

Texas Commission on Environmental Quality (TCEQ)

Docket Numbers

TCEQ Docket 2012-1650-MIS-U is for Midlothian Energy Limited Partnership
TCEQ Docket 2012-1662-MIS-U is for Ennis-Tractebel Power Company Limited Partnership
TCEQ Docket 2012-1682-MIS-U is for Hays Energy Limited Partnership

IN SUPPORT OF	§	BEFORE THE TEXAS
	§	
THE EXECUTIVE DIRECTOR'S	§	
NEGATIVE USE DETERMINATION	§	COMMISSION ON
ISSUED TO MIDLOTHIAN ENERGY,	§	
ENNIS-TRACTEBEL POWER COMPANY,	§	
AND HAYS ENERGY	§	ENVIRONMENTAL QUALITY

BRIEF OF ELLIS APPRAISAL DISTRICT AND HAYS COUNTY APPRAISAL DISTRICT IN SUPPORT OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATIONS ISSUED TO MIDLOTHIAN ENERGY, ENNIS-TRACTEBEL POWER COMPANY L.P., AND HAYS ENERGY

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Ellis Appraisal District and the Hays County Appraisal District (collectively "CADs") submit this Brief in support of the Executive Director's ("ED") Negative Use Determinations under the Texas Commission on Environmental Quality's ("TCEQ") Tax Relief for Pollution Control Property Program for applications 12271 that is TCEQ Docket 2012-1650-MIS-U issued to Midlothian Energy L.P., application 12203 that is TCEQ Docket 2012-1662-MIS-U issued to Ennis Power Company L.P., and application 12272 that is TCEQ Docket 2012-1682-MIS-U issued to Hays Energy L.P..

I. INTRODUCTION

Two power plants in Ellis County and one in Hays County filed applications with the TCEQ for pollution control property designations for certain equipment which is part of those power plants. The TCEQ issued negative determinations on all three of the applications. Because the

properties and the equipment in question, as well as the basis for the negative determinations were virtually identical, the CADs file this response to the determinations in all three matters.

We will briefly discuss the procedural history of each of the plants.

MIDLOTHIAN ENERGY L.P.

On April 29, 2008, Midlothian Energy L.P. (“Midlothian”) submitted an Application for Use Determination for Midlothian Energy Project to the TCEQ seeking a use determination for six (6) Heat Recovery Steam Generators (“HRSG”), twelve (12) steam turbines, and dedicated ancillary systems located in Ellis County. On June 17, 2014, in accordance with Title 30 of the Texas Administrative Code Chapter 17, the ED issued a Negative Use Determination, citing as a basis therefore the ED's determination that the methods used by Midlothian for determining the use determination percentage were not reasonable. Thereafter, on July 3, 2014, Midlothian filed its appeal of the ED’s Negative Use Determination. ECAD now files this Brief in support of the ED’s Negative Use Determination.

ENNIS-TRACTEBEL POWER COMPANY L.P.

On April 21, 2008, Ennis-Tractebel Power Company L.P. (“Ennis-Tractebel”) submitted an Application for Use Determination to the TCEQ seeking a use determination for an HRSG and a Tier IV partial use determination. On June 17, 2014, the ED issued a Negative Use Determination for the property in accordance with Title 30 of the Texas Administrative Code Chapter 17, determining that the ED could not find that the property was used, constructed, acquired, or installed wholly or partly to meet or exceed the relevant laws, rules and regulations and, as with Midlothian, that Ennis-Tractebel’s methods for determining the use determination percentage were not reasonable. Thereafter, Ennis-Tractebel filed its appeal of the ED’s Negative

Use Determination. ECAD now files this brief in support of the ED's Negative Use Determination.

HAYS ENERGY L.P.

On December 5, 2012, Hays Energy L.P. ("Hays") submitted an Application for Use Determination to the TCEQ seeking a use determination for four (4) HRSG's, eight (8) steam turbines, and dedicated ancillary systems. On June 17, 2014, the ED issued a Negative Use Determination for the property in accordance with Title 30 of the Texas Administrative Code Chapter 17, determining, as with Ennis-Tractebel, that the ED could not find that the property was used, constructed, acquired, or installed wholly or partly to meet or exceed the relevant laws, rules and regulations and, as with Midlothian and Ennis-Tractebel, that Hay's methods for determining the use determination percentage were not reasonable. Thereafter, Hays filed its appeal of the ED's Negative Use Determination. ECAD now files this brief in support of the ED's Negative Use Determination.

II. ARGUMENT

Texas Constitution article VIII, section 1 mandates that all real and tangible personal property, unless exempt as required or permitted by the Constitution, shall be taxed in proportion to its value. Tex. Const. art. VIII, § 1(a). The Constitution expressly exempts certain specific property from taxation in the Constitution itself and additionally permits the legislature to grant certain other specific exemptions. The exemptions authorized by the Texas Constitution are set out in various sections within Constitution article VIII. Chapter 11 of the Texas Property Tax Code effectuates these exemptions.

The standard of review for exemptions and other findings that may lead to exemptions is rightfully a strict one. It has long been established that exemptions from taxation are strictly

construed and that all doubts are resolved against the exemption. *See, e.g., North Alamo Water Supply Corp. v. Willacy County Appraisal Dist.*, 804 S.W.2d 894, 899 (Tex.1991).

The reason for this requirement of strict construction was explained by the Texas Supreme Court in the *North Alamo Water Supply* case, where the Court made clear that “[s]tatutory exemptions from taxation are subject to strict construction because they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally.” *Id. at 899; see also Hilltop Village, Inc. v. Kerrville Ind. Sch. Dist.*, 426 S.W.2d 943, 948 (Tex.1968) (“tax exemptions are subject to strict construction since they are the antithesis of equality and uniformity”). Accordingly, an exemption cannot be raised by implication, but must be affirmatively shown, resolving all doubts in favor of the taxing authority and against the claimant. *Bullock v. Nat'l Bancshares Corp.*, 584 S.W.2d 268, 272 (Tex.1979). Parties claiming a tax exemption thus bear the dual burden of passing the constitutional strict construction test as well as affirmatively proving that they clearly fall within the statutory exemption, with all doubts being resolved against them. *Bullock*, 584 S.W.2d at 272; *Aransas Hospital, Inc. v. Aransas Pass Ind. Sch. Dist.*, 521 S.W.2d 685, 689 (Tex. App. – Corpus Christi 1975).

A. THE E.D. CORRECTLY ISSUED THE NEGATIVE USE DETERMINATIONS FOR THE THREE TIER IV APPLICATIONS BECAUSE THE METHODS FOR DETERMINING THE USE DETERMINATION PERCENTAGE WERE NOT REASONABLE.

It is black letter law that the Tier IV application process for an application dated April 29, 2008, permitted an applicant to propose a method for calculating a partial use determination. The commission rules allow for determinations that distinguish the portion of the property that is used to control, monitor, prevent or reduce pollution from the portion of the property that is used to produce goods or services. The burden is on the applicant, if the property is not wholly used

for pollution control, to present sufficient information and/or methodology in the application to allow the pollution control portion to be calculated. The method must be reasonable. Once presented to the Executive Director by the applicant, the Executive Director is to review the proposal and make the final determination as to its reasonableness.

The Executive Director reviewed all the methods proposed by the applicant and properly determined that the methods did not reasonably distinguish the proportion of the HRSGs, steam turbines, and dedicated proportion of the equipment that produces steam that is used in a process or to produce electricity for use or sale or otherwise produced a negative number. Thus, the Executive Director properly concluded that the property was not eligible for a positive use determination.

The ED made a Negative Use Determination after thorough review of the three (3) possible methods for calculating a partial positive use determination. The ED determined that all but one of the methods were unacceptable. The remaining acceptable approach, as discussed below, produced a negative number and thus would not support a positive finding.

A. AVOIDED EMISSIONS APPROACH

The ED found that the Avoided Emissions Approach was not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. The ED correctly determined that the Avoided Emissions Approach does not consider the economic benefit of the value of the electricity produced by the HRSG and the steam turbine.

B. MODIFIED CAP CALCULATIONS

The ED correctly included a capital cost old (“CCO”) in the CAP calculation. In addition to meeting new energy demand, many of the combined cycle power plants built since 1994 have

replaced energy generation capacity that was once provided by gas fired steam boilers. Approximately 10 gigawatts (1,000 Megawatts) of gas fired steam boiler power plants have been retired since the year 2000. Most of this capacity has been replaced with natural gas fired combined cycle power plants. In the Plants' avoided emissions approach, they compare the current combined cycle plant to a natural gas fired boiler power plant. Including the boiler cost as the capital cost old in the ED's calculation would be consistent with what the Plants used in their avoided emissions approach. Therefore, we respectfully request that the Negative Use Determination be upheld for the HRSGs and dedicated ancillary systems.

B. THE E.D. CORRECTLY ISSUED THE NEGATIVE USE DETERMINATIONS FOR THE THREE TIER IV APPLICATIONS BECAUSE THE ED CORRECTLY COULD NOT FIND THAT THE PROPERTY WAS USED, CONSTRUCTED, ACQUIRED, OR INSTALLED WHOLLY OR PARTIALLY TO MEET OR EXCEED ANY CITED LAWS, RULES, OR REGULATIONS ADOPTED BY ANY ENVIRONMENTAL PROTECTION AGENCY.

The Plants have failed to meet the legal standard applicable to the applications by failing to cite to a specific law, rule, or regulation that is being met or exceeded by the use, construction, acquisition, or installation of the pollution control property. The Commission rule at 30 TAC §17.10(d) requires an applicant to cite to a specific law, rule, or regulation that is being met or exceeded by the use, construction, acquisition, or installation of the pollution control property. As specified in 30 TAC §17.4(a) and authorized by Article VIII, § 1-1, of the Texas Constitution, for a property to be eligible for an exemption from ad valorem taxation, all or part of property must be used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision for the prevention, monitoring, control, or reduction of air, water, or land pollution. Commission rules do not allow an applicant to omit the requirement to cite a specific environmental law even for property that is specified on

the list of property in Texas Tax Code §11.31(k).

In this case the ED properly did not require a citation to a law or rule that mandates the installation of a specific type of equipment. However, in this case the ED did not find, and the plants failed to show, that the HRSGs and other equipment are used to meet or exceed any of the environmental laws that were cited in their applications. While the applications and responses provided numerous rule citations, none were to rules that the HRSGs and other equipment were required to meet. Therefore, the HRSGs, steam turbine, and dedicated ancillary equipment do not meet the applicability requirements of 30 TAC §17.4(a) to be eligible for exemption from ad valorem taxation and the ED's decision should be properly upheld.

III. CONCLUSION AND PRAYER

For these reasons, the EAD and Hays CAD request that the Commission uphold the ED's negative use determination for the HRSGs and dedicated ancillary equipment installed at the Plants and grant to them any additional relief to which they may be entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 8, 2014, a true and correct copy of the foregoing document was served on each party on the attached mailing lists via first class mail and efile if available:

/s/ Braden W. Metcalf

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