in a rate increase for Tall Timbers' remaining customer and could affect Tall Timbers' ability to plan for future growth. The Executive Director's witness admitted that this was only a theoretical possibility, and he acknowledged that Tall Timbers did not raise it as an issue.⁷² He also stated that he performed no study to determine whether granting the amendment would increase rates to Tall Timbers' remaining customers – that this was merely another theoretical possibility.⁷³ With regard to how granting the amendment could affect Tall Timbers' ability to plan for future growth, the Executive Director offers no explanation. Any explanation would be difficult to make given that the evidence shows that Tall Timbers has not followed through with any prior planning and that its current planning is purely on an ad-hoc basis.⁷⁴

To the extent that the Commission finds that customers might be harmed by the construction of duplicate facilities if Tyler is allowed to serve Area 5, Tyler requests that the Commission grant Tyler's application, but include the following special condition. This special condition will

Tyler may not provide service in Area 5 unless Tyler first acquires the collection facilities used by Tall Timbers to provide service to the area.

⁷² Dickey Cross, Tr. at 313-314.

⁷³ *Id.*

⁷⁴ Morgan Direct, Ex. Tyler-1 at 13-14 (TYLER000014-15); Sorensen Direct, Ex. TTUC-1 at 18; Sorensen Cross, Tr. at 168/14-20.

Such a special condition would prevent Tall Timbers (and more importantly – Tall Timbers' current ratepayers) from suffering any economic harm from the Commission's decision to grant Tyler's application.

The Probable Improvement of Service or Lowering of Costs to Consumers in the Requested Area

45. There is insufficient evidence that the granting of the CCN amendment will improve service or lower the costs of customers in the Requested Area.

— The granting of the CCN amendment will improve service and lower the costs to consumers in the Requested Area. TTUC lacks the ability to provide adequate service to these areas, and Tyler's retail sewer rates are lower than Tall Timbers' rates. Tyler does not charge additional fees to allow new development to attach to Tyler's system.

Existing service to the Requested Area is inadequate. Allowing Tyler to provide service will ensure that sufficient service capacity is available now and in the future to meet the needs of the area. Additionally, by introducing competition, at least with regard to extensions for new service, both Tyler and Tall Timbers should be incented to provide better service and lower prices. Even Tall Timber's witness agreed that competition would be good for the customers in the Requested Area:

Q. If the City of Tyler has original jurisdiction over what rates Tall Timbers charges, do you agree with Mr. Morgan's assessment that there is fair competition, at least within the city of Tyler's corporate limits?

A. (Mr. Wilkins) Yes, sir; I do.

Q. You do. Okay. What's the basis for your agreement with that statement?

A. Any time, from my role, you have the ability to dual service, it brings the competitive nature and one party may or may not have an advantage.⁷⁵

Granting Tyler's application also should lower customer costs. Tyler's sewer rates are lower than Tall Timbers and Tyler does not charge additional fees to allow new development to attach to Tyler's system.⁷⁶

The ALJ found that costs might not be lowered by Tyler providing service because "the costs of duplicating existing facilities would most probably be passed on" by Tyler. The testimony at the hearing was clear that Tyler's cost to construct facilities to serve Area 5 would more than likely be paid for by all of Tyler's 31,000 existing sewer customers and not surcharged to those customers in Area 5.⁷⁷ To the extent that the Commission is concerned that the cost of

⁷⁵ Wilkins Cross, Tr. at 213 - 214.

⁷⁶ Morgan Direct, Ex. Tyler-1 at 32 (TYLER000033).

⁷⁷ Morgan Rebuttal, Tr. at 325-326.

Tyler's acquisition of the existing facilities, or construction of new facilities, to serve Area 5 could be assessed directly to customers in Area 5, Tyler would accept a condition in the CCN that prohibited Tyler from assessing a surcharge against customers in Area 5 to recover the cost of Tyler extending service to Area 5.

2. Exceptions to Conclusions of Law

Consistent with its arguments herein, the following corrections need to be made to the ALJ's proposed conclusions of law:

5. City has met all substantive criteria for granting a sewer CCN amendment for ~~Areas 1-4~~ of the Requested Area in Smith County, Texas, as set forth in Code §§ 13.241, 13.244, and 13.246 and 30 TAC § 291.102.
6. Amending City's CCN to allow it to provide sewer service to ~~Areas 5-9~~ of the Requested Area is ~~not~~ necessary for the service, accommodation, convenience, or safety of the public.

3. Exceptions to the Proposed Order

Consistent with its arguments herein, the following corrections need to be made to the ALJ's proposed order:

1. The application of the City of Tyler to amend its Certificate of Convenience and Necessity No. 20319 in Smith County, Texas for ~~Areas 1-4~~ of the Requested Area is GRANTED.
2. Certificate of Convenience and Necessity No. 20319 shall include the Requested Areas 1-4 as described in the application.
3. ~~The application of the City of Tyler to amend its Certificate of Convenience and Necessity No. 20319 in Smith County for Areas 5-9 of the Requested Area is DENIED.~~

III. Motion for Limited Remand on Areas 6 & 7

If the Commission does not decide to grant Tyler's application for Areas 6 and 7, Tyler respectfully requests that the Commission reopen the record as to these two areas based on changed circumstances. At the time of the hearing Area 7 was entirely inside Tall Timbers' service area. That is no longer the case. In November 2012, S&T Development filed a petition to remove its property from Tall Timbers' CCN using the process set out in Texas Water Code §13.254(a-5). The Executive Director granted the petition on January 28, 2013. (See Attachment D). Both the filing of the petition and its granting occurred after the closing of the administrative record in this proceeding.

The property removed from Tall Timbers' service area represents the majority of Area 7. Additionally, with the removal of the S&T Development property, Tall Timbers will have a difficult, if not impossible, time extending service to Area 6 and the small remainder of Area 7. These areas are relatively small and isolated at a considerable distance from Tall Timbers' existing facilities. Based on this change of facts, the ALJ's analysis needs to be revised regarding Tall Timbers' ability to provide service to the S&T Development property and to the remainder of Area 7 and all of Area 6.

Tyler respectfully requests the Commission reopen the record pursuant to 30 TAC §80.265 and remand to the ALJ to reconsider his recommendation regarding whether Tyler's application should be granted with regard to Areas 6 and 7. The S&T Development property in Area 7 has been removed from Tall Timbers' service area, in the same manner as Areas 2 through 4 were removed. Tall Timbers and the Executive Director had no objection to granting Tyler's application as to those areas, and Tyler assumes that neither Tall Timbers nor the Executive Director will object to granting Tyler's application as to the S&T Development property. Tall Timbers may object to reopening the record as to Area 6 and the remainder of Area 7, but Tyler believes that loss of the S&T Development property will significantly affect Tall Timbers' ability to efficiently and adequately provide service to these areas.

IV. Conclusion and Prayer

After considering the foregoing, Tyler respectfully requests that the Commission adopt a final order incorporating Tyler's proposed changes to the ALJ's recommended findings of fact and conclusions of law, as set out herein, approve the ALJ's PFD in part and reject in part as discussed in these exceptions, and approve Tyler's application to amend its CCN in its entirety as requested by Tyler in this proceeding. To the extent that the Commission is concerned that granting the Tyler's application as to Area 5 could lead to the construction of duplicative facilities and that the costs of such an extension would be pushed onto the customers in the area, Tyler consents to special conditions (set out above) that would prevent these outcomes. Alternatively, the Commission could grant Tyler's application to all areas other than Area 5.

If the Commission decides not to grant Tyler's application with regard to Areas 6 and 7, as recommended by the ALJ, Tyler requests that the Commission reopen the record as to these two areas and remand the matter to SOAH to determine whether, based on new information, Tyler's application should be granted as to Areas 6 and 7.

Respectfully submitted,

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ATTORNEYS FOR
THE CITY OF TYLER

CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of February, 2013, a true and correct copy of the foregoing document was served on the individuals listed below by hand deliver, email, facsimile or First Class Mail.

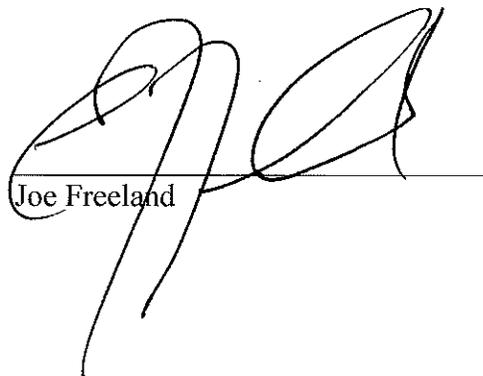
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Joe Freeland

Attachment A
Map of Requested Area
(Exhibit Tyler-34)

Attachment B
City of Tyler Orders
(Exhibits Tyler-9 through 12)

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
TYLER TO AMEND CERTIFICATE	§	
OF CONVENIENCE AND	§	OF
NECESSITY NO. 20319	§	
(APPLICATION NO. 37037-C)	§	ADMINISTRATIVE HEARINGS

Exhibit Tyler-9

Tyler Resolution
R-2009-27

RESOLUTION NO. R-2009-27

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS RESOLVING APPEAL OF SERVICE REQUIREMENTS BY FINDING THAT TALL TIMBERS UTILITY COMPANY, INCORPORATED (TTUC) IS NOT AUTHORIZED TO ASSESS CERTAIN CAPACITY OR SIMILAR FEES OR TO REQUIRE CERTAIN ITEMS AS A CONDITION FOR EXTENDING SEWER SERVICE; ORDERING TTUC TO PREPARE AND SUBMIT REVISED LXAS REFLECTING THE DECISION HEREIN AND TO PROVIDE SERVICE TO CERTAIN SUBDIVISIONS; ORDERING DEVELOPMENT SERVICES DEPARTMENT AND DEVELOPER TO TAKE CERTAIN ACTIONS RELATED TO RESOLVING SERVICE REQUIREMENTS APPEAL; ORDERING TTUC TO STOP USE OF TTUC'S UNAPPROVED DEVELOPMENT GUIDE FOR SERVICE EXTENSIONS IN THE CITY OF TYLER UNTIL APPROVED BY THE CITY COUNCIL; AND REQUIRING DELIVERY OF THIS RESOLUTION TO TTUC AND THE DEVELOPER.

WHEREAS, Tall Timbers Utility Company, Inc. (TTUC) holds Sewer Certificate of Convenience and Necessity (CCN) No. 20694, issued by the Texas Commission on Environmental Quality (TCEQ), which authorizes TTUC to be the exclusive provider of retail sewer utility service within part of the City of Tyler, and pursuant to state law, TTUC has filed a tariff with the City of Tyler specifying the terms and conditions on which TTUC will extend sewer utility service to new subdivisions located inside TTUC's certificated service area; and

WHEREAS, the City of Tyler is the regulatory authority having a statutory duty to review, approve, interpret and enforce retail sewer utility tariffs within its municipal boundaries, including regulatory authority over TTUC; the City of Tyler is authorized by TTUC's tariff, the Charter and Ordinances of the City of Tyler, and state statutes to hear and resolve complaints and appeals brought by TTUC's customers, including developers, home builders and retail customers regarding TTUC's rates and services, including the terms and conditions upon which TTUC will extend sewer utility services to areas not previously served; and,

WHEREAS, Elk River Addition Unit 1 at Cumberland Gap and Harpers Ridge Addition Unit 3 at Cumberland Gap (Subdivisions) are residential subdivisions located inside TTUC's CCN boundaries and the City of Tyler's corporate boundaries; Subdivisions were developed by Geaux/Cumberland Gap Joint Venture No. 1 (Developer), who constructed a sanitary sewer collection system to serve the Subdivisions as part of the Developer's quest to obtain sewer utility service from TTUC; and,

WHEREAS, the City of Tyler issued building permits for the construction of five homes in the Subdivisions without knowledge that sewer service was unavailable to the Subdivisions; homes have been built and sold in the Subdivisions; Developer, builders and homeowners have sought retail sewer service from TTUC, but TTUC has refused to extend sewer service to these homes, some of which are complete and occupied; once the Director of Public Utilities and Public Works (Director) became aware that TTUC was not providing service to the Subdivisions, the Director issued a moratorium on the issuance of building permits until the matter could be resolved; and,

WHEREAS, the Director received requests from citizens of Tyler, with interest in property located inside the Subdivisions, to review the charges being demanded by TTUC and the other reasons claimed by TTUC to justify its refusal to extend service to the Subdivisions; the Director decided to treat these requests as appeals of TTUC's requirements for extending service as authorized by TTUC's tariff; and,

WHEREAS, on June 23, 2009, the Director notified TTUC of the appeals (Exhibit A) and ordered TTUC to provide Tyler with information needed to resolve the dispute by June 30, 2009; the Director also ordered TTUC to immediately begin providing service, as authorized by TTUC's tariff, pending resolution of the appeal, to the five lots in the Subdivisions with building permits; and,

WHEREAS, on July 7, 2009, TTUC responded with a letter to the Director (Exhibit B), which did not provide the information requested by the Director; on July 10, 2009, the Director sent an additional letter to TTUC (Exhibit C) requesting more specific information from TTUC; at a meeting on August 19, 2009, TTUC representatives stated that TTUC would not provide any additional information regarding the matter to the City of Tyler and requested that the City of Tyler rule on the appeal without the benefit of hearing TTUC's position so that TTUC could appeal the City Council's decision to TCEQ; and,

WHEREAS, the Director obtained information from the Developer regarding its dealings with TTUC, including correspondence with TTUC, copies of Development Guides used by TTUC, a letter from TTUC dated July 9, 2009, which included a list of items to be resolved before TTUC would provide service to the Elk River Addition Unit 1 at Cumberland Gap (Exhibit D), and copies of the Line Extension Agreements (LXAs) proposed by TTUC for both subdivisions; and,

WHEREAS, the Director has reviewed TTUC's tariff, applicable law, and the information obtained from the Developer and, based on that review, concludes that TTUC is demanding fees and other requirements from the Developer that are not authorized by TTUC's tariff; these include:

- Capacity Fee – TTUC failed to provide a sufficient written explanation of the charge as required by Section 3.20 of its tariff, and because such a uniform charge is a rate that has not been approved by the City Council.
- Exhibit D, Item 3 – Sewer Valves (Elder Valves) are not required by TTUC's tariff.
- Exhibit D, Item 6 – The all weather road is not required by TTUC's tariff. Moreover, the information reviewed indicates that the all weather road has been constructed to the lift station, and that the construction plans for the lift station were approved by TTUC.
- Exhibit D, Item 7 – Minimum easements of 16 feet are not required by TTUC's tariff. TTUC's tariff states that minimum easement width is 15 feet.
- Exhibit D, Item 8 – Compaction tests, videotaping of pipes, insecticide coating inside manhole certifications, and excavation tests of the pipe are not required by TTUC tariff or TCEQ's minimum design requirements.
- Exhibit D, Item 9 – Developer constructed sewer facilities itself, therefore Developer should submit its construction cost data rather than submitting invoices from the underground contractor.

WHEREAS, the Director further concludes that TTUC should be required to extend service to the Elk River Addition Unit 1 at Cumberland Gap once the Developer satisfies Items 2, 4, 5, 7b, 7c, 8b, 8c, 8f, 8g, 9, and 10 (as clarified above), as listed in Exhibit D, and extend service to Harpers Ridge Unit 3 at Cumberland Gap once the Developer provides information similar to Items 8b, 8c, 8f, 8g, 9, and 10 (as clarified above).

WHEREAS, it is the obligation of the City of Tyler to rule on the appeal and determine whether the charges and other requirements sought by TTUC are authorized by TTUC's tariff and other law.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS, THAT:

PART 1: All statements made above are hereby found to be true and correct and are incorporated in their entirety. The decision of the City Council of the City of Tyler is being made based on the information available to it, which does not include information requested from, but not supplied by, TTUC.

PART 2: The City Council finds that TTUC's approved extension policy does not authorize TTUC to charge a "capacity fee" of \$1,000 per connection because TTUC failed to provide a sufficient written explanation of the charge as required by PART 3.20 of its tariff, and because such a uniform charge is a rate that has not been approved by the City Council. The City Council further finds that TTUC may not assess a site-specific capacity or similar fee for extending service to the Subdivisions because TTUC did not assess the fee at the time the Developer requested the extension of service.

PART 3: The City Council has reviewed Exhibit D and finds that the following items are not required by TTUC's tariff, and cannot be required as a condition for extending sewer service to the Subdivisions: Items 3, 6, 7a, 7d, 8a, 8d, 8e, and 8h, as listed in Exhibit D.

PART 4: The City Council orders the Developer to submit to TTUC information responding to Exhibit D Items 2, 4, 5, 7b, 7c, 8b, 8c, 8f, 8g, 9, and 10 (as clarified), for the Elk River Addition Unit 1 at Cumberland Gap, and responding to Exhibit D Items 8b, 8c, 8f, 8g, 9, and 10 (as clarified) for the Harpers Ridge Unit 3 at Cumberland Gap.

PART 5: The City Council orders TTUC, within 30 days of the date of this resolution, to prepare revised LXAs reflecting the City Council's decision herein and to submit the revised LXAs to the Developer and the Director.

PART 6: The City Council orders TTUC to provide service to the Subdivisions during the interim period until the revised LXAs can be executed. By providing interim service pursuant to this order, TTUC is not deemed to have accepted the facilities constructed by the Developer.

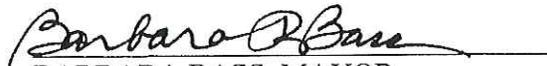
PART 7: The City Council orders the City of Tyler Development Services department to extend the existing moratorium on the issuance of new building permits in the Subdivisions until March 15, 2010 or until revised LXAs are executed, whichever ever occurs first. If TTUC appeals this decision to the TCEQ, TTUC is relieved from any obligation to execute the revised LXAs until the appeal is concluded. Nevertheless, if TTUC fails to submit satisfactory LXAs within 30 days, the Director shall lift the moratorium on the issuance of new building permits. Once the moratorium is lifted, TTUC shall provide service to all homes in the Subdivisions requesting service.

PART 8: The City Council determines that TTUC's Development Guide, as prepared by Algonquin Water Resources, including the revisions of February 7, 2003, October 29, 2007, and November 14, 2008, are changes to the extension policy contained in TTUC's tariff as approved by the City Council on August 1, 2002. Because these attempted changes to TTUC's approved extension policy have not been approved by the City Council (as required by 30 TAC §291.21(b)(2)(B)), the Development Guide is not applicable to service extensions in the City of Tyler. The City Council orders TTUC to stop using its Development Guide and the form LXA as part of its extension policy until the extension policy has been approved by the City Council. The City of Tyler will treat TTUC's submittal of the November 14, 2008, revisions to the Development Guide as a statement of intent to change rates, which the City of Tyler will process once TTUC submits an application and provides proper notice of the change.

PART 9: Copies of this Resolution shall be sent to TTUC and the Developer.

PART 10: That this Resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED this 9th day of September, 2009.


BARBARA BASS, MAYOR
CITY OF TYLER, TEXAS

ATTEST:


CASSANDRA BRAGER, CITY CLERK



APPROVED:


GARY C. LANDERS, CITY ATTORNEY

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
TYLER TO AMEND CERTIFICATE	§	
OF CONVENIENCE AND	§	OF
NECESSITY NO. 20319	§	
(APPLICATION NO. 37037-C)	§	ADMINISTRATIVE HEARINGS

Exhibit Tyler-10

Tyler Resolution
R-2011-4

RESOLUTION NO. R-2011-4

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS DIRECTING THE DIRECTOR OF UTILITIES AND PUBLIC WORKS TO INVESTIGATE TALL TIMBERS UTILITY COMPANY, INCORPORATED, AND TO NEGOTIATE A UTILITY FRANCHISE AGREEMENT, AND AUTHORIZING THE EXERCISE OF ENFORCEMENT POWERS PURSUANT TO SECTIONS 7.351 AND 7.352 OF THE TEXAS WATER CODE

WHEREAS, pursuant to §13.042 of the Texas Water Code, the City of Tyler has exclusive original jurisdiction over all water and sewer rates, operations, and services provided by water and sewer utilities providing services within its corporate limits, and pursuant to §§26.171 and 26.173 of the Texas Water Code authorizes the City of Tyler to investigate persons who have wastewater discharge permits to determine whether these persons are in compliance with the requirements of their permits; and,

WHEREAS, pursuant to §§7.351 and 7.352, if the City Council adopts a resolution authorizing the exercise of the power, the City of Tyler may institute a civil suit in the same manner as the Texas Commission on Environmental Quality (TCEQ) in a district court for injunctive relief, civil penalties or both for violations or threats violations of Chapter 26 of the Texas Water Code; and,

WHEREAS, Tall Timbers Utility Company, Inc. (TTUC) is a public sewer utility that provides retail sewer service inside and outside the City of Tyler pursuant to Sewer Certificate of Convenience and Necessity No. 20694 issued by the TCEQ and a retail tariff filed with the City of Tyler; and,

WHEREAS, TTUC owns and operates a wastewater treatment plant that is located inside the City of Tyler and that discharges to waters in the state that are located inside the City of Tyler as authorized by a wastewater discharge permit issued by TCEQ; and,

WHEREAS, TTUC has previously charged rates not authorized by its tariff and refused to extend utility service as required by its tariff as found in the City Council's Resolution R-2009-27; and,

WHEREAS, the Director is concerned that TTUC is not currently providing service inside the City of Tyler in compliance with its tariff and other applicable rules and laws and that TTUC is not operating its wastewater treatment plant in accordance with the permit issued by TCEQ; and,

WHEREAS, TTUC uses the public rights-of-way located inside the City of Tyler to provide retail sewer service without a franchise granted by the City of Tyler as required by the Charter of the City of Tyler.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS, THAT:

PART 1: The City Council authorizes the City Manager to investigate Tall Timbers Utility Company, Inc., using all the power and authority available to the City of Tyler, to determine whether TTUC is complying with its sewer utility tariff and other applicable laws,

ordinances and rules relating to the provision of retail sewer service inside the City of Tyler, and to report to the City Council the findings of such investigation and make recommendations regarding enforcement or other methods to bring TTUC into compliance. Any failure by TTUC to provide information requested by the Director, within ten (10) days of receipt of request, will be considered a violation of Section 15-4 of the City of Tyler Code of Ordinances.

PART 2: The City Council directs the City Manager to investigate TTUC, using all the power and authority available to the City of Tyler, to determine whether TTUC is in compliance with its wastewater discharge permit, and if not, to request the City Attorney to seek civil penalties, injunctive relief, or both against TTUC using Subchapter D of Chapter 7 of the Texas Water Code to bring TTUC into compliance.

PART 3: The City Council, pursuant to §§ 7.351 and 7.352 of the Texas Water Code, hereby authorizes the City of Tyler to institute a civil suit under Subchapter D of Chapter 7 of the Texas Water Code in the same manner as the TCEQ against any wastewater discharge permit holder who has violated, is violating or is threatening to violate its permit or Chapter 26 of the Texas Water Code. The City Council delegates to the City Manager the authority to determine if a civil suit should be instituted based on the recommendations of the Director and City Attorney.

PART 4: The City Council directs the City Manager to negotiate a franchise agreement with TTUC consistent with the Charter and Chapter 15 of the Tyler Code of Ordinances and to present the negotiated agreement to the City Council by January 15, 2011. If the Director and TTUC are unable to agree on a franchise agreement by January 15, 2011, the City Council will adopt a franchise ordinance using its powers granted by Charter.

PART 5: The City Council requests the advice and assistance of the Texas Commission on Environmental Quality, as authorized by Texas Water Code §13.085, with regard to matters addressed by this resolution.

PART 6: Copies of this Resolution shall be sent to TTUC and the Texas Commission on Environmental Quality.

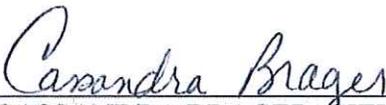
PART 7: That this Resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED this 26th day of January, 2011.



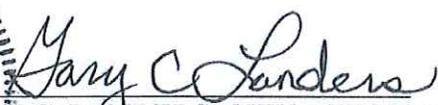
BARBARA BASS, MAYOR OF
THE CITY OF TYLER, TEXAS

ATTEST:



CASSANDRA BRAGER, CITY CLERK



APPROVED:


GARY C. LANDERS, CITY ATTORNEY

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION OF THE CITY OF
TYLER TO AMEND CERTIFICATE
OF CONVENIENCE AND
NECESSITY NO. 20319
(APPLICATION NO. 37037-C)

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

Exhibit Tyler-11

Tyler Resolution
R-2011-5

RESOLUTION NO. R-2011-5

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS FINDING THAT TALL TIMBERS UTILITY COMPANY, INCORPORATED, (TTUC) FAILED TO COMPLY WITH THE REQUIREMENTS OF RESOLUTION NO. R-2009-27; ORDERING TTUC TO PERMANENTLY PROVIDE UTILITY SERVICE TO CERTAIN SUBDIVISIONS LOCATED INSIDE TTUC'S CERTIFICATED SERVICE AREA AND WITHIN THE CITY OF TYLER; AND REQUIRING DELIVERY OF THIS RESOLUTION TO TTUC AND THE DEVELOPER.

WHEREAS, Tall Timbers Utility Company, Inc. (TTUC) holds Sewer Certificate of Convenience and Necessity (CCN) No. 20694, issued by the Texas Commission on Environmental Quality (TCEQ), which authorizes TTUC to be the exclusive provider of retail sewer utility service within part of the City of Tyler, and pursuant to state law, TTUC has filed a tariff with the City of Tyler specifying the terms and conditions on which TTUC will extend sewer utility service to new subdivisions located inside TTUC's certificated service area; and

WHEREAS, TTUC uses the public rights-of-way owned and controlled by the City of Tyler to provide sewer service to the Subdivisions and other customers inside the City of Tyler without a franchise agreement at the sufferance of the City of Tyler; and

WHEREAS, the City of Tyler is the regulatory authority having a statutory duty and Charter authorization to review, approve, interpret and enforce retail sewer utility tariffs within its municipal boundaries, including regulatory authority over TTUC; the City of Tyler is authorized by TTUC's tariff, the Charter and Ordinances of the City of Tyler, and state statutes to hear and resolve complaints and appeals brought by TTUC's customers, including developers, home builders and retail customers regarding TTUC's rates and services, including the terms and conditions upon which TTUC will extend sewer utility services to areas not previously served; and,

WHEREAS, Elk River Addition Unit 1 at Cumberland Gap and Harpers Ridge Addition Unit 3 at Cumberland Gap (Subdivisions) are residential subdivisions located inside TTUC's CCN boundaries and the City of Tyler's corporate boundaries; Subdivisions were developed by Geaux/Cumberland Gap Joint Venture No. 1 (Developer), who constructed a sanitary sewer collection system to serve the Subdivisions as part of the Developer's quest to obtain sewer utility service from TTUC; and,

WHEREAS, the City of Tyler issued building permits for the construction of five homes in the Subdivisions without knowledge that sewer service was unavailable to the Subdivisions; homes have been built and sold in the Subdivisions; Developer, builders and homeowners sought retail sewer service from TTUC, but TTUC refused to extend sewer service to these homes; once the Director of Public Utilities and Public Works (Director) became aware that TTUC was not providing service to the Subdivisions, the Director issued a moratorium on the issuance of building permits until the matter could be resolved; and,

WHEREAS, the Director received requests from citizens of Tyler, with interest in property located inside the Subdivisions, to review the charges being demanded by TTUC and the other reasons claimed by TTUC to justify its refusal to extend service to the Subdivisions; the Director decided to treat these requests as appeals of TTUC's requirements for extending service as authorized by TTUC's tariff; and,

WHEREAS, on September 9, 2009, the City of Council, after reviewing the findings of the Director, adopted Resolution No. R-2009-27 (Exhibit A), which ruled on the appeals, finding that TTUC was not authorized to charge "capacity fees," directing TTUC to prepare revised line extension agreements (LXAs) consistent with the resolution and submit the revised LXAs to the Director of Utilities (Director) on or before October 9, 2009, and directing TTUC to execute the revised LXAs after the completion of any appeal of the resolution to the Texas Commission on Environmental Quality (TCEQ); and

WHEREAS, TTUC began providing sewer service to the existing houses in the Subdivisions on an interim basis on or about September 9, 2009; and

WHEREAS, on October 14, 2008, TTUC appealed the decision of the City Council to the TCEQ seeking to overturn the City Council's order, but TTUC withdrew its appeal with prejudice on September 7, 2010, before TCEQ could affirm the decision of the City Council; and

WHEREAS, TTUC failed to submit revised LXAs to the Director by October 9, 2009, and has not executed revised LXAs with the Developer to extend service to the Subdivisions, which places TTUC in violation of the City Council's prior orders contained in Resolution No. R-2009-27, and

WHEREAS, the City of Tyler has incurred reasonable costs of \$31,400 for the services of rate consultants, accountants, auditors, attorneys, and engineers to investigate the complaints made against TTUC, and to advise and represent the City of Tyler during the investigation, decision and appeal to TCEQ; and

WHEREAS, it is the obligation of the City of Tyler to enforce its prior decision regarding the appeal despite TTUC's refusal to comply with the decision.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS, THAT:

PART 1: All statements made above are hereby found to be true and correct and are incorporated in their entirety. The decision of the City Council of the City of Tyler is being made based on the information available to it, which does not include information requested from, but not supplied by, TTUC.

PART 2: The City Council finds that TTUC has failed to comply with the requirements of Resolution No. R-2009-27 by failing to submit revised LXAs to the Director for review and by failing to execute revised LXAs consistent with Resolution No. R-2009-27.

PART 3: The City Council orders TTUC to provide service to the Subdivisions on a permanent basis. TTUC must connect to all service locations (lots) in the Subdivisions when requested by the owner of the service location. No LXAs will be required or allowed as a condition of extending service and no further action is required by the Developer to obtain service.

PART 4: Any refusal by TTUC to connect qualified customers requesting service inside the Subdivisions will be considered to be a violation of this resolution and Resolution No. R-2009-27, a failure by TTUC to provide continuous and adequate service, a violation of Section 15-263 of the Code of Ordinances, City of Tyler, Texas, for the unauthorized use of public right-

of-way, and a violation of the Charter of the City of Tyler. Each day after the specified compliance date shall be considered a separate violation until TTUC comes into compliance.

PART 5: The City Council, pursuant to Texas Water Code §13.084, orders TTUC to reimburse the City of Tyler the amount of \$31,400 for the reasonable costs of services provided by experts in investigating, presenting evidence, advising and representing the City and assisting with litigation. This amount shall be paid to the City of Tyler by November 1, 2010, unless the City Manager authorizes a later date. Because TTUC withdrew its appeal before obtaining a ruling by TCEQ, the City Council disallows any recovery by TTUC of these costs through rates.

PART 6: Copies of this Resolution shall be sent to TTUC and the Developer.

PART 7: That this Resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED this 26th day of January, 2011.

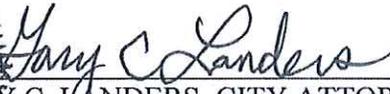

BARBARA BASS, MAYOR OF
THE CITY OF TYLER, TEXAS

ATTEST:


CASSANDRA BRAGER, CITY CLERK



APPROVED:


GARY C. LANDERS, CITY ATTORNEY

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
TYLER TO AMEND CERTIFICATE	§	
OF CONVENIENCE AND	§	OF
NECESSITY NO. 20319	§	
(APPLICATION NO. 37037-C)	§	ADMINISTRATIVE HEARINGS

Exhibit Tyler-12

Tyler Resolution
R-2011-6

RESOLUTION NO. R-2011-6

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS ORDERING TALL TIMBERS UTILITY COMPANY, INCORPORATED (TTUC) TO IDENTIFY AND SUBMIT WITHIN A SPECIFIED TIME CERTAIN INFORMATION ON "CAPACITY FEES" ASSESSED BY TTUC AS A CONDITION OF EXTENDING SERVICE WITHIN THE CITY; ORDERING TTUC TO REFUND OR CREDIT ALL ACCOUNTS CHARGED "CAPACITY FEES"; ORDERING TTUC TO SUBMIT WITHIN A SPECIFIED TIME TO THE DIRECTOR OF UTILITIES A SCHEDULE FOR REFUNDING OR CREDITING "CAPACITY FEES" OVERCHARGES; AND REQUIRING DELIVERY OF THIS RESOLUTION TO TTUC.

WHEREAS, Tall Timbers Utility Company, Inc. (TTUC) provides retail sewer utility service within part of the City of Tyler, and pursuant to state law, TTUC has filed a tariff with the City of Tyler specifying the rates, terms and conditions on which TTUC will provide and extend sewer utility service inside TTUC's certificated service area located inside the City of Tyler; and

WHEREAS, the City of Tyler is the regulatory authority having a statutory duty to review, approve, interpret and enforce retail sewer utility tariffs within its municipal boundaries, including regulatory authority over TTUC; and,

WHEREAS, TTUC has charged developers and others a "capacity fee" as a condition of extending service to new developments inside the City of Tyler; and

WHEREAS, the City Council of the City of Tyler, in Resolution No. R-2009-27, found that the "capacity fee" charged by TTUC was not authorized because such fee had never been presented to the City Council for approval; and

WHEREAS, TTUC appealed the City of Tyler's finding in Resolution No. R-2009-27 to the Texas Commission on Environmental Quality (TCEQ) to obtain a ruling by TCEQ that its capacity fee was authorized by its approved tariff, but on September 7, 2010, TTUC withdrew its appeal, thereby conclusively acknowledging that the "capacity fee" is not authorized by its tariff; and

WHEREAS, the City of Tyler is concerned that TTUC charged a "capacity fee" as a condition of extending service to other developments within the City of Tyler, including charging "capacity fees" of \$550 and \$1,000 per connection;

WHEREAS, the Director of Utilities and Public Works (Director) has requested information regarding the "capacity fees" charged to developers within the City of Tyler, but TTUC has refused to provide the requested information;

WHEREAS, it is the obligation of the City of Tyler to determine whether the charges made by TTUC are authorized by TTUC's tariff and other law and to enforce compliance by TTUC with the tariff.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS, THAT:

PART 1: The City Council renews its finding from Resolution No. R-2009-27 that TTUC is not authorized by its tariff to charge a predetermined "capacity fee" as a condition of extending service to new developments. Specifically, TTUC is not authorized to charge a predetermined "capacity fee" of either \$550 or \$1,000 per connection, as a condition of extending service to new subdivisions inside the City of Tyler.

PART 2: The City Council orders TTUC to identify all "capacity fees" assessed after November 13, 2002, as a condition of extending service within the City of Tyler. TTUC shall submit documentation to the Director showing the total amount paid to TTUC as "capacity fees," the per connection amount of the "capacity fee," and the date the fees were paid to TTUC for each subdivision for which "capacity fees" were assessed. TTUC shall provide this information to the Director within 30 days of the adoption of this resolution.

PART 3: The City Council orders TTUC to refund all unauthorized and unlawfully charged "capacity fees" by crediting each account associated with a connection for which a "capacity fee" was paid the amount of the "capacity fee." If a "capacity fee" was paid for a connection that is not currently in service, the amount of the "capacity fee" shall be credited to the account once service is connected or reconnected to the lot. TTUC shall submit to the Director a plan for crediting these accounts within 45 days after the adoption of this resolution and shall credit these accounts within 60 days after the adoption of this resolution, unless a later deadline is allowed by the Director.

PART 4: Failure by TTUC to provide the documentation required by Part 2 of this resolution or to refund "capacity fees" as required by Part 3 of this resolution shall be considered a violation of Articles 15-3 and 15-4 of the Code of Ordinances, City of Tyler, Texas, the Charter of the City of Tyler, and a failure to provide continuous and adequate service. Each day after the specified compliance date shall be considered a separate violation until TTUC comes into compliance.

PART 5: Copies of this Resolution shall be sent to TTUC.

PART 6: That this Resolution shall take effect immediately upon its adoption.

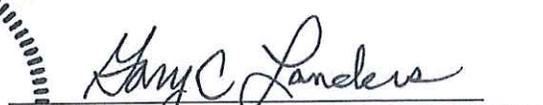
PASSED AND APPROVED this 26th day of January, 2011.


BARBARA BASS, MAYOR OF
THE CITY OF TYLER, TEXAS

ATTEST:


CASSANDRA BRAGER, CITY CLERK

APPROVED:


GARY C. LANDERS, CITY ATTORNEY



Attachment C

Tall Timbers' Admissions

(Exhibit Tyler-13)

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION OF THE CITY OF
TYLER TO AMEND CERTIFICATE
OF CONVENIENCE AND
NECESSITY NO. 20319
(APPLICATION NO. 37037-C)

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

Exhibit Tyler-13

Tall Timbers'
Responses to Discovery

SOAH DOCKET NO. 582-12-3195
TCEQ DOCKET NO. 2011-1684-UCR

APPLICATION BY THE CITY OF § BEFORE THE STATE OFFICE
TYLER TO AMEND CERTIFICATE §
OF CONVENIENCE AND §
NECESSITY NO. 20319, § OF
APPLICATION NO. 37037-C IN §
SMITH COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

TALL TIMBERS UTILITY COMPANY'S
RESPONSE TO CITY OF TYLER'S FIRST SET
OF DISCOVERY REQUESTS

TO: The City of Tyler, by and through its attorney of record, Mr. Joe Freeland,
Mathews and Freeland, LLP, PO Box 1568, Austin, Texas 78765-1568.

Tall Timbers Utility Company (TTUC) provides the following responses to Applicant's requests for Information under Tex. R. Civ. P. 194, 196, 197 and 198 for the application by the City of Tyler for an amendment to CCN No. 37037-C in Smith County, Texas.

RESPONSE: Not applicable to sewer utility certification

(h) any settlement agreements described in Rule 192.3(g);

RESPONSE: Not applicable to sewer utility certification

(i) any witness statements described in Rule 192.3(h);

RESPONSE: None. Will be prepared in the future and submitted as prefiled testimony.

RESPONSE TO REQUESTS FOR ADMISSIONS

RFA1-1 Admit or deny: TPDES Permit No. WQ0013000001, as issued on December 29, 2006, required Tall Timbers to enlarge the chlorine contact chamber at the plant within 18 months after issuance of the permit.

Admit.

RFA1-2 Admit or deny: Tall Timbers did not notify TCEQ by July 1, 2008, of the completion of the expansion of the chlorine contact chamber at Tall Timbers' wastewater treatment plant operating under TPDES Permit No. WQ0013000001.

Admit.

RFA1-3 Admit or deny: Tall Timbers did not expand the chlorine contact chamber at the wastewater treatment plant operating under TPDES Permit No. WQ0013000001 between December 29, 2006, and August 1, 2011.

Admit – currently underway.

RFA1-4 Admit or deny: Within 60 days of December 29, 2006, Tall Timbers did not submit to the TCEQ Wastewater Permits Section either a copy of the approval letter from TCEQ for the nuisance odor prevention request for the wastewater treatment plant operating under TPDES Permit No. WQ0013000001 or a nuisance odor prevention request as required by Other Requirements No. 4 on page 23 of TPDES Permit No. WQ0013000001.

Admit.

RFA1-5 Admit or deny: Treatment plant units, as described in 30 TAC 309.13 located at the wastewater treatment plant operating under TPDES Permit

No. WQ0013000001 are located closer than 150 feet to the nearest property line.

Admit.

RFA1-6 Admit or deny: Tall Timbers has never submitted a nuisance odor prevention request, as that term is used in 30 TAC 309.13(e)(2), for the wastewater treatment plant operating under TPDES Permit No. WQ0013000001.

Deny.

RFA1-7 Admit or deny: Tall Timbers is not in compliance with the requirements of 30 TAC 309.13(e) at the wastewater treatment plant operating under TPDES Permit No. WQ0013000001.

Admit.

RFA1-8 Admit or deny: The maximum as-built capacity of Tall Timbers' wastewater treatment plan operating under TPDES Permit No. WQ0013000001 is no greater than 0.312 million gallons per day.

Admit. Currently expanding to the permitted 0.445 in a phased plan approved by TCEQ.

RFA1-9 Admit or deny: Tall Timbers did not file an application to renew or amend TPDES Permit No. WP0013000001 at least 180 days prior to August 1, 2011.

Admit. Discussions with TCEQ on phased expansion and 75/90 waiver in progress.

RFA1-10 Admit or deny: Tall Timbers demanded of Cumberland Place Apartments a developer capacity fee charge of \$149,968.

Admit. On 206 apartments with a number of members service structures.

RFA1-11 Admit or deny: Cumberland Place Apartments paid Tall Timbers \$149,968 as a developer capacity fee.

Admit.

RFA1-12 Admit or deny: Tall Timbers did not identify any capacity fee payments as required by Tyler Resolution \$-2011-6.

Response: Deny. Tall Timbers identified the portions of its tariff permitting capacity charges and demonstrated how it calculated them. The remainder of Tyler's ordinance is invalid and unenforceable.

RFA1-13 Admit or deny: Tall Timbers has not refunded the capacity fee charge paid by Cumberland Place Apartments as required by Tyler Resolution R-2011-6.

Admit. Tyler's ordinance is invalid and unenforceable.

RFA-14 Admit or deny. Tall Timbers demanded capacity fee charges from the developer of Elk River Addition Unit 1 at Cumberland Gap and Harpers Ridge Addition Unit 3 at Cumberland Gap subdivisions.

Admit.

RFA-15 Admit or deny: Tall Timbers did not comply with Ordering Provision No. 4 of the final order of the TCEQ Commissioners in SOAH Docket No. 582-03-2283/TCEQ Docket No. 2003-0153-UCR, which ordered Tall Timbers to refund over-collections.

Deny.

RFA-16 Admit or deny: Tall Timbers did not submit its "Development Guide" to the City of Tyler for approval.

Deny.

RFA-17 Admit or deny: Tall Timbers did not submit its "Development Guide" to the TCEQ for approval.

Admit. Tall Timbers is not under any legal obligation to submit such a "Guide" to the TCEQ. Tall Timbers operates under a TCEQ-approved tariff.

RFA-18 Admit or deny: Tall Timbers has not recorded in the real property records of Smith County Texas a certified copy of the map of its certificate of convenience and necessity as required by Texas Water Code §13.275(r).

Deny.

RFA-19 Admit or deny: Tall Timbers has retained customer deposits paid by customers located inside the City of Tyler for longer than 18 months.

Deny. Tyler was given documentation on this Nov. 22, 2011.

Attachment D

**ED Order on S&T Development's
Petition for Expedited Decertification**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



APPLICATION NO. 37494-C

PETITION FROM S & T	§	BEFORE THE TEXAS
DEVELOPMENT, LTD. FOR AN	§	COMMISSION ON
EXPEDITED RELEASE FROM TALL	§	ENVIRONMENTAL QUALITY
TIMBERS UTILITY COMPANY, INC.	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 20694 IN	§	
SMITH COUNTY, TEXAS	§	

ORDER

On **January 28, 2013**, the Executive Director of the Texas Commission on Environmental Quality, pursuant to Texas Water Code Chapters 5 and 13, considered the petition of S & T Development, LTD. (Petitioner) for expedited release from sewer Certificate of Convenience and Necessity (CCN) No. 20694, held by Tall Timbers Utility Company, Inc., in Smith County, Texas.

The requirements of Texas Water Code Section 13.254(a-5) were considered and the Petitioner satisfied all criteria for release from the CCN pursuant to that section.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The petition submitted by S & T Development, LTD. for expedited release from sewer CCN No. 20694 held by Tall Timbers Utility Company, Inc., as reflected in the attached copy of the official sewer service area map for Smith County, Texas, is hereby approved.

2. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order and the attached map to the Petitioner and CCN holder.
3. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issue Date: **January 28, 2013**

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY



For the Commission



Texas Commission on Environmental Quality

By These Presents Be It Known To All That

Tall Timbers Utility Company, Inc.

having duly applied for certification to provide sewer utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service by this Applicant, is entitled to and is hereby granted this

Certificate of Convenience and Necessity No. 20694

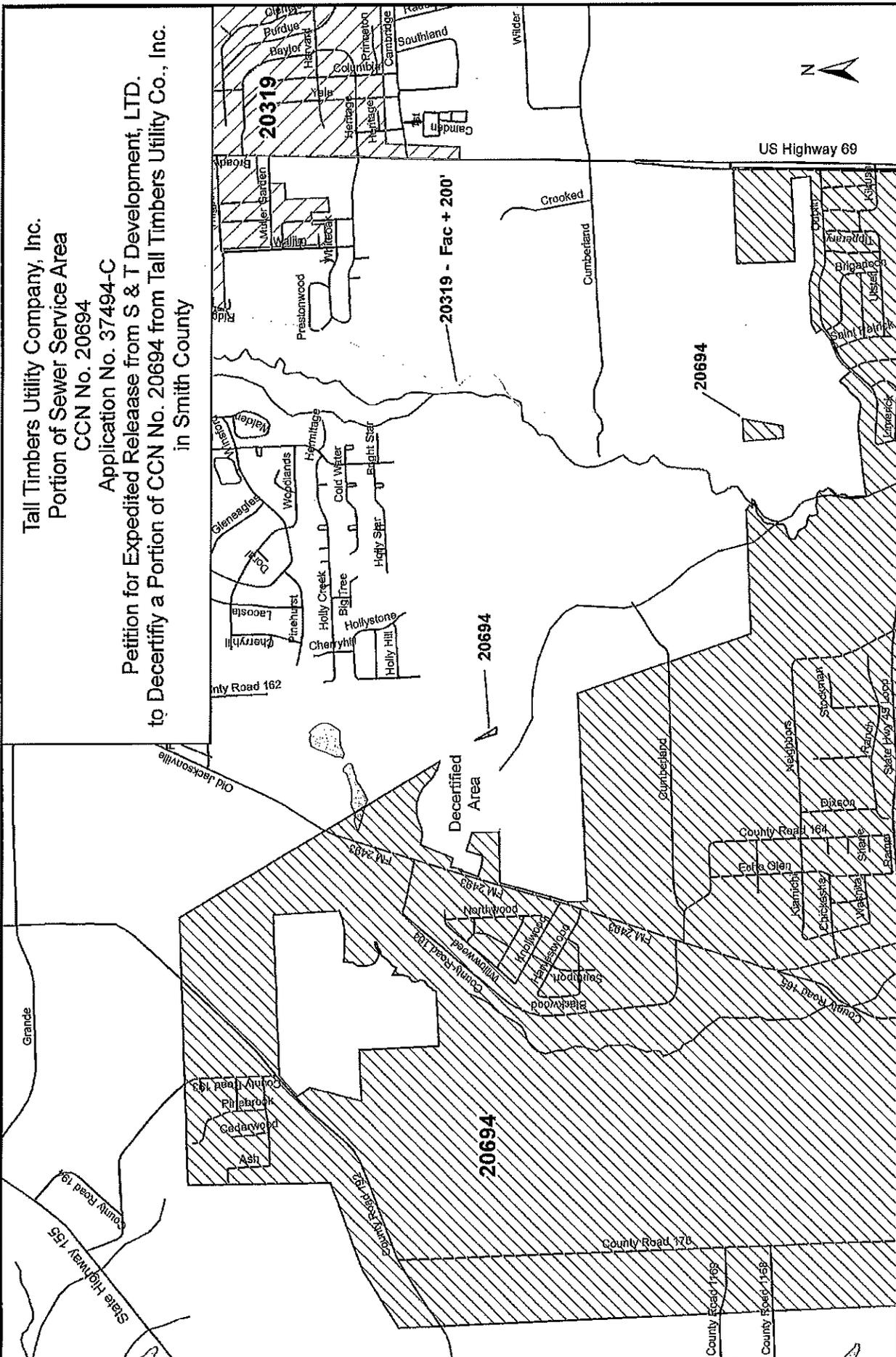
to provide continuous and adequate sewer utility service to that service area or those service areas in Smith County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Application No. 37494-C are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of Tall Timbers Utility Company, Inc., to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Issued at Austin, Texas, this **January 28, 2013**


For the Commission

Tall Timbers Utility Company, Inc.
 Portion of Sewer Service Area
 CCN No. 20694

Application No. 37494-C
 Petition for Expedited Release from S & T Development, LTD.
 to Decertify a Portion of CCN No. 20694 from Tall Timbers Utility Co., Inc.
 in Smith County



- Sewer CCN Service Areas**
-  20694 - Tall Timbers Utility Co Inc
 -  20319 - City of Tyler
 -  20319 - City of Tyler (Fac. + 200')

Decertified Area

