

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Kingsgate Telephone, Inc. Petition for Waiver of the Definition of “Study Area” in the Appendix—Glossary of Part 36)	

PETITION

ETS Telephone Company, Inc. (“ETS”), by its attorney, pursuant to Section 1.3 of the Commission’s Rules and the Commission’s Memorandum Opinion and Order released on June 3, 2014,¹ respectfully requests a waiver, *nunc pro tunc*, of the definition of “Study Area” contained in Part 36, Appendix-Glossary of the Commission’s Rules, to permit ETS to continue to operate as an incumbent local exchange carrier throughout its existing study area that was created pursuant to an order of the Commission in 1996. ETS also seeks waiver of any Commission rule to the extent deemed necessary to permit ETS to continue to operate and receive high-cost support throughout its study area, subject to the generally-applicable reforms being implemented by the Commission. ETS files this petition without prejudice to its position that no waivers are necessary.

ETS was established in 1995 to deliver telecommunications services to previously unserved areas in southeastern Texas. Like a typical incumbent local exchange carrier, in every area that it serves, ETS constructed entirely new facilities to serve new, previously unserved communities, and was always the first telephone company to serve the area. In some areas, ETS

¹ *Federal-State Joint Board on Universal Service; Kingsgate Telephone, Inc. Petition for Waiver of the Definition of “Study Area” in the Appendix—Glossary of Part 36*, Order, CC Docket No. 96-45 (WCB rel. June 3, 2014).

remains the only telephone company offering wireline local exchange telephone service to consumers.

On March 28, 1996, ETS (then named Kingsgate Telephone, Inc.) filed a Petition for Waiver to allow for the creation of a new study area. On July 16, 1996, the Common Carrier Bureau issued an order (hereinafter, the “*Kingsgate Order*”) that determined that study area waivers are not required “under any of the following three conditions: (a) a separately incorporated company is establishing a study area for a previously unserved territory; (b) a company is combining previously unserved territory with one of its existing study areas in the same state; and (c) a holding company is consolidating existing study areas in the same state.”² Apparently because it was undisputed that ETS was a separately incorporated company establishing a study area for a previously unserved territory, the Bureau dismissed ETS’s petition for waiver as moot. Based upon this final order of the Commission, Study Area No. 442091 was established for ETS in Texas.

ETS thereafter on occasion added additional previously unserved territories in Texas to its existing study area, in accordance with the standard set forth in the *Kingsgate Order*. In each case, ETS was the first local exchange service provider in the new community. Pursuant to the terms of the *Kingsgate Order*, no waiver was needed to combine these previously unserved territories into ETS’s existing study area, and so these areas were incorporated into Study Area No. 442091. A current map of the study area is attached hereto as Exhibit 1. The names of each community and the first date of service in each are listed in Exhibit 2. ETS has operated under

² *Request for Clarification filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules*, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd 8156, 8160, ¶ 9 (Com. Car. Bur. 1996) (“*Kingsgate Order*”).

this study area, received universal service support, and participated in the NECA pool for 18 years without incident.

In 2004, the Commission addressed a petition for waiver filed by Skyline Telephone Company, first authorized to provide telecommunications service in 2000, which sought to transfer a portion of a Verizon study area to Skyline. In the *Skyline Order*,³ the Commission concluded that “a study area waiver request must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas.”⁴ Four years later, in 2008, personnel at NECA informally suggested to ETS that it seek clarification as to whether the *Skyline Order*’s holding applied in any way to ETS. ETS obliged, but explained that (1) the *Skyline Order* did not apply retroactively to the creation of its Study Area in 1996 because the Commission had not made the requisite findings necessary for retroactive application, and thus did not repeal the *Kingsgate Order* that had led to the creation of Study Area No. 442091,⁵ and (2) the *Skyline Order* did not apply prospectively to ETS’ post-2004 additions of unserved areas to its existing study area, because it was not creating a “new study area” in such cases.⁶ Nonetheless, more than six years later, on June 3, 2014, the Bureau responded to ETS’s filing by directing the company seek a study area waiver.

In evaluating whether to grant any study area waivers required by the *Skyline Order*, the Commission has applied a three-prong standard set forth in the *PTI/Eagle Order*: (1) grant of the waiver must not adversely affect the universal service fund; (2) no state commission having

³ *M&L Enterprises, Inc., d/b/a Skyline Telephone Company Petition for Waiver of Sections 36.611, 36.612, and 69.2 (hh) of the Commission’s Rules*, CC Docket No. 96-45, Order, FCC 04-86 (rel. April 12, 2004) (“*Skyline Order*”).

⁴ *Skyline Order*, ¶ 13.

⁵ See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

⁶ Request of ETS Telephone Company, Inc., AAD 96-51, CC Docket No. 96-45 (filed Mar. 12, 2008)

regulatory authority over the relevant area opposes the waiver; and (3) the waiver must be in the public interest.⁷ All three of these criteria are met in this case.

First, the impact on the universal service fund today of granting a waiver would be zero, because ETS has already been receiving all of the funding to which the study area waiver would apply. In any event, ETS's projected future receipts represent far less than one percent of the fund.

Second, the Texas Public Utilities Commission ("PUC") informed the Commission in a letter dated April 26, 1996 that it had no objection to any necessary waiver to establish a study area for ETS (then Kingsgate).⁸ ETS met with the PUC staff this summer and they are aware that ETS would be filing this Petition.

Third, the public interest and fealty to Commission precedent would be best served by grant of all waivers necessary to enable ETS to continue to participate in the high-cost program and the NECA tariffs and pools. While ETS's first service date was July 8, 1996, after the Act's cutoff date for establishing ETS as an incumbent local exchange carrier for purposes of Section 251, in the *Kingsgate Order* and ever since, the Commission and NECA have always treated ETS as an incumbent. Therefore, ETS has believed that the *Kingsgate Order* had already made the determination that ETS, since it began operations in 1995, would be treated as an incumbent for purposes of universal service and NECA. If the Commission now finds that ETS is not an incumbent LEC at least for purposes of Section 251 unbundling and interconnection obligations, it would still be consistent with prior Commission decisions and policy to continue to treat ETS as an incumbent for purposes of its participation in the high-cost fund and NECA tariffs and

⁷ *Skyline Order*, ¶ 13, citing *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-27, 10 FCC Rcd 1771 (1995) ("*PTI/Eagle Order*").

⁸ The letter was received by the Commission and filed in the record of this proceeding on April 29, 1996.

pool. The Commission has granted waivers to many other incumbent-like carriers that initiated service after February 8, 1996.⁹ The public interest would be similarly served in this case, because, like many of the companies that have previously received such waivers, ETS has made “significant investment to provide service in areas and to customers that did not previously have service.”¹⁰

Such waivers have been granted even where a proposed new study area is within the nominal study area boundaries of an ILEC, even when the existing ILEC has served some customers within the proposed new study area, and even when such ILEC has opposed the creation of the new study area. For example, in March 1996, Rural Telephone Service Company petitioned for a study area waiver to receive high-cost support for new local exchange facilities that it wanted to build to serve a portion of the existing study area of United Telephone, which already served 1500 access lines in the proposed area. United opposed the petition, but the Bureau disagreed, finding that “granting Rural’s petition to expand its study area ... is consistent with Section 214(e) ..., which permits more than one carrier to qualify for receipt of universal service assistance.”¹¹ Under that precedent, it is possible for two study areas to overlap.

Similarly, the Commission granted a study area and others waivers to Sandwich Isles Communications, Inc., to enable that company to be treated as an ILEC for purposes of high-cost

⁹ See, e.g., *Westgate Communications LLC D/B/A Weavtel Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules; Beaver Creek Telephone Company Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, Order, 20 FCC Rcd. 13573 (Wireline Comp. Bureau 2005); *Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules*, Order, 20 FCC Rcd 8999 (Wir. Comp. Bur. 2005) (“*Sandwich Isles II*”); *American Samoa Government and the American Samoa Telecommunications Authority*, Order, 14 FCC Rcd. 9974 (Acct. Aud. Div. 1999); *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order, AAD 97-41, DA 97-2730, 13 FCC Rcd 198 (Acct. Aud. Div. 1997); *Wilderness Valley Telephone Company, Inc., Petition for Waiver of Sections 69.605(c) and 69.3(e)(11) of the Commission's Rules*, Order on Reconsideration, AAD 96-99, DA 98-603, 13 FCC Rcd 6573 (Acct. Aud. Div. rel. March 31, 1998).

¹⁰ *Sandwich Isles II* at ¶ 19.

¹¹ *Petition for Waiver Filed by Rural Telephone Service Company*, Memorandum Opinion and Order, 12 FCC Rcd. 785, ¶ 14 (CCB rel. Jan. 13, 1997).

support for areas in which it initiated service in 1998 within the Hawaii study area of GTE but that GTE either did not service or only provided very limited service. The order explained:

We find that the fact that GTE (later Verizon) may have had authority to serve the Hawaiian home land does not demonstrate that it is not in the public interest to grant a study area waiver to Sandwich Isles. In fact, the record is clear that GTE was not offering service throughout much of the Hawaiian home lands. The record reflects that, at least in the 1990s, GTE was not providing service to residents, or was at best providing multi-party service in the Hawaiian home lands.¹²

In other words, even if the *Skyline Order* required a waiver for a new Sandwich Isles study area to be created in areas within GTE's study area, the Bureau found that such waiver should be granted where most of the area was in fact not served at the time of Sandwich Isles' entry. The same is true here. Like Sandwich Isles and like Rural Telephone, ETS has invested significant capital to build telecommunications infrastructure in unserved areas that were included in other ILECs' study areas, but were in fact unserved by them. Granting ETS's request to expand its current study area to include these territories is therefore in the public interest.

In addition, the public interest would also be served by allowing ETS to continue to be treated in the manner that it has expected over the eighteen years since the *Kingsgate Order* (subject of course to any generally-applicable changes that would result from the Commission's ongoing reforms). ETS reasonably relied on that order that led to the creation of ETS's study area and ETS's eligibility for universal service support, and thereupon invested millions of dollars to build a new network to areas that had never been served by any wireline telephone company. Developers subsequently relied on this Commission precedent when they chose to build new homes in areas that ETS had pledged to serve. ETS's private investors and creditors have relied on the Commission's precedent in their decisions to provide capital to ETS for its

¹² *Sandwich Isles II* at ¶ 21.

buildout, based on a business plan that assumed ETS's eligibility to receive high-cost support for its study area at least for the period through implementation of the reforms of the *USF/ICC Transformation Order*. And consumers relied on the results of the Commission's decision when they chose to buy homes in communities served by ETS, believing that the homes had access to the affordable and reliable telephone service provided by ETS. Many of these decisions over the course of the past 18 years would have been made differently if the Commission had not effectively granted Kingsgate/ETS's request in 1996, *or* if it had explicitly applied the *Skyline Order* to existing study areas at the time of that 2004 order, *or* if it had timely responded to ETS's request in 2008 by clarifying that a new waiver would be needed. Because the Commission instead treated ETS as an eligible incumbent throughout this eighteen-year period, these investment-backed expectations deserve substantial consideration.¹³ Serious due process concerns would arise from any decision by the Commission in 2014 to retroactively apply the 2004 *Skyline Order* to repeal the 1996 *Kingsgate Order*, and upset the long-settled expectations of ETS and its investors, especially if such action singled ETS out for treatment different from other universal service recipients.

ETS understands that, notwithstanding its investors' reliance on prior Commission decisions and practice, the *Kingsgate Order* does not entitle ETS to permanent universal service funding. The Commission is in the process of reforming its high-cost support programs to eliminate support in areas where it is no longer necessary. To the extent that these reforms would reduce or eliminate ETS's funding, ETS will necessarily accept those changes. But after eighteen years of reliance on the Commission's *Kingsgate Order* and the high-cost support received by ETS in plain sight based upon this order, ETS should be treated the same as other

¹³ See *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

recipients. It should lose its support only if the generally-applicable reforms would in any case compel that result, and in such case ETS should then receive the same transitional relief that will be afforded to other companies that are similarly affected by the reforms. The Commission has repeatedly found that a flash cut away from a long-standing reality would be disruptive and not in the public interest.

The public interest is also served by grant of a waiver where application of a rule in a particular circumstance would not further the purpose of the rule.¹⁴ The purpose of the study area freeze was to prevent carriers from disaggregating and recombining study areas, or portions thereof, to increase high-cost support through the manipulation of study area boundaries.¹⁵ This concern is plainly inapplicable in this case.

Finally, if the Commission determines that ETS is not an incumbent LEC, it should grant all other waivers that it deems necessary for ETS to continue to receive high-cost support as an incumbent and participate in the NECA tariffs and pool. The Commission has previously granted such waivers from portions of Parts 36, 54, and 69 of its rules where the carrier, such as ETS, has been the first to provide service in its territory.¹⁶ Such waivers are particularly justified in this case, given that ETS not only shares similar factual circumstances with several of the companies that have received such waivers, but also because the Commission has in fact treated ETS as an incumbent for these purposes for two decades, and it would be highly costly and disruptive to ETS to have that treatment upended now.

¹⁴ See *WAIT Radio*, 418 F.2d at 1157-59 (D.C. Cir. 1969) (“[A] general rule, deemed valid because the overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”).

¹⁵ See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order (1984).

¹⁶ *Sandwich Isles II*, ¶ 26.

CONCLUSION

For the foregoing reasons, ETS respectfully requests that the Commission grant any waivers it deems necessary to permit ETS to continue to operate and receive high-cost support and participate in NECA tariffs and pools throughout its Study Area as shown in Exhibit 1.

Respectfully submitted,



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Exhibit 1

Map of ETS Study Area No. 442091

Note 1: The two- and three-letter codes on the map are abbreviations for the communities served, as indicated in Exhibit 2.

Note 2: This map is identical to the shapefile map previously submitted to the Commission pursuant to its November 6, 2012 Order in Docket 10-90, except that ETS recently discovered that one community, shown as a red box in the attached map, was inadvertently omitted from that filing. ETS will promptly file an updated shapefile map with the Commission.

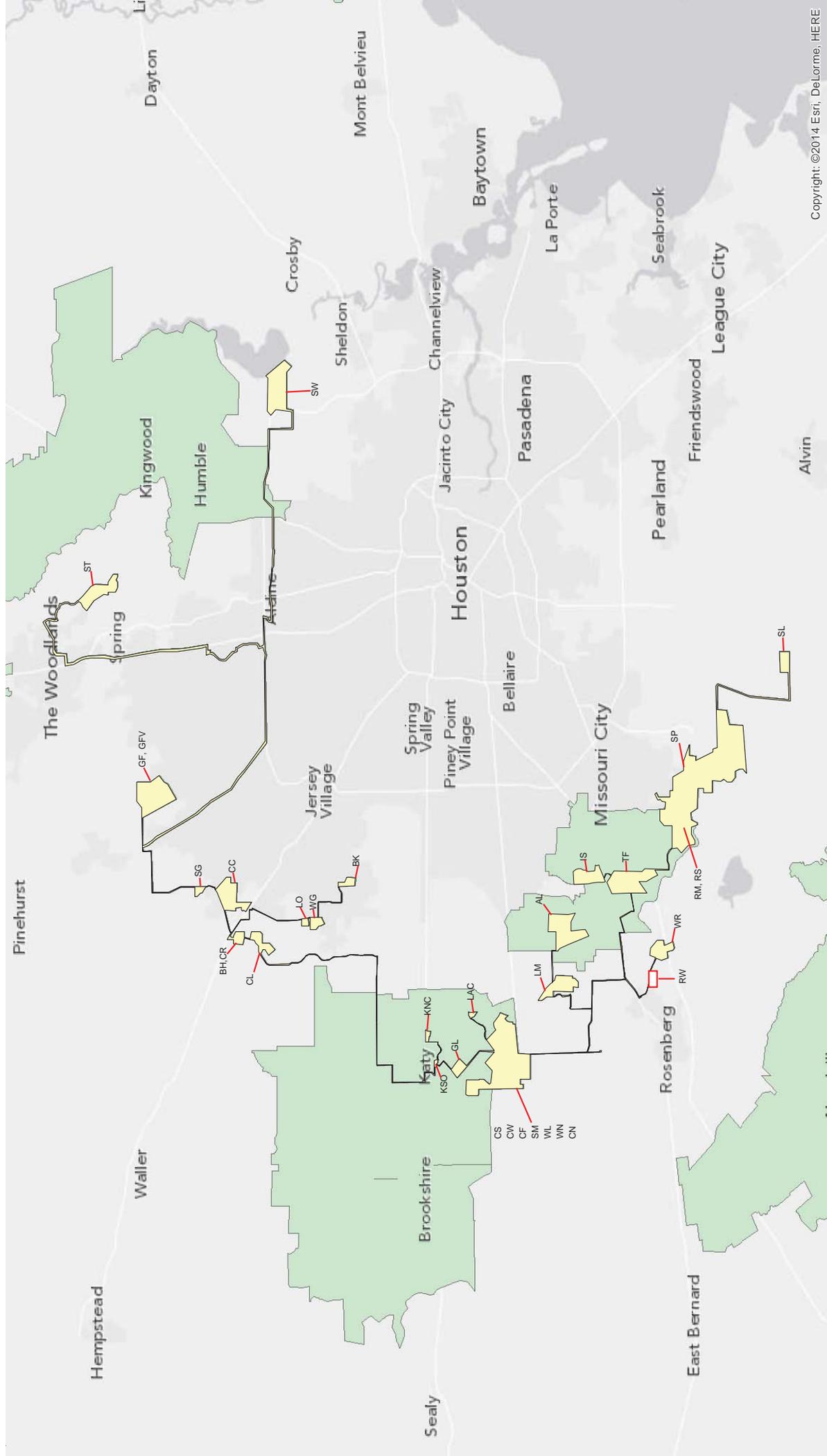


Exhibit 2

Service Initiation Dates for Communities Served by ETS

Map Code	Community Name	Service Date	City	Zip Code
AL	Aliana	05/18/08	Richmond	77407
BH	Blackhorse	12/01/00	Cypress	77433
BK	Berkshire	05/01/02	Houston	77084
CC	Coles Crossing	01/20/98	Cypress	77433
CF	Cardiff Ranch	04/06/10	Katy	77494
CL	Cypress Creek Lakes	03/05/04	Cypress	77433
CN	Cinco Northwest	05/03/12	Katy	77494
CR	Cypress Creek Ranch	05/18/01	Cypress	77433
CS	Cinco Southwest	01/26/07	Katy	77494
CW	Cinco West at Seven Meadows	07/20/05	Katy	77494
GF	Gleannloch Farms	02/03/98	Spring	77379
GFV	Village at Gleannloch Farms	05/01/08	Spring	77379
GL	Grayson Lakes	06/28/02	Katy	77494
IS	Imperial Sugarland	06/13/14	Sugar Land	77479
LM	Long Meadow Farm	10/20/04	Richmond	77406
LO	Lone Oak	08/06/02	Cypress	77433
KNC	Katy North Commercial	07/24/13	Katy	77449
KSO	Katy South Commercial	07/19/13	Katy	77494
LAC	La Centerra	03/22/11	Katy	77494
RM	Riverstone Missouri City	06/29/06	Missouri City	77459
RS	Riverstone Sugarland	01/27/06	Sugar Land	77479
RW	Riverpark West	05/27/02	Richmond	77469
SG	Stablegate	08/31/00	Cypress	77429
SL	Sterling Lakes South	07/11/07	Rosharon	77583
SM	Seven Meadows	01/15/04	Katy	77479
SP	Sienna Plantation	06/17/97	Missouri City	77459
ST	Spring Trails	05/23/08	Spring	77386
SW	Summerwood	07/08/96	Houston	77044
TF	Telfair	05/26/06	Sugar Land	77479
WG	Westgate	09/24/99	Cypress	77433
WL	Westheimer Lakes	02/14/05	Richmond	77406
WN	Westheimer Lakes North	01/04/06	Katy	77494
WR	Williams Ranch	08/30/07	Richmond	77469