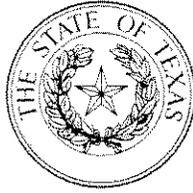


# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

January 11, 2013

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

Re: SOAH Docket No. 582-12-3195; TCEQ Docket No. 2011-1684-UCR; In the Matter of the Application by the City of Tyler to Obtain Dual Certification with a Portion of CCN No. 20694 and to Amend CCN No. 20319

Dear Mr. Trobman:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **January 31, 2013**. Any replies to exceptions or briefs must be filed in the same manner no later than **February 11, 2013**.

This matter has been designated **TCEQ Docket No. 2011-1684-UCR; SOAH Docket No. 582-12-3195**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Roy G. Scudday".

Roy G. Scudday  
Administrative Law Judge

RGS/ap  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** CITY OF TYLER

**SOAH DOCKET NUMBER:** 582-12-3195

**REFERRING AGENCY CASE:** 2011-1684-UCR

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ ROY SCUDDAY**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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TALL TIMBERS UTILITY COMPANY, INC.

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CITY OF TYLER

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OFFICE OF PUBLIC INTEREST COUNSEL

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

<b>IN THE MATTER OF THE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>APPLICATION BY THE CITY OF</b>	§	
<b>TYLER TO OBTAIN DUAL</b>	§	<b>OF</b>
<b>CERTIFICATION WITH A PORTION</b>	§	
<b>OF CCN NO. 20694 AND TO AMEND</b>	§	
<b>CCN NO. 20319</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The City of Tyler (City) has applied to the Texas Commission on Environmental Quality (TCEQ or Commission) to amend Certificate of Convenience and Necessity (CCN) No. 20319 to add geographic territory located within its corporate boundaries. Tall Timbers Utility Company (TTUC) protested City's Application.

The Administrative Law Judge (ALJ) recommends that the Commission grant in part and deny in part City's application.

**II. PARTIES**

The following are the Parties in this case:

PARTY	REPRESENTATIVE
City	Joe Freeland
Executive Director (ED)	James Aldredge
Office of Public Interest Counsel (OPIC)	James Murphy
TTUC	Mark Zeppa

### III. JURISDICTION

No party disputes either the Commission's or the State Office of Administrative Hearings' (SOAH) jurisdiction. The attached Proposed Order contains the necessary findings and conclusions concerning jurisdiction.

### IV. PROCEDURAL HISTORY

The application seeks to amend City's CCN in order to provide retail sewer utility service to areas located inside the City's corporate boundaries, some of which areas are currently within the boundaries of TTUC's CCN No. 20694. City filed its application on May 6, 2011. The ED determined the application to be administratively complete on June 14, 2011. City proceeded to publish the requisite notices.

On October 17, 2011, the Commission referred the case for a contested case hearing.

A preliminary hearing was conducted on January 30, 2012, at which time parties were designated and a schedule was adopted. The hearing on the merits was conducted in Austin, Texas, on September 17-18, 2012, by ALJ Roy G. Scudday. The record closed on November 29, 2012, upon filing of a transcript and the parties' briefs.

### V. APPLICABLE LAW

The Texas Water Code and the Commission's rules specifically provide the standards for amending a CCN when a municipality is seeking certification for an area within the boundaries of a certificated retail public utility. Tex. Water Code (Code) § 13.247(a) provides as follows:

If an area is within the boundaries of a municipality, all retail public utilities certified or entitled to certification under this chapter to provide service or operate facilities in that area may continue and extend service in its area of public convenience and necessity within the area pursuant to the rights granted by its certificate and this chapter, unless the municipality exercises its power of eminent domain to acquire the property of the retail public utility under Subsection (d).

Except as provided by Section 13.255, a municipally owned or operated utility may not provide retail water and sewer utility service within the area certificated to another retail public utility without first having obtained from the commission a certificate of public convenience and necessity that includes the areas to be served.

Code § 13.246(b) and (c) provide:

(b) The commission may grant applications and issue certificates and amendments to certificates only if the commission finds that a certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue a certificate or amendment as requested, or refuse to issue it, or issue it for the construction of only a portion of the contemplated system or facility or extension, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.

(c) Certificates of public convenience and necessity and amendments to certificates shall be granted on a nondiscriminatory basis after consideration by the commission of:

- (1) the adequacy of service currently provided to the requested area;
- (2) the need for additional service in the requested area, including whether any landowners, prospective landowners, tenants, or residents have requested service;
- (3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area;
- (4) the ability of the applicant to provide adequate service, including meeting the standards of the commission, taking into consideration the current and projected density and land use of the area;
- (5) the feasibility of obtaining service from an adjacent retail public utility;
- (6) the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
- (7) environmental integrity;
- (8) the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and
- (9) the effect on the land to be included in the certificated area.

Moreover, Code § 13.241 provides:

(a) In determining whether to grant or amend a certificate of public convenience and necessity, the commission shall ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.

(c) For sewer utility service, the commission shall ensure that the applicant is capable of meeting the commission's design criteria for sewer treatment plants and the requirements of this code.

Largely paraphrasing the factors set forth in Code §§ 13.241 and 13.246 quoted above, 30 Tex. Admin. Code (TAC) § 291.102(d) sets out the factors to consider when deciding whether to amend a certificate:

- Whether service in the requested area is inadequate – 30 TAC § 291.102(d)(1)
- Whether there is a need for service in the requested area – 30 TAC § 291.102(d)(2)
- The effect of granting the CCN on the recipient, landowners, and other retail public utilities – 30 TAC § 291.102(d)(3)
- Ability of the applicants to provide adequate service – 30 TAC § 291.102(d)(4)
- Feasibility of obtaining service from an adjacent retail public utility – 30 TAC § 291.102(d)(5)
- Financial ability of the applicants to pay for the facilities necessary to provide continuous and adequate service – 30 TAC § 291.102(d)(6)
- Environmental integrity – 30 TAC § 291.102(d)(7)
- Probable improvement of service or lowering of cost to consumers in the requested area – 30 TAC § 291.102(d)(8)
- Effect on land in the requested area – 30 TAC § 291.102(d)(9)
- Whether the CCN is necessary for the service, accommodation, convenience, or safety of the public – 30 TAC § 291.102(c)

Each of these factors set out in the Code and the rules is addressed separately below, including the parties' arguments.

## VI. DISCUSSION OF FACTORS FOR CONSIDERATION

### A. Description of the Requested Area and the Two Systems

Before addressing the statutory factors, it is important to briefly describe the proposed utility service area (the Requested Area).

City seeks dual certification of all the area currently served by TTUC within City's boundaries.<sup>1</sup> Subsequent to City's filing of its application, Areas 2-4 of TTUC's CCN were decertificated and removed from TTUC's CCN area. These decertificated tracts comprise a total of about 525 acres located throughout the Requested Area. Area 2 is composed of property owned by Sandra C. Taylor and Sandra Crank Taylor Special Marital Trust. Area 3 is composed of property owned by City. Area 4 is composed of property owned by Werner, Taylor, Werner, LLC. TTUC does not oppose these decertificated areas being added to City's CCN. In addition, Area 1, including The Crossing subdivision and surrounding area, has been receiving retail sewer service from City since 2007. TTUC does not oppose Area 1 being added to City's CCN.

The remainder of the Requested Area consists of five separate sections within TTUC's CCN. Area 5 includes areas actually served by TTUC, the Irish Meadows and Cumberland Gap subdivisions. Areas 6 and 7 are currently owned by S&T Development and include the undeveloped part of the Oak Hollow Development. Area 8 includes area adjacent to the Cumberland Gap development. Area 9 includes areas situated generally to the south of Cumberland Gap and Irish Meadows. Areas 6-9 are not currently receiving actual sewer service from any provider.

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<sup>1</sup> City Ex. 41.

**B. Adequacy of Service Currently Provided in the Requested Area – 30 TAC § 291.102(d)(1)**

**1. Area 5**

TTUC currently provides retail sewer service within this area to over 100 houses, out of a total of 300 platted residential lots, as well as to a school and to at least one multi-unit apartment complex.<sup>2</sup> City asserts that TTUC's service in this area is inadequate for the following reasons:

- TTUC lacks sufficient treatment and collection capacity to serve its existing customers, much less new customers;
- TTUC is not properly operating and maintaining its sewer system;
- TTUC has overcharged its customers in violation of its tariffs and City orders;
- TTUC has charged unlawful capacity charges to developers;
- TTUC refused to extend service to customers in the area pursuant to its tariff, causing delays and economic harm to homeowner, builders, and developers.

**a. Lack of Sufficient Treatment Facilities**

TTUC is currently permitted to discharge 0.445 million gallons per day (MGD) from its sewage treatment plant. However, TTUC has admitted that, as currently constructed, the plant's actual capacity is 0.312 MGD.<sup>3</sup> Based on the testimony of Walter F. (Tracy) Hicks, a professional engineer who has been involved in planning and development of City's wastewater system for 28 years, City argues that such a level of treatment capacity is insufficient to meet the minimum levels of capacity needed to serve TTUC's existing customers. Mr. Hicks pointed to the fact that TTUC's failure to expand the chlorine contact chamber in the plant limited its capacity to the 0.312 MGD limit, and that this failure prevents TTUC from adequately treating its existing flows. Mr. Hicks contends that TTUC has exceeded the capacity limit beginning as

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<sup>2</sup> Transcript (Tr.) at 101-102.

<sup>3</sup> City Ex. 29.

early as July 2007, and that, based on his calculations, the existing number of connections in TTUC's CCN requires a capacity of at least 0.632 MGD.<sup>4</sup>

In response to Mr. Hicks' testimony, Joe Wilkins, senior business manager for Liberty Utilities (LU), the parent company of TTUC, testified that the current average daily flow at the plant is around 0.300 MGD, which is within the current capacity limitations. He further testified that TTUC plans to expand the capacity of the plant's clarifiers to its permitted level, but did not give any indication when that expansion would be accomplished.<sup>5</sup> Gregory Sorenson, Vice President and General Manager of LU, testified that the expansion is scheduled to come on line in approximately twelve months.<sup>6</sup>

The ED argues that whether TTUC lacks capacity and has adequately planned for future growth are irrelevant to the determination whether current service is adequate. He argues that because TTUC has not even reached seventy-five percent of its permitted discharge capacity, it is currently able to adequately provide continuous service, citing the factors in the Rule at 30 TAC § 291.94 including sufficiency of service, sufficiency of treatment, and maintenance of the facilities. Brian David Dickey, an Engineering Specialist employed by TCEQ, testified that the current service in Area 5 "appears adequate." As for the sufficiency of treatment and maintenance of the facilities, those factors will be discussed as part of the next factor to be considered.

**b. Proper Operation and Maintenance of the Sewer System**

City asserts that TTUC has failed to properly operate and maintain its sewer collection and treatment system by failing to expand its chlorine contact chamber within eighteen months of permit issuance, failing to comply with the buffer zone requirements since at least 2006, exceeding its permitted effluent limits, failing to initiate engineering planning to expand the

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<sup>4</sup> City Ex. 2 at 5-8.

<sup>5</sup> Tr. at 214-219.

<sup>6</sup> TTUC Ex. 1 at 17.

treatment plant to meet existing demand requirements, and discharging sludge into a receiving stream in the Fall of 2011.

City points out that TTUC admitted that it did not expand the chlorine contact chamber as required by TCEQ, and that such expansion is only now underway.<sup>7</sup> Mr. Hicks testified that this compliance failure is “a clear indication of Tall Timbers’ failure to properly operate and maintain its treatment plant.”<sup>8</sup> In regard to the buffer zone, City points out that TTUCs’ permit requires a buffer zone of at least 150 feet between any treatment unit and the nearest property line, and that TTUC is not in compliance with that requirement.<sup>9</sup>

Mr. Hicks further testified that, based on TTUC’s reports, the treatment plant has exceeded the NH<sub>3</sub>, or ammonia, effluent requirement at least nine times since January 2009.<sup>10</sup> In response to an Agreed Order adopted by TCEQ on June 22, 2011, TTUC reported in November 2011, that these excursions were due to continued air system piping leaks and it was currently in the process of replacing all the air piping.<sup>11</sup>

In regard to the alleged failure to initiate engineering planning to expand the treatment plant to meet existing demand requirements, City asserts that TTUC should have initiated such planning in September 2007 and should have sought authorization to expand the plant by February 2010. This assertion is based on the testimony of Mr. Hicks that TTUC’s plant flows routinely exceeded 0.234 MGD for three consecutive months beginning in July 2007, which he asserted meant that it had reached the seventy-five percent threshold and should have initiated engineering planning at that time. Mr. Hicks also testified that the plant exceeded ninety percent of its as-built capacity, or 0.281 MGD for three consecutive months starting in December 2009, and TTUC should have then sought a permit amendment for an expansion.<sup>12</sup>

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<sup>7</sup> City Ex. 13 at 4.

<sup>8</sup> City Ex. 2 at 12.

<sup>9</sup> City Ex. 13 at 4-5.

<sup>10</sup> City Ex. 2 at 11.

<sup>11</sup> City Exs. 17 and 18.

<sup>12</sup> City Ex. 2 at 10.

Finally, City points to an incident that occurred in the fall of 2011, when TTUC allegedly discharged sludge into a receiving stream. The ED's investigation determined that TTUC was not properly operating its plant at the time of the discharge and that it did not timely commence clean-up activities or fully remove sludge from the creek.<sup>13</sup>

Mr. Wilkins testified that the permit compliance problems are being addressed by the current expansion of the chlorine contact chamber and the proposed expansion of the clarifiers. He stated that the air piping work was completed in June or July of 2012.<sup>14</sup> He further testified that TTUC's current design engineer disagrees that the plant fails to comply with the buffer zone requirements, and that several technologies will enable expansion in the future.<sup>15</sup>

Mr. Sorenson responded that TTUC has engaged outside engineers to design, permit, and construct capacity additions, although he admitted that TTUC had not given the ED written notice in accordance with the seventy-five- and ninety-percent thresholds. He stated that part of the reason for this failure is that the continuing controversy between the City and TTUC has dissuaded TTUC from making major capital investments in a plant expansion that would have to be scrapped if City prevails in obtaining the CCN amendment at issue in this case. As for the sludge discharge, Mr. Sorenson stated that settlement negotiations with the ED regarding this allegation are ongoing.

The ED asserts that the failure to properly operate and maintain its wastewater treatment system is not dispositive of whether TTUC is currently failing to provide continuous and adequate services to the area. Relying on the testimony of Mr. Wilkins, the ED asserts that it "has not found that any potential or alleged failure to properly maintain its facilities has resulted in an actual failure to provide service to any of its customers," suggesting that the ability of the plant to continue to receive wastewater is the primary consideration in determining adequacy of service.

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<sup>13</sup> City Ex. 36.

<sup>14</sup> Tr. at 266.

<sup>15</sup> TTUC Ex. 2 at 5.

**c. Overcharge of Customers**

City asserts that TTUC has violated its tariff and valid orders of City by charging its customers that live within the city limits rates applicable to customers living outside the city limits. Gregory Morgan, Managing Director of the Utilities and Public Works Division of City, testified that he was contacted in 2009 by a TTUC customer seeking service within the city limits about rates quoted to her by TTUC. Based on that contact, Mr. Morgan requested that TTUC provide a list of all TTUC customers with service location addresses and documentation of the rates charged to each customer since 2002 or the date of connection. Mr. Morgan stated that on September 4, 2009, he received a letter from TTUC's attorney purportedly containing a list of inside-the-city customers and a summary of the rates they had been charged. He further testified that he is of the opinion that TTUC was still overcharging customers within the city limits in 2011 and 2012, and that he has not received documentation that TTUC has fully refunded the overcharges.<sup>16</sup>

City argues that the fact that TTUC is not complying with City's orders relating to service of customers within the city limits is sufficient evidence to conclude that TTUC is not providing adequate service. Mr. Sorenson testified that the overcharges were corrected.<sup>17</sup> Both TTUC and the ED take the position that the inadvertent overcharging of customers is not relevant to whether service being provided is adequate.

**d. Charging Unlawful Capacity Charges to Developers**

City asserts that TTUC has charged service extension fees or capacity charges that are not authorized by its tariff. Mr. Morgan testified that in his 2009 conversation with the same TTUC customer seeking service within the city limits he discovered that TTUC was in a dispute with developers relating to these extension fees. He stated that he discovered that TTUC was charging a \$1,000 per connection extension fee to developers both inside and outside the city, which fees were not authorized by its tariff (although they are provided for in TTUC's

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<sup>16</sup> City Ex. 1 at 21-23.

<sup>17</sup> Tr. at 127-133.

Development Guide). Mr. Morgan further testified that on April 1, 2011, he received a letter from TTUC's attorney stating that no capacity fees had been assessed inside City since 2002. However, in October 2011, TTUC's attorney provided a copy of a letter from TTUC to the Cumberland Place Apartments dated October 13, 2008, in which it demanded developer capacity fees in the amount of \$149,968, which fees were paid.<sup>18</sup>

As in the prior discussion, City argues that the fact that TTUC is not complying with its tariff by charging capacity charges to developers within the city limits is sufficient evidence to conclude that TTUC is not providing adequate service.

Mr. Wilkins testified that he was aware that the Cumberland Place Apartments were charged the capacity fee, but, at the time, thought that the apartments were located outside of City. He stated that he was not aware if a refund of the fee has been made.<sup>19</sup> Again, both TTUC and the ED take the position that the charging of capacity fees to developers within the city is not relevant to whether the service being provided is adequate. (It should be noted that the question of whether City must approve TTUC's Development Guide has been and continues to be a source of contention between the parties.)

**e. Refusing to Extend Service to Customers in the Area**

City argues that TTUC has a history of mistreating developers in the Requested Area. City specifically points to the dealings between TTUC and Geaux Corporation (GC) regarding the development of the Cumberland Gap Subdivision and a number of adjacent subdivisions developed by GC.

Rea Boudreaux is the Vice President and Principal in the C. T. Brannon Corporation, a consulting engineering firm. He testified that he had been involved in the design and construction of the sewer systems for those subdivisions. Mr. Boudreaux testified that in May 2008, TTUC began to demand that GC enter into a line extension agreement (LXA) before

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<sup>18</sup> City Ex. 1 at 14-20.

<sup>19</sup> Tr. at 242-245.

TTUC would approve plans and allow construction to occur, even though collection systems in some of the subdivisions had already been accepted without such an agreement. At the same time TTUC demanded that GC pay capacity fees before beginning construction. Thinking it had already obtained approval, Mr. Boudreaux testified that GC began selling lots to builders in the new subdivisions and houses were built on those lots. He stated that, beginning in April 2009, TTUC refused to connect the newly constructed homes to its system until the collection systems met TTUC requirements and the payment of the \$1,000 per connection capacity fee. He stated that the delays caused by the dispute cost GC a significant amount of money and forced it to sell most of the project.<sup>20</sup>

On cross-examination, Mr. Boudreaux admitted that only a lift station and outfalls had been approved, not the entire collection system. He further stated that GC never signed an LXA. Mr. Boudreaux testified that because of the disagreement between TTUC and GC, two homes could not be occupied and City placed a moratorium on new home construction, but the service was later provided by TTUC. He also testified that he was not aware of any property formerly owned by GC that TTUC has refused to service.<sup>21</sup>

Based on the position of the ED and the testimony of Mr. Wilkins and Mr. Sorenson, the ALJ finds that TTUC is currently providing adequate service to Area 5.

## **2. Areas 6-9**

Inasmuch as there is currently no service in these areas, adequacy of current service is not at issue.

### **C. Need for Service in the Requested Area – 30 TAC § 291.102(d)(2)**

City argues that TTUC lacks capacity to extend service to unserved areas and has demonstrated its intention not to serve those areas unless it charges unauthorized extension fees

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<sup>20</sup> City Ex. 3 at 4-10.

<sup>21</sup> Tr. at 91-104.

and imposes other conditions on the developers of those areas, even though they are targeted for development in the near term by City.

Mr. Boudreaux testified that the current owner of the former GC property does not want to take the risk of running into the same problems encountered by GC.<sup>22</sup> Mr. Morgan testified that Steve Thornton, the developer of the proposed Oak Hollow Subdivision in Areas 6 and 7, had requested that City provide it sewer service, and that the owners of the Fair Property in Area 8 had also approached City for service.<sup>23</sup>

Mr. Sorenson testified that TTUC is currently undergoing an expansion that will allow it to prudently grow its treatment capacity to meet its current increase in demand as well as provide headroom for growth. He stated that TTUC stands ready to meet any need that may arise.<sup>24</sup>

Mr. Dickey testified that, based on information provided by Mr. Morgan, there was no need for additional service from City in Areas 8 or 9 at this time. He further stated that, in his opinion, there is currently no need for additional service in Areas 5, 6, and 7.

Based on the testimony, while there will be a need for service in the future, the ALJ finds that there is no current need for service in Areas 5-9.

**D. The Effect of Granting the CCN Amendment on the Recipient, Landowners, and Other Retail Public Utilities – 30 TAC § 291.102(d)(3)**

City asserts that granting the CCN for the Requested Area would have a beneficial effect on it because doing so will allow development to increase in the area, give City the opportunity to better implement its Comprehensive Municipal Plan, and provide uniform service and benefits to its citizens. TTUC argues that if City provided service to Area 5, it would need to install collection system infrastructure that duplicates that already existing. The ED asserts that the City may immediately be required to extend such service systems to Area 5, but that there would

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<sup>22</sup> Tr. at 106-107.

<sup>23</sup> Tr. at 34, 65-66.

<sup>24</sup> TTUC Ex. 1, at 17-18.

be no immediate effect for the other areas of the Requested Area because those areas are undeveloped.

City argues that granting the CCN amendment for the Requested Area will benefit landowners by allowing them to secure service from it as opposed to TTUC. The ED agrees that landowners would have a choice for obtaining retail sewer service.

City argues that granting the CCN amendment for the Requested Area will actually benefit TTUC by reducing the pressure on it to immediately expand its treatment capacity. The ED asserts that granting the CCN for Area 5 could result in significant adverse effects for TTUC by disrupting the reliability of TTUC's customer base and reducing its ability to generate capital, potentially resulting in an increase in rates to its existing customers. TTUC agrees with the ED on these points.

Based on the record, City would, the landowners could, and TTUC would not benefit from granting the CCN amendment for Areas 5-9.

**E. Ability of City to Provide Adequate Service – 30 TAC § 291.102(d)(4)**

The evidence established that City will extend service to Areas 5-9 in the same way that City extends service to other parts of its existing service area. Developers requesting service would be required to build the sewer collection system within the development and either connect that system to an existing sewer main or construct a new main to tie the collection system to the treatment plant. The cost of constructing new mains would be shared between the developer and City. City has existing collection facilities with available capacity immediately adjacent to Areas 5-9. City can easily extend service into these areas using its existing collection system.

None of the parties dispute that City has the ability to provide adequate service to the Requested Area.

**F. Feasibility of Obtaining Service from TTUC – 30 TAC § 291.102(d)(5)**

For the reasons set forth in the above discussion, City asserts that TTUC is not in a position to provide service to the Requested Area. City claims that TTUC lacks treatment capacity, has operational problems, is overcharging its customers, and has had problems with developers. In response, Mr. Sorenson testified that TTUC is currently servicing the Requested Area and will continue to do so in the future, with which position the ED agrees.

For the reasons discussed above, the ALJ finds that it is feasible for the Requested Area to obtain service from TTUC.

**G. Financial Ability of City to Pay for the Facilities Necessary to Provide Continuous and Adequate Service – 30 TAC § 291.102(d)(6)**

None of the parties dispute that City has the financial ability to pay for facilities necessary to provide continuous and adequate service to the Requested Area.

**H. Environmental Integrity – 30 TAC § 291.102(d)(7)**

City asserts that construction of new sewer collection systems in the Requested Area should not adversely affect environmental integrity because it would discourage the number of septic tanks and its development requirements would ensure that any construction associated with expanding infrastructure would be protective of environmental concerns.

TTUC argues that having two sewer systems in the same area will increase the likelihood of environmental problems. The ED asserts that extending service in Area 5 could disrupt service facilities already in place and result in an inadvertent introduction of wastewater into the environment.

Based on the record, the granting of the CCN amendment will not adversely affect the environmental integrity of the Requested Area. This is because, whether or not the amendment is granted, the eventual provision of sewer collection systems by either party would discourage

the number of septic tanks, and development requirements would ensure that any construction associated with expanding infrastructure would be protective of environmental concerns.

**I. Probable Improvement of Service or Lowering of Cost to Consumers in the Requested Area – 30 TAC § 291.102(d)(8)**

City argues that granting the CCN amendment would ensure that sufficient service capacity is available now and in the future, and that customer costs would be lower because its rates are lower and it does not charge additional line extension fees to developers. TTUC asserts that the need for duplicate collection systems will ultimately increase costs to customers. It points out that its rates to customers within the City are and would continue to be subject to its tariff. The ED argues that, because developers are not consumers, the effect on them is not relevant.

City has not shown that it would improve service to customers over that currently being provided by TTUC. Based on the record, there is insufficient evidence to conclude that the granting of the CCN amendment will lower the costs to consumers in the long run, because, although City service charges might be less than those of TTUC, the costs of duplicating existing facilities would most probably be passed on by City to those same customers in the form of taxes and other fees.

**J. Effect on Land in the Requested Area – 30 TAC § 291.102(d)(9)**

The parties agree that the granting of the CCN amendment will not have an effect on land in the Requested Area.

**K. Whether the CCN amendment is necessary for the service, accommodation, convenience, or safety of the public – 30 TAC § 291.102(c)**

Beyond that already discussed, no additional evidence was submitted on this issue.

## VII. ANALYSIS AND RECOMMENDATION

The factors that are at issue in this case are: 1) the adequacy of service currently provided to the Requested Area; 2) the need for additional service in the Requested Area; 3) the effect of granting an amendment on the landowners in the Requested Area and TTUC; and 4) probable improvement of service or lowering of cost to consumers in the Requested Area. City has failed to prove by a preponderance of the evidence that the service currently being provided by TTUC is inadequate or that the amendment would probably result in improved service or lower costs to consumers in the Requested Area. The evidence clearly establishes that granting the amendment would have an adverse effect on TTUC. While the evidence does establish that there is a future need for additional service in the Requested Area, there is no evidence that current needs are not being filled by TTUC. Instead, it has been shown that developers simply do not want to pay the capacity fees that TTUC charges. City has failed to prove by a preponderance of the evidence that TTUC is not able to fulfill the current needs or that by adding capacity to its treatment facility and extending collection systems it cannot provide service to future areas as needed.

Based on the evidence in the record, City has failed to show by a preponderance of the evidence that the amendment of the CCN for it to serve Areas 5-9 is necessary for the service, accommodation, convenience, or safety of the public. Accordingly, the ALJ recommends that City's application to amend its CCN to allow it to serve Areas 5-9 be denied. The ALJ further recommends that City's application to amend its CCN to add Areas 1-4, which is not contested, be granted.

SIGNED January 11, 2013.

  
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ROY G. SCUDDAY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Granting in Part And Denying in Part the Application by the City of Tyler to Obtain Dual Certification with a Portion of CCN No. 20694 and to Amend CCN No. 20319; TCEQ Docket No. 2011-1684-UCR; SOAH Docket No. 582-12-3195**

On \_\_\_\_\_, 2013, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application of the City of Tyler to amend Certificate of Convenience and Necessity (CCN) No. 20319 in Smith County, Texas.

Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a preliminary hearing on the application on January 30, 2012, and a contested case hearing on the merits of the application on September 17-18, 2012. ALJ Scudday prepared a proposal for decision (PFD), which recommended that the Commission approve in part and deny in part the application of the City of Tyler. The following parties were named and participated in this proceeding: the Executive Director (ED) of the Commission; the Office of Public Interest Counsel (OPIC); the City of Tyler (City); and Tall Timbers Utility Company (TTUC).

After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

**Procedural History**

1. City is a retail public utility holding Certificate of Convenience and Necessity (CCN) No. 20319 in Smith County, Texas.

2. City has applied to the Commission to amend its CCN No. 20319 to provide sewer service in Smith County, Texas.
3. City's application was filed on May 6, 2011, and deemed administratively complete on June 14, 2011.
4. Notice of the application was published in the *Tyler Morning Telegraph*, a newspaper of general circulation in Smith County, Texas, on June 27 and July 4, 2011.
5. Notice of the application was mailed by City on July 1 and July 7, 2011, to municipalities and neighboring utilities providing similar service within two miles of the area for which certification was sought, and to landowners in the requested area.
6. Notice of the public hearing on the application was mailed on December 27, 2011, by the Chief Clerk of the Commission to City and all interested parties.
7. A preliminary hearing was held on January 30, 2012. Designated as parties at the preliminary hearing were the ED, OPIC, City, and TTUC.
8. On August 7, 2012, the parties were given notice of the date, place, and time of the hearing on the merits.
9. The hearing on the merits was held on September 17-18, 2012. The record closed on November 29, 2012.

#### **Description of the Requested Area**

10. City seeks dual certification of all the area currently served by TTUC within City's boundaries in Smith County (Requested Area), including Areas 1-9 as set out below. TTUC holds CCN No. 20694, which included all the Requested Area at the time City's application was filed.
11. Area 1, including The Crossing subdivision and surrounding area, has been receiving retail sewer service from City since 2007. TTUC does not oppose this area being added to City's CCN.
12. Subsequent to City's filing of its application, portions of TTUC's CCN, referred to as Areas 2-4 in City's application, were decertificated and removed from TTUC's CCN area. Areas 2-4 include tracts comprising a total of about 525 acres located throughout the Requested Area.
13. Area 2 is composed of property owned by Sandra C. Taylor and Sandra Crank Taylor Special Marital Trust.
14. Area 3 is composed of property owned by City.

15. Area 4 is composed of property owned by Werner, Taylor, Werner, LLC.
16. No party opposes these decertificated areas being added to City's CCN.
17. The remainder of the Requested Area consists of five separate sections within TTUC's CCN.
18. Area 5 includes areas actually served by TTUC, the Irish Meadows and Cumberland Gap subdivisions.
19. Areas 6 and 7 are currently owned by S&T Development and include the undeveloped part of the Oak Hollow Development.
20. Area 8 includes area adjacent to the Cumberland Gap development.
21. Area 9 includes areas situated generally to the south of Cumberland Gap and Irish Meadows.

### **Description of City and its Facilities**

22. City is a home rule municipality that provides sewer service to more than 31,000 connections serving a population of 96,900.
23. City owns and operates two wastewater treatment plants. The Westside Wastewater Treatment Plant is currently authorized to discharge 13 million gallons per day (MGD) and the Southside Wastewater Treatment Plant is currently authorized to discharge 9.0 MGD. City currently treats and discharges a combined total of approximately 12.0 MGD at both treatment plants. City currently operates more than 609 miles of sewage collection system, including more than 99 miles of sewer mains of 10 inches or greater, four major sewage lift stations, and sixteen minor sewage lift stations.
24. City is currently providing service to Area 1 in the Requested Area through a 21-inch main that runs from the Lake Palestine Water Treatment Plant to the Southside Wastewater Treatment Plant. This main is adequate to provide service to the Crossing, once fully built out, as well as to Area 2 west of Old Jacksonville Highway (FM 2493), once fully built out.
25. City will extend service to the remainder of the Requested Area in the same way that City extends service to other parts of its existing service area. Developers requesting service would be required to build the sewer collection system within the development and either connect that system to an existing sewer main or construct a new main to tie the collection system to the treatment plant. The cost of constructing new mains would be shared between the developer and City.
26. City has existing collection facilities with available capacity immediately adjacent to Areas 5-9. City can easily extend service into these areas using its existing collection system.

### **Adequacy of Service in the Requested Area**

27. TTUC is currently providing service in only Area 5 of the Requested Area. No utility is currently providing service in Areas 6-9.
28. TTUC is currently permitted to discharge 0.445 MGD from its wastewater treatment plant. However, as currently constructed, the plant's actual capacity is 0.312 MGD.
29. The current average daily flow at the TTUC wastewater treatment plant is around 0.300 MGD, which is within the 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.
30. TTUC's wastewater treatment plant has exceeded the ammonia (NH<sub>3</sub>) effluent requirement at least nine times since January 2009. In November 2011, in response to an Agreed Order adopted by TCEQ on June 22, 2011, TTUC reported that these excursions were due to continued air system piping leaks and that it was currently in the process of replacing all the air piping, which repairs were completed by June or July 2012.
31. In the fall of 2011, TTUC allegedly discharged sludge into a receiving stream. The ED investigation determined that TTUC was not properly operating its plant at the time of the alleged discharge and that it did not timely commence clean-up activities or fully remove sludge from the creek. Settlement negotiations between TTUC and the ED regarding this allegation are ongoing.
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 City. These overcharges have been corrected.
33. On one occasion, TTUC charged capacity fees to Cumberland Place Apartments located within the city limits, which fees were not authorized under its tariff with City.
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 a \$1,000 per connection capacity fee, also provided for by that 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.

### **Need for Service in the Requested Area**

35. Although some developers have approached City requesting service in the future as well as expressing their desire to not have to work with TTUC, there does not appear to be a current need for service in Areas 6-9.
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 for growth. TTUC stands ready to meet any need that may arise in the future.

### **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.
38. If the CCN amendment is granted to City, there would be no immediate effect in Areas 6-9 because those areas are undeveloped.
39. If the CCN amendment is granted to City, landowners would have a choice of obtaining retail sewer service from either City or TTUC.
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 base, thereby reducing its ability to generate capital and potentially resulting in an increase in rates to its existing customers.

### **Ability of City to Provide Adequate Service**

41. City has the ability to provide adequate sewer service to the Requested Area.

### **The Feasibility of Obtaining Service from TTUC**

42. TTUC is currently servicing Area 5 and will continue to serve Areas 5-9 in the future.

### **Financial Ability of City to Pay for the Facilities Necessary to Provide Continuous and Adequate Service to the Requested Area.**

43. City has the financial ability to pay for facilities necessary to provide continuous and adequate service to the Requested Area.

### **Environmental Integrity**

44. The granting of the CCN amendment will not adversely affect the environmental integrity of the Requested Area.

### **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.

### **Effect on Land in the Requested Area**

46. The granting of the CCN amendment will not have an effect on land in the Requested Area.

## **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this case under Tex. Water Code (Code) Ch. 13.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code Ch. 2003.
3. City published notice and provided notice to neighboring utilities and affected parties, as well as all landowners in the requested area as required by Code § 13.246 and 30 Tex. Admin. Code (TAC) § 291.106.
4. Parties received proper and timely notice of the hearing. Tex. Gov't Code §§ 2001.051 and 2001.052.
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.
7. City's CCN amendment should be granted for Areas 1-4 of the Requested Area.
8. City's CCN amendment should be denied for Areas 5-9 of the Requested Area.

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

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 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, Texas, for Areas 5-9 of the Requested Area is DENIED.
4. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Tex. Gov't Code § 2001.144.
6. The Executive Director of the Texas Commission on Environmental Quality shall amend the official maps to reflect this decision.
7. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
8. 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:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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