

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2007 MAR 27 PM 4:30

CHIEF CLERKS OFFICE

March 27, 2007

Derek Seal
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: *SOAH Docket No. 582-06-1029; TCEQ Docket No.; 2005-2007-UCR; Application of City of Midlothian to amend Certificate of Convenience and Necessity No. 11706 and to Cancel Certificate of Convenience and Necessity No. 11966 in Ellis County, Texas*

Dear Mr. Seal:

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 original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than April 16, 2007. Any replies to exceptions or briefs must be filed in the same manner no later than April 26, 2007.

This matter has been designated **TCEQ Docket No. 2005-2007-UCR; SOAH Docket No. 582-06-1029**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Sharon Cloninger".

Sharon Cloninger
Administrative Law Judge

SC/pp
Enclosures
cc: Service List

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

STATE OFFICE OF ADMINISTRATIVE HEARINGS

WILLIAM P. CLEMENTS BUILDING, Jr.

300 West Fifteenth Street

Austin, Texas 78701

Phone (512) 475-4993

Facsimile (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CITY OF MIDLOTHIAN

SOAH DOCKET NUMBER: 582-06-1029

REFERRING AGENCY CASE: 2005-2007-UCR

STATE OFFICE OF ADMINISTRATIVE

ADMINISTRATIVE LAW JUDGE

HEARINGS

ALJ SHARON CLONINGER

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
OFFICE OF THE PUBLIC INTEREST COUNSEL
MC-103 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)

TCEQ PUBLIC INTEREST COUNSEL

DOCKET CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
PO BOX 13087
AUSTIN, TX 78711
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

MARIA SANCHEZ
ATTORNEY
DAVIDSON & TROLIO, P.C.
919 CONGRESS, SUITE 810
AUSTIN, TX 78701
(512) 469-6006 (PH)
(512) 473-2159 (FAX)

CITY OF MIDLOTHIAN

GABRIEL SOTO
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-3668 (PH)
(512) 239-0606 (FAX)

TCEQ EXECUTIVE DIRECTOR

DERFK SEAL
GENERAL COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087

(512) 239-5533 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JAMES COUSAR
ATTORNEY AT LAW
THOMPSON AND KNIGHT, LLP
98 SAN JACINTO BLVD., STE. 1900
AUSTIN, TX 78701
(512) 469-6112 (PH)
(512) 469-6180 (FAX)

WAX-MID, INC.

LEONARD H DOUGAL
ATTORNEY AT LAW
JACKSON WALKER, L.L.P.
100 CONGRESS AVENUE, SUITE 1100
AUSTIN, TX 78701
(512) 236-2000 (PH)
(512) 236-2002 (FAX)

SARDIS LONE WSC

R. JO RESER
DAVIDSON & TROILO
919 CONGRESS AVENUE, SUITE 810
AUSTIN, TX 78701
(512) 469-6006 (PH)
(512) 473-2159 (FAX)

CITY OF MIDLOTHIAN

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-06-1029
TCEQ DOCKET NO. 2005-2007-UCR

APPLICATION BY THE CITY OF § BEFORE THE STATE OFFICE
MIDLOTHIAN TO AMEND CCN NO. §
11706 AND TO DECERTIFY AND § OF
CANCEL CCN NO. 11966 FROM WAX- §
MID, INC., IN ELLIS COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. JURISDICTION 2

III. PROCEDURAL HISTORY 2

 A. Midlothian’s Application; Wax-Mid’s Request for a Cease and Desist Order .
 2

 B. Preliminary Hearing 4

 C. Consolidation of the Midlothian and Wax-Mid Cases 4

 D. Acknowledgment by Wax-Mid That It Does Not Hold a CCN 5

 E. Withdrawal of Wax-Mid’s Request for Cease and Desist Order 5

 F. Hearing on the Merits 6

IV. PARTY POSITIONS AND ALJ RECOMMENDATION 6

 A. Midlothian 6

 B. Wax-Mid 6

 C. Sardis 8

 D. ED 8

 E. ALJ 8

V. BACKGROUND 9

VI. LEGAL STANDARDS 11

VII. MIDLOTHIAN’S REQUEST TO DECERTIFY WAX-MID’S CCN NO. 11966.... 12

 A. Applicable Law 12

 B. Evidence 13

 C. ALJ’s Analysis and Conclusion 15

VIII. EFFECT OF 1986 ORDER CONCERNING WAX-MID ON MIDLOTHIAN'S APPLICATION15

- A. 1986 Order 15
- B. Background 16
- C. Midlothian's Argument18
 - 1. Revocation of 1986 Order18
 - 2. Judicial estoppel and equitable estoppel21
 - 3. Waiver21
 - 4. Stock transfer22
- D. Wax-Mid's Argument 23
 - 1. Wax-Mid may obtain a CCN pursuant to the 1986 Order 23
 - 2. Revocation would be an improper collateral attack on 1986 Order .. 24
 - 3. Stock transfer25
 - 4. Summary26
- E. ED's Argument27
- F. ALJ's Analysis and Conclusion27

IX. MIDLOTHIAN MAY SERVE THE APPLICATION AREA WITHOUT A CCN AMENDMENT, BUT IS NOT PRECLUDED FROM SEEKING A CCN AMENDMENT28

- A. Applicable Law28
- B. Wax-Mid's Argument29
- C. ALJ's Analysis and Conclusion29

X. ISSUES PRESENTED 30

- A. Based on criteria set out in TEXAS WATER CODE § 13.246 (c) and 30 TAC § 291.102(d), should Midlothian's CCN amendment application be granted? 30
 - 1. Adequacy of service currently provided in the requested area 30
 - a. Uncontroverted evidence.....30
 - b. Analysis and conclusion..... 32
 - 2. Need for additional service to the requested area 33
 - a. Midlothian's argument 33
 - b. Wax-Mid's argument 35
 - c. ED's argument 36

d.	Analysis and conclusion	37
3.	Effect of granting the amendment on Midlothian and on any retail public utility of the same kind already serving the proximate area	37
a.	Uncontroverted evidence	37
b.	Analysis and conclusion	38
4.	Ability to provide adequate service	39
a.	Uncontroverted evidence	39
b.	Analysis and conclusion	41
5.	Feasibility of obtaining service from an adjacent retail public utility	41
a.	Uncontroverted evidence	41
b.	Analysis and conclusion	42
6.	Financial ability of the applicant	43
a.	Uncontroverted evidence	43
b.	Analysis and conclusion	43
7.	Environmental integrity	44
a.	Uncontroverted evidence	44
b.	Analysis and conclusion	44
8.	Probable improvement in service or lowering of costs to consumers in the area resulting from granting of the certificate	44
a.	Uncontroverted evidence	44
b.	Analysis and conclusion	45
B.	Midlothian's CCN Amendment Is Necessary	45
C.	Summary of the ALJ's analyses	48
XI.	ALLOCATION OF TRANSCRIPT COSTS	48

XII. CONCLUSION 48

APPENDICES

ATTACHMENT A – map of Midlothian’s Application area

ATTACHMENT B – 1986 Order

SOAH DOCKET NO. 582-06-1029
TCEQ DOCKET NO. 2005-2007-UCR

APPLICATION BY THE CITY OF § BEFORE THE STATE OFFICE
MIDLOTHIAN TO AMEND CCN NO. §
11706 AND TO DECERTIFY AND § OF
CANCEL CCN NO. 11966 FROM WAX- §
MID, INC., IN ELLIS COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

This matter involves an application (the Application) by the City of Midlothian (Midlothian)¹ to amend its water Certificate of Convenience and Necessity (CCN) No. 11706 to add approximately three connections and 1,135 acres in Ellis County to the area it is currently certificated to serve. The Application area is located in Midlothian's corporate limits and extra-territorial jurisdiction (ETJ),² and Midlothian is serving three customers within the area.³ Sardis-Lone Elm Water Supply Corporation (Sardis) holds a CCN to provide water service to part of the Application area.⁴

At the time Midlothian filed its Application, it believed that Wax-Mid, Inc. (Wax-Mid) held inactive CCN No. 11966 for part of the Application area. After the preliminary hearing, but before the hearing on the merits was held, it instead found that a July 1986 order (1986 Order) issued by

¹ Midlothian is located in northwest Ellis County, approximately 25 miles southwest of Dallas, on U.S. Highway 67, and 10 miles northwest of Waxahachie, on U.S. Highway 87. Midlothian is part of the Dallas/Fort Worth Metroplex, encompasses an area of approximately 50.5 square miles, and has an estimated population of 12,500. Midlothian Exh. 9, at ii.

² See Attachment A to this Proposal for Decision, map depicting how Midlothian's city limits and ETJ overlap with Wax-Mid's 1986 Order area.

³ Pre-filed testimony of Michael Adams, P.E., Midlothian's Director of Engineering, Midlothian Exh. 2, at 2, lines 9-20.

⁴ Midlothian and Sardis have entered into an agreement designating which parts of the Application area each will serve.

the Texas Water Commission (TWC) states that a CCN would be issued to Wax-Mid upon meeting two conditions, only one of which has been met.

Wax-Mid asserts that Midlothian's proposed CCN amendment is not necessary because Midlothian, as a municipality, may lawfully serve the Application area even without a CCN. Wax-Mid also claims to have rights under the 1986 Order that preclude Midlothian's Application from being granted.⁵

The Administrative Law Judge (ALJ) recommends that the Commission approve Midlothian's Application to add area to its CCN. Since Wax-Mid never obtained a CCN, she recommends that the Commission dismiss, as moot, Midlothian's request to decertify Wax-Mid. The ALJ concludes that Midlothian's recent alternative request to set aside the 1986 Order concerning Wax-Mid may not be granted because the Commission has no jurisdiction to do so in this case.

II. JURISDICTION

There are no disputed jurisdictional issues. Therefore, jurisdiction is addressed in the Findings of Fact and Conclusions of Law sections of this Proposal for Decision.

III. PROCEDURAL HISTORY

A. Midlothian's Application; Wax-Mid's Request for a Cease and Desist Order

Midlothian's Application was received by the Texas Commission on Environmental Quality (TCEQ or Commission) on August 30, 2005. On September 30, 2005, Midlothian notified

⁵ The effect of the 1986 Order on Midlothian's Application is more fully addressed in Section VIII of this Proposal for Decision.

neighboring utilities within two miles of its requested area (Wax-Mid, Sardis, City of Waxahachie, and Mountain Peak Special Utility District) and landowners in the requested area (ECOM Real Estate Management, Inc., Ennis Business Forms, Ken Pritchett Properties, Alma Ann Seale, and Sara Jane Properties LP) of the Application. Midlothian also published notice of its Application in the *Waxahachie Daily Light* on October 5, 2005, and October 12, 2005. TCEQ Staff declared the Application administratively complete on October 31, 2005.

After receiving protests to the Application from Wax-Mid and Sardis on October 27, 2005, the TCEQ Chief Clerk transferred the official file for Midlothian's Application to the State Office of Administrative Hearings (SOAH) on December 14, 2005, and issued a Notice of Public Hearing on March 8, 2006.

Wax-Mid's owner, ECOM Real Estate Management, Inc. (ECOM), received notice of the Application on October 1, 2005.⁶ On October 31, 2005, Wax-Mid's corporate charter was reinstated by the Texas Secretary of State.⁷ On December 22, 2005, Wax-Mid filed a Request for a Cease and Desist Order with the Commission on the basis that Midlothian was providing water service to a customer inside Wax-Mid's CCN area without its authorization. On August 10, 2006, Wax-Mid filed a First Supplement to Its Petition for a Cease and Desist Order Against the City of Midlothian, after discovering Midlothian was serving two additional customers in Wax-Mid's area without its authorization.

⁶ Pre-filed testimony of Victoria Harkins, Ph.D., P.E., Midlothian Exh. 1, VRH-5, at 6.

⁷ According to the Office of the Secretary of State and Texas Comptroller of Public Accounts, Wax-Mid filed Articles of Incorporation on October 5, 1984; had its corporate privileges forfeited March 28, 1986, for failure to satisfy franchise tax requirements; had its corporate charter forfeited on June 9, 1992, for failure to file a franchise tax return and/or pay state franchise tax; and had its corporate charter reinstated on October 31, 2005. Harkins pre-filed testimony, Midlothian Exh.1, at 13, lines 2-7, VRH-4, and VRH-5, at 7; Midlothian Exh. 10 and Midlothian Exh. 12.

B. Preliminary Hearing

ALJ Mike Rogan⁸ convened the preliminary hearing on April 4, 2006, at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The Notice of Hearing, Affidavit of Notice to Neighboring Utilities and Affected Parties, and Publisher's Affidavit were admitted into evidence, and the following were designated as parties:

- Midlothian, represented by Maria Sanchez, attorney;
- Wax-Mid, represented by James E. Cousar, attorney;
- Sardis, represented by Leonard H. Dougal, attorney;⁹
- the ED, represented by Gabriel Soto, staff attorney; and
- Office of Public Interest Counsel (OPIC), represented by Blas Coy, Jr.¹⁰

C. Consolidation of the Midlothian and Wax-Mid Cases

After Midlothian filed its Application and Wax-Mid filed its Request for a Cease and Desist Order, Wax-Mid's case¹¹ was referred to SOAH and consolidated with Midlothian's case on May 31, 2006, as set out in Order No. 3 in this matter.

Order No. 4 in this matter issued June 7, 2006, directed Wax-Mid to submit the jurisdictional documents that would have been submitted into evidence at Wax-Mid's June 12, 2006 preliminary

⁸ Between the preliminary hearing and the hearing on the merits, the case was re-assigned to ALJ Sharon Cloninger.

⁹ Mr. Dougal represented to ALJ Rogan that Sardis and Midlothian had recently reached a settlement agreement, and that once the agreement was effective, Sardis would withdraw as a party. Sardis has not submitted a request to withdraw as a party.

¹⁰ OPIC did not participate in this proceeding.

¹¹ The case was formally designated as Petition of Wax-Mid, Inc., Requesting a Cease and Desist Order Against the City of Midlothian; TCEQ Docket No. 2006-0487-UCR; Application No. 35240-D; SOAH Docket No. 582-06-2332.

hearing, which was canceled after the Midlothian and Wax-Mid cases were consolidated. Wax-Mid submitted the requested documents on June 27, 2006, and they were admitted as ED Exhibits D and E in Order No. 5, issued November 8, 2006.

D. Acknowledgment by Wax-Mid That It Does Not Hold a CCN

At the preliminary hearing, Wax-Mid represented to ALJ Rogan that it held a CCN that overlapped with 100 percent of the Application area that Midlothian seeks, and Wax-Mid was admitted as a party. During the discovery phase of this docket, Wax-Mid obtained from the TCEQ archives a microfilm copy of the hearing record in Docket No. 5951 in which the 1986 Order was issued. Wax-Mid produced that microfilm file as a discovery response, and the parties to this docket became aware of the actual language of the 1986 Order. Additional research revealed the legislative history and 1987 repeal of TEX. WATER CODE ANN. § 13.249, the statute under which the TWC granted the 1986 Order.

On November 14, 2006, in a Cross-Motion for Summary Disposition, Wax-Mid stated in part that as a result of discovery, testimony, deposition testimony, and recent pleadings in this proceeding, it became clear that the parties concur that Wax-Mid's rights at issue in this docket are not based on a CCN. Wax-Mid asserted that because it does not hold a CCN, it is not subject to the statutory remedy of decertification sought by Midlothian under TEX. WATER CODE ANN. § 13.254.

E. Withdrawal of Wax-Mid's Request for a Cease and Desist Order

On November 14, 2006, Wax-Mid filed a Request to Withdraw Its Application for a Cease and Desist Order Against the City of Midlothian. The Request was granted with prejudice and the matter was remanded to the ED as set out in Order No. 6, issued November 16, 2006.

F. Hearing on the Merits

The hearing on the merits commenced November 28, 2006, before ALJ Sharon Cloninger at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Maria Sanchez, R. Jo Reser, and Patrick Ledner, attorneys, appeared on behalf of Midlothian; James Couser and Christopher Smith, attorneys, represented Wax-Mid; Ali Abazari, attorney, appeared as a courtesy for Sardis; and Gabriel Soto, staff attorney, represented the ED. The record closed January 26, 2007, after parties submitted closing arguments and replies.

IV. PARTY POSITIONS AND ALJ RECOMMENDATION

A. Midlothian

Based on the preponderance of the evidence, Midlothian maintains that it meets all the statutory criteria to amend its CCN to include the requested area. In addition, Midlothian contends the requested CCN amendment is necessary for the service, accommodation, convenience, or safety of the public.

B. Wax-Mid

Wax-Mid recommends that the Application be denied on the following multiple grounds, and asks that this docket be dismissed:¹²

- (1) Midlothian has not met its statutory burden of proof because it has presented no evidence to meet the mandatory requirement of "necessity of a CCN amendment" and no evidence of "need for additional service" in the area at issue.

¹² Wax-Mid's Closing Argument.

- (2) Wax-Mid holds rights under a 1986 Order of the Texas Water Commission based on former Section 13.249 of the Texas Water Code. Wax-Mid does not hold a CCN. As such, Wax-Mid's rights are not subject to modification or repeal under the current Water Code provisions cited by Midlothian, which deal with decertification of CCN holders in order to amend the CCN of another utility.
- (3) Midlothian has presented no evidence that Wax-Mid has violated the terms and requirements of the 1986 Order under which it continues to hold the right to be granted a CCN for a defined area upon submission of construction plans. Midlothian has cited no legal basis and presented no factual grounds for modifying Wax-Mid's rights under the 1986 Order.
- (4) Midlothian's application to be granted a CCN for the area subject to Wax-Mid's 1986 Order, without reopening that docket and amending or revoking that order, is an impermissible collateral attack on a final order.
- (5) The notice and docketing statements of this case are insufficient under the Texas Administrative Procedure Act for the relief sought by Midlothian¹³ because they do not address or provide notice of any action relating to the 1986 Order and Wax-Mid's rights under the 1986 Order, nor do they advise the parties of the legal criteria to be applied by the agency.
- (6) Midlothian's allegations about Wax-Mid's ownership and change of control are based on a misstatement of the controlling statute, are legally irrelevant and are factually incorrect. They provide no basis for the relief sought by Midlothian.¹⁴

Wax-Mid concludes that the Commission should deny the Application. Wax-Mid claims there is no necessity for a CCN amendment because:

- (1) Midlothian is already serving or can lawfully serve the area it seeks to add its CCN; and
- (2) there is no need for additional service because the developed portions of the requested area are already served by two utilities;

¹³ Midlothian requested revocation of the 1986 Order, which Wax-Mid characterizes as an impermissible collateral attack on the Order. Midlothian's Closing Argument; Wax-Mid's Closing Argument.

¹⁴ See party arguments regarding Wax-Mid's stock transfer, at Section VIII(C)(4) and Section VIII(D)(3) of this Proposal for Decision.

and (3) the undeveloped portion owned by ECOM is likely to remain so for the foreseeable future.¹⁵

C. Sardis

Sardis took no position on whether the Application should be granted or denied.

D. ED

The Executive Director (ED) of TCEQ recommends that Midlothian's Application be approved for the area it is currently serving as well as the area within Midlothian's corporate limits.¹⁶

E. ALJ

The ALJ recommends that the Application be granted because Midlothian presented sufficient evidence to prove it meets all legal criteria for approval of its CCN amendment. The ALJ also recommends that Midlothian's request for decertification be dismissed because Wax-Mid does not hold a CCN.

Counter to the finding in Order No. 8 in this proceeding ruling on motions for summary disposition, the ALJ now concludes that Midlothian has shown there is a need for additional service in the Application area,¹⁷ and issuance of the CCN amendment is necessary for the service, accommodation, convenience, or safety of the public.¹⁸

¹⁵ Wax-Mid's Closing Argument.

¹⁶ Pre-filed testimony of Prabin Basnet, TCEQ Engineering Specialist, ED Exh. 4, at 10, lines 250-253, and at 11, lines 254-266.

¹⁷ TEX. WATER CODE ANN. § 13.246 (c)(2)

¹⁸ 30 TAC § 291.102(c); TEX. WATER CODE ANN. § 13.246 (b)

The ALJ does not agree with Wax-Mid's position that Midlothian is precluded from seeking a CCN amendment because it can otherwise lawfully provide water service to the Application area as a municipality. In addition, even if the 1986 Order entitles Wax-Mid to obtain a CCN, it does not preclude Midlothian's Application from being granted, because the law provides for dual certification.¹⁹

V. BACKGROUND

Midlothian's proposed service area is located approximately five miles southwest of downtown Midlothian, and is generally bounded on the north by F.M. 1387; on the east by the North Prong Creek and the Mid-Way Regional Airport (airport);²⁰ on the south by U.S. Highway 287; and on the west by South Walnut Grove Road.²¹ The total area being requested includes approximately 1,135 acres and three customers:²² Ennis Business Forms and Whataburger in the Walnut Grove Center, and the airport. The Application area includes about 1,050 acres owned by ECOM, which controls Wax-Mid: the Walnut Grove tract (37 acres sold to Mr. Pritchett by ECOM) and the airport tract (47 acres taken from ECOM in condemnation proceedings by Midlothian and Waxahachie).²³

The record is not clear as to how much of the Application area is outside Midlothian's city limits. According to the Application, the requested area is located entirely inside Midlothian's

¹⁹ TEX. WATER CODE ANN. § 13.255(a)

²⁰ The airport is located about half-way between Midlothian and Waxahachie, on 243 acres, and is co-owned by the cities. The facilities include one runway, a full-length taxiway, terminal building, a rotating beacon and numerous hangars and two business locations. Pre-filed testimony of Cam Fearis, airport manager, Midlothian Exh. 4, at 4; and CF-1.

²¹ The Application, Midlothian Exh. 13, at 15.

²² The Application, Midlothian Exh. 13, at 15. Note that in August 2005, Midlothian was serving two customers in the Application area, but now serves three customers there.

²³ Pre-filed testimony of William Nabors, president of ECOM, Wax-Mid Exh. 3, at 13, and Attachment 9. Pritchett pre-filed testimony, Exh. 5, at 5.

corporate limits.²⁴ But Don Hastings, Midlothian's Deputy City Manager and Director of Planning, testified that nearly all the property owned by ECOM was included within the corporate limits as a result of annexations completed February 4, 2004.²⁵ About 95 percent of Wax-Mid's 1986 Order area is within Midlothian's city limits.²⁶ He said the remainder of the Application area is located within Midlothian's extraterritorial jurisdiction or within a quarter mile of Midlothian's area currently certificated under CCN No. 11706.²⁷ He explained that Midlothian has entered into an agreement with Sardis relating to service areas immediately adjacent to the area claimed to be in Wax-Mid's 1986 Order area. In accordance with the agreement, Midlothian's water service area and facilities basically surround the area claimed by Wax-Mid.²⁸

Whether the Application area is confined to Midlothian's corporate limits or extends to its ETJ, Midlothian is entitled to serve the entire Application area whether the CCN amendment is granted or not. Pursuant to TEXAS WATER CODE § 13.243(1), a utility may extend service into a contiguous area if the point of use is within one-quarter mile of the certificated area and not within another utility's service area.

Decertification of CCN No. 11966 was sought to allow Midlothian single certification of the Application area. Midlothian has major water and wastewater trunk lines around and through the

²⁴ Midlothian Exh. 13, at 6. Several witnesses testified that the *majority* of the Application area is within Midlothian's corporate limits. The ALJ gives more weight to the information contained in Midlothian's Application because the Application is what is being considered in this matter, and proceeds in this Proposal for Decision on the premise that all of the Application area is inside Midlothian's corporate limits. On the map submitted with the Application, all but one small section of Wax-Mid's area is included in the city limits. A second map submitted with the pre-filed testimony of Mr. Hastings (Midlothian Exh. 3, DH-2) shows the Wax-Mid section outside Midlothian's city limits to be in Midlothian's ETJ. See Attachment B to this Proposal for Decision.

²⁵ Hastings pre-filed testimony, Midlothian Exh. 3, at 5, lines 1-20; and DH-2.

²⁶ Hastings testimony at hearing on the merits.

²⁷ Hastings pre-filed testimony, Midlothian Exh. 3, DH-2 and DH-4.

²⁸ *Id.* at 6, lines 4-18; and DH-3 and DH-4.

Application area, and has received requests for service within the Application area.²⁹ Midlothian is responsible for providing all other public services including sanitary sewer and solid waste service, and police and fire protection,³⁰ in the Application area.

At the time Midlothian began providing water service in the Application area – May 27, 2004³¹ – it did not contact Wax-Mid because the Commission's records indicated the area was inactive, and Wax-Mid did not exist as a business in the State of Texas.³²

VI. LEGAL STANDARDS

The Texas Water Code and Commission Rules set forth a variety of broadly stated requirements, standards and criteria by which to measure the merits of CCN applications in contested case proceedings. All are based on assessing whether applicants have demonstrated the managerial, technical, and financial capability to provide adequate service. Applicable law is stated below:

The commission may approve applications and grant or amend certificates only after finding that the certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public. 30 TAC § 291.102(c); TEXAS WATER CODE § 13.246 (b).

In determining whether to 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. TEX. WATER CODE ANN. § 13.241(a); 30 TAC § 291.102(a).

²⁹ The Application, Midlothian Exh. 13, at 6.

³⁰ Adams pre-filed testimony, Midlothian Exh. 2, at 2, lines 31-40.

³¹ *Id.* at 4, lines 42-43, and at 5, lines 1-3.

³² *Id.* at 2, lines 42-43, and at 3, lines 1-3.

For water utility service, the commission shall ensure that the applicant (1) is capable of providing drinking water that meets the requirements of Chapter 341, Health and Safety Code, and requirements of this code; and (2) has access to an adequate supply of water. TEX. WATER CODE ANN. § 13.241(b).

In considering whether to grant a water CCN, the Commission is directed under TEXAS WATER CODE § 13.246 (c) and 30 TAC § 291.102 (d) to consider the following criteria:

- the adequacy of service currently provided to the requested area;
- the need for additional service in the requested area;
- the effect of the granting of a certificate on the recipient of the certificate and on any retail public utility of the same kind already serving the proximate area;
- the ability of the applicant to provide adequate service;
- the feasibility of obtaining service from an adjacent retail public utility;
- the financial ability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
- environmental integrity; and
- the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate.

Additionally, Midlothian, as the applicant and moving party, has the burden of proof on all substantive issues pursuant to 30 TAC § 291.12.

VII. MIDLOTHIAN'S REQUEST TO DECERTIFY WAX-MID'S CCN NO. 11966

A. Applicable Law

The commission at any time after notice and hearing may revoke or amend any CCN . . . if it finds that the certificate holder has never provided, is no longer providing, or has failed to provide continuous and adequate service in the area, or part of the area, covered by the certificate. TEX. WATER CODE ANN. § 13.254(a)(1).

A certificate **or other order of the commission** does not become a vested right and the commission at any time after notice and hearing may on its own motion or on receipt of a petition revoke or amend any certificate of public convenience and necessity . . . if it finds that:

(1) the certificate holder has never provided, is no longer providing service, is incapable of providing service, or has failed to provide continuous and adequate service in the area or part of the area covered by the certificate; . . . [emphasis added] 30 TAC § 291.113(a)(1).³³

A “utility” is “any person . . . other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, owning or operating for compensation in this state equipment or facilities for the sale of potable water to the public or disposal of sewage, or engaged in certain other activities.” TEX. WATER CODE ANN. § 13.002(23).

B. Evidence

As stated in its Application, Midlothian sought decertification of Wax-Mid’s CCN because Wax-Mid is not a retail public utility and holds an inactive CCN. The evidence establishes that Wax-Mid has never provided, is no longer providing, or has failed to provide continuous and adequate service in the area, or part of the area, covered by what was believed at the outset of this proceeding to be a certificated area under CCN 11966. Wax-Mid does not have any infrastructure in place or a viable water source to serve the Application area.³⁴

Wax-Mid has not provided service and is not providing service in the requested area.³⁵ In a November 29, 2004 letter³⁶ sent to William Nabors, president of ECOM, which owns Wax-Mid, Juan Martinez, airport manager, requested information regarding Wax-Mid’s ability or interest in

³³ The title of this rule is “Revocation or Amendment of Certificate.” Although the rule uses the words “or other order of the commission,” the ALJ is not certain if this rule pertains to the 1986 Order which technically is not a certificate.

³⁴ Adams pre-filed testimony, Midlothian Exh. 2, at 3, lines 14-21.

³⁵ Harkins pre-filed testimony, Midlothian Exh. 1, at 12, lines 19-23.

³⁶ *Id.* at 13, lines 1-13, and VRH-3. *See also* Wax-Mid’s Response to Interrogatory No. 7 in Midlothian’s Request for Disclosure, VRH-5, page 4, stating, “On or around November 29, 2004, William Nabors received a letter from Juan Martinez regarding the provision of service to Mid-Way Regional Airport.” *See also* Midlothian Exh. 8a.

providing water service to the airport. The letter was not answered ³⁷ as required by 30 TAC § 291.85.³⁸

The evidence also establishes that in 1986 the TWC issued an order preliminary to issuance of a CCN to Wax-Mid, but Wax-Mid has not met one of the two conditions set out in the 1986 Order for obtaining the CCN, and no CCN has been issued. Wax-Mid filed an application for a CCN with the TWC on October 10, 1984. The application was protested and referred to hearing. As part of that hearing, the ED recommended that a CCN not be granted until Wax-Mid provided a letter of approval [from the Texas Department of Health] for construction of a water supply system. The recommendation was incorporated into the order for Docket No. 5951 and adopted by the Texas Water Commission on July 1, 1986.³⁹ Wax-Mid stated in its discovery responses in the current case that it did not have any plant items or lines in the requested area.⁴⁰ The Commission has no record of Wax-Mid ever submitting plans and specifications as required in the 1986 Order.⁴¹ In the opinion of Victoria Harkins, Ph.D., P.E., Wax-Mid did not fulfill its obligations as set out in the 1986 Order, so does not hold a CCN.⁴²

Jack E. Stowe, Jr., a municipal consultant and Midlothian's expert witness, testified that Wax-Mid does not meet the definition of a retail public utility under TEX. WATER CODE ANN. ch. 13 because it does not operate, maintain, or control facilities for providing potable water services for

³⁷ Midlothian Exh. 8b.

³⁸ Harkins pre-filed testimony, Midlothian Exh. 1, at 13, lines 8-11. Presumably Wax-Mid believed it held a valid CCN in November 2004, and was obligated to answer the inquiry; but technically, because Wax-Mid did not hold a CCN, it was not required to respond to Mr. Martinez' letter.

³⁹ *Id.* at 13, lines 14-22; and VRH-6. *See also* Midlothian Exh. 11.

⁴⁰ Wax-Mid's response to the ED's Request for Admissions, No. 10, at 8, and to Midlothian's Request for Admissions Nos. 1 and 3.

⁴¹ Harkins pre-filed testimony, Midlothian Exh. 1, at 14, lines 3-7; and VRH-7.

⁴² *Id.* at 14, lines 9-13.

compensation. He noted that by Wax-Mid's own admission, it does not have any source of water or facilities to transmit and distribute water.⁴³

C. ALJ's Analysis and Conclusion

No party has presented evidence or argument that Wax-Mid does, in fact, hold a CCN. If Wax-Mid held a CCN, the requirements for decertification under TEX. WATER CODE ANN. § 13.254(a)(1) would have been met, and the ALJ would have recommended that Midlothian's request for decertification of Wax-Mid's CCN No. 11966 be granted. However, Wax-Mid does not hold a CCN, rendering Midlothian's request for decertification moot.

**VIII. EFFECT OF THE 1986 ORDER CONCERNING WAX-MID
ON MIDLOTHIAN'S APPLICATION**

A. The 1986 Order

In 1984, Wax-Mid filed an application to obtain a CCN. The application was contested and a final order was issued on July 1, 1986, by the TWC, predecessor to the TCEQ. The 1986 Order indicated in Finding of Fact No. 39 and Conclusion of Law No. 8 that it was a preliminary or conditional issuance of a CCN to Wax-Mid:

Since counsel for Wax-Mid agreed that the certificate should be conditional upon Wax-Mid obtaining approval of its proposed tariff and a construction approval letter from the Texas Department of Health, the Texas Water Commission should issue an order preliminary to the issuance of a certificate of convenience and necessity pursuant to PURA Section 57 and Section 13.249 of the Texas Water Code, as amended, declaring that the certificate of convenience and necessity will be awarded after Wax-Mid has

⁴³ Stowe's pre-filed testimony, Midlothian Exh. 7, at 3, lines 15-23, and at 4, lines 1-3.

presented satisfactory evidence showing the two conditions have been met.⁴⁴

Wax-Mid obtained an approved tariff,⁴⁵ but to date has submitted no plans and specifications to the TDH or the TCEQ to acquire construction approval of its water system and to obtain CCN No. 11966.⁴⁶ The 1986 Order set no time limit for Wax-Mid to meet the two conditions.

The area covered by the 1986 Order is about 1,050 acres of the Diamond J Ranch located north of Highway 287 as shown on a map created by Shive-Hatterly Engineering that was submitted to the TWC with Wax-Mid's CCN application.⁴⁷ Mr. Nabors said there are three parcels of land within the 1986 Order area that are not owned by ECOM. He described those parcels as 47 acres acquired by Midlothian and Waxahachie in condemnation proceedings related to the airport in 1991; 37 acres sold to Mr. Pritchett in 2001, of which 12 acres were developed; and 25 acres owned by Sara Jane Properties, Ltd., one of Mr. Pritchett's companies.⁴⁸

B. Background

Mr. Nabors, president of ECOM since 1992, and the president and sole director of Wax-Mid since 2005, testified that ECOM owns approximately 1,700 acres of undeveloped land between Midlothian and Waxahachie.⁴⁹ He said ECOM's property in Ellis County was acquired in 1973 by an entity known as Blackland Properties, a predecessor to ECOM. He said in 1973, the land was

⁴⁴ Harkins pre-filed testimony, Midlothian Exh. 1, VRH-6, Texas Water Commission Order, Finding of Fact No. 39, Conclusion of Law No. 8, and Order, Paragraph 1.

⁴⁵ Nabors' pre-filed testimony, Wax-Mid Exh. 3, Attachment 10.

⁴⁶ *Id.* at 12, lines 14-23 and at 13, line 1. Note also that the TDH Drinking Water Program, including plan review, was subsequently transferred to the TCEQ. Basnet pre-filed testimony, ED Exh. 4, at 4, lines 93-94.

⁴⁷ *Id.* at 9, lines 4 through page 11, line 21, and Wax-Mid Attachments 6-9.

⁴⁸ *Id.* at 13, lines 13-23; at 14, lines 1-8; and at 17, lines 4-8.

⁴⁹ *Id.* at 4.

known as the Diamond J Ranch. In 1992, Blackland Properties was dissolved, and its assets, including the Diamond J Ranch, were conveyed to ECOM. Mr. Nabors was an employee of Blackland Properties.⁵⁰

Mr. Nabors testified that in the early 1980s, Blackland Properties developed detailed plans for development of the Diamond J Ranch. The proposed development would have included single family and multi-family homes, and a retirement community. He said the recession of the 1980s made development of the property unfeasible, and ultimately forced Blackland Properties to table its plans.⁵¹

Mr. Nabors testified that as part of the development plans, Blackland Properties commissioned a study to evaluate options for water service. The study concluded that development of groundwater and surface water on the property could support limited development, but that an off-property source of water would be required to serve the entire development. Subsequently, Blackland Properties began to monitor issues related to water utilities in the early 1980s, and became involved with Wax-Mid as a result.⁵²

Mr. Nabors described Wax-Mid as a domestic business corporation incorporated in 1984. He said Blackland Properties acquired Wax-Mid in 1986, when Wax-Mid's CCN application was pending before the TWC.⁵³ He explained that Blackland Properties thought that by wholly owning Wax-Mid, it could better coordinate the development of the Diamond J Ranch with the provision of water service to the property. In 1992, Blackland Properties' interest in Wax-Mid was conveyed to ECOM, who has wholly owned Wax-Mid since that time. That same year, the Texas Secretary of State forfeited Wax-Mid's charter for failure to pay franchise tax; the charter was reinstated on

⁵⁰ *Id.* at 5, lines 1-7.

⁵¹ *Id.* at 5, lines 8-13.

⁵² *Id.* at 5, lines 14-23.

⁵³ *Id.* at 6, lines 1-13, and Attachments 1 and 2.

October 31, 2005. Wax-Mid is currently a corporation in good standing with the Texas Secretary of State and the Texas Comptroller of Public Accounts.⁵⁴

C. Midlothian's Argument⁵⁵

Midlothian contends that the existence of an order that has not been fulfilled for 20 years casts a cloud over the development of Midlothian's water service infrastructure and service to a rapidly growing area within its corporate limits and ETJ. Midlothian asks TCEQ to revoke the 1986 Order and grant Midlothian's amendment to its CCN to provide water utility service to this area in Ellis County.

1. Revocation of 1986 Order

According to Midlothian, TCEQ has the power as well as the duty to revoke the 1986 Order for the public interest. It claims that TCEQ has jurisdiction over Wax-Mid, which is "a business corporation incorporated in 1984 for the purpose of operating a water utility in Ellis County"⁵⁶ and, as such, is subject to TCEQ jurisdiction. Midlothian notes that the Legislature in TEX. WATER CODE ANN. § 13.001 has vested the TCEQ with the inherent power to establish a comprehensive regulatory system to protect the public interest inherent in the rates and services of retail public utilities.

⁵⁴ *Id.* at 7, lines 1-20, and Attachment 3.

⁵⁵ Midlothian's Closing Argument, at 9-12; Midlothian's Rebuttal to Wax-Mid's Closing Statement, at 1-8.

⁵⁶ Wax-Mid Closing Statement, at 2.

At any time after notice and hearing, the Commission may revoke any certificate of convenience and necessity if it finds certain facts. TEX. WATER CODE ANN. § 13.254(a).⁵⁷ The facts for revocation, include among others:

that the certificate holder has never provided, is no longer providing, is incapable of providing or has failed to provide continuous and adequate service; agreed in writing to allow another public utility to provide service within its service area, except for an interim period, without amending its certificate; and failed to file a cease and desist action within 180 days after becoming aware that another retail public utility is providing service within its service area. TEX. WATER CODE ANN. § 13.254(a)(1), (3), and (4).

There is no dispute that Wax-Mid has never provided retail water service. Mr. Nabors testified at hearing on cross-examination that Wax-Mid does not have or maintain any water utility infrastructure to include meters, lines, or systems in place to provide water service to commercial or residential customers. There is also evidence that Wax-Mid, in anticipation of development of the ECOM tract, has contracted with Sardis to provide service within its territory designated on TCEQ maps as being in Wax-Mid's CCN. There is also no dispute that Midlothian is a retail public utility and that Midlothian has been serving within the territory designated on TCEQ maps as being within the CCN held by Wax-Mid for more than six months prior to Wax-Mid filing its Request for a Cease and Desist Order.

As a result of this proceeding, the parties discovered that Wax-Mid was never issued a CCN because Wax-Mid never satisfied the conditions of the 1986 Order approving its 1984 application.⁵⁸ Since Wax-Mid does not hold a CCN, the area that Midlothian wants to add to its CCN is not within the CCN of another utility. However, Midlothian argues that the Commission should proceed to

⁵⁷ TEXAS WATER CODE ANN. § 13.254(a) was amended by H.B. 2876 by inserting the phrase "on its own motion or on receipt of a petition described by section (a-1)" between the words "may" and "revoke" in the first sentence. The application was filed before the amendments became effective, but the amendment does not have any effect on the pending application.

⁵⁸ Midlothian points out that the 1986 Order in question was not a final order. On its face, the Order states: "Wax-Mid, Inc., is ISSUED an Order preliminary to the issuance of a certificate of convenience and necessity."

revoke its authorization for Wax-Mid to acquire a CCN based upon the application of Midlothian and the evidence admitted at the hearing. When Midlothian filed this application and Wax-Mid appeared and was named a party, all parties were under the impression that Wax-Mid held a CCN. Wax-Mid appeared to defend its CCN, and fully participated as a party claiming to hold a CCN until shortly before the hearing on the merits, so Wax-Mid cannot complain about any notice issues, according to Midlothian.

Midlothian argues that Wax-Mid had adequate notice for the Commission to revoke the 1986 Order. Wax-Mid opposed Midlothian's Application, which if granted will revoke Wax-Mid's authority to provide water service. Midlothian asserts that Wax-Mid cannot argue lack of notice. No showing of harm or prejudice has been shown by Wax-Mid, that maintained it had a CCN until November 14, 2006, just two weeks before the hearing on the merits, when in fact the 1986 Order was attached to Mr. Nabors testimony pre-filed August 26, 2006, as Exhibit 7.⁵⁹

While Wax-Mid technically does not hold a CCN, and TEX. WATER CODE ANN. § 13.254(a) uses the phrase "certificate of convenience and necessity," Midlothian argues the Commission has jurisdiction to grant the relief requested by Midlothian based upon the evidence submitted in this proceeding. The Commission can still rely on TEX. WATER CODE ANN. § 13.254 for revocation or amendment of the 1986 Order. The Legislature's intent in adopting TEX. WATER CODE ANN. ch. 13 is plainly expressed in TEX. WATER CODE ANN. § 13.001(c) as establishing "a comprehensive regulatory system that is adequate to the task of regulating retail public utilities." According to Midlothian, Section 13.254(a) of the Texas Water Code should not be construed narrowly because the term "certificate of convenience and necessity" is not defined by the Legislature in TEX. WATER CODE ANN. § 13.002, nor is the phrase defined by the Legislature in TEX. WATER CODE ANN. subchapter G. Absent such a definition, Midlothian asserts the 1986 Order should be construed as a "certificate of convenience and necessity."

⁵⁹ The ALJ notes that just because the 1986 Order was attached to Mr. Nabors' pre-filed testimony, it does not prove Wax-Mid had failed to fulfill one of the two conditions preliminary to obtaining a CCN, and therefore held no CCN.

According to Midlothian, the Commission could address this issue in at least two ways: (1) find that the 1986 Order was never final, being subject to conditions, and issue an order denying Wax-Mid's application; or (2) adopt an order that repeals or modifies the 1986 Order in a manner that prohibits Wax-Mid from waiting 20 years to satisfy the conditions for obtaining a CCN, using the Commission's general authority to adopt orders under TEX. WATER CODE ANN. §§ 5.102 and 13.041(c).

2. Judicial estoppel and equitable estoppel

Midlothian argues that Wax-Mid is judicially and equitably stopped from claiming to have rights under the 1986 Order because up until November 14, 2006, it filed multiple judicial pleadings maintaining it held a CCN, forcing Midlothian to engage in discovery, written and oral, defending against Wax-Mid's Request for a Cease and Desist Order. That request was predicated on Wax-Mid maintaining in its pleadings that it had a CCN. Only when grounds for revocation for Wax-Mid's alleged CCN were undisputedly established during discovery did Wax-Mid backtrack and, 14 days before the hearing on the merits, claimed that the 1986 Order was "cast in stone."

3. Waiver

Midlothian argues that Wax-Mid has waived its rights under the 1986 Order by its course of conduct over the past 20 years. Wax-Mid has engaged in conduct that is inconsistent with a known right. *Ford v. Culbertson*, 308 SW2d 855, 865 (1958). Specifically, Wax-Mid has failed to obtain a construction approval letter from the Texas Department of Health, which was a condition precedent to Wax-Mid being entitled to secure a CCN. The 1986 Order was issued based upon representations that its requested 1,700-acre service area on the Diamond J Ranch would develop "in increments of 80 acres per year, spread over 10 to 20 years. Residential service could be required as early as mid-summer 1986."⁶⁰ Wax-Mid was purchased by Blackland Properties, the owner of the Diamond J

⁶⁰ Harkins pre-filed testimony, Midlothian Exh. 1, VRH-6, 1986 Order, Finding of Fact No. 17.

Ranch, immediately after this 1986 Order was granted in July 1986. Wax-Mid was subsequently transferred to ECOM from Blackland Properties along with the former Diamond J Ranch acreage in Ellis County in 1992. Neither Blackland Properties, nor ECOM, ever fulfilled the representations to warrant the issuance of this 1986 Order, even though as the real estate developers of the Diamond J Ranch both corporations had the ability to do so.

4. Stock transfer

Midlothian asserts that any rights that Wax-Mid claims to have under the 1986 Order are void. Mr. Nabors testified that he did not have any proof that Wax-Mid reported to the TWC the transfer of ownership that occurred on August 29, 1986. Mr. Nabors also testified that he had no proof that the transfer of stock of Wax-Mid from Blackland Properties to ECOM was reported to the Commission. Since Wax-Mid's stock transfer to Blackland Properties was never reported to the TWC. Midlothian argues that any rights under the 1986 Order are void. Section 13.302(f) of the Texas Water Code provides in pertinent part that "a purchase or acquisition that is not completed in accordance with the provisions of this section is void."

Mr. Stowe, a municipal consultant and expert witness for Midlothian, testified that in his opinion, when Blackland Properties in 1986 and ECOM in 1992 acquired Wax-Mid, and did not report the transactions to the Commission, they failed to meet regulatory requirements set out in TEX. WATER CODE ANN. § 13.251, thereby invalidating Wax-Mid's conditional CCN authorized by the 1986 Order.⁶¹

⁶¹ Stowe pre-filed testimony, Midlothian Exh. 7, at 4, lines 16-22, and at 5, lines 1-14.

D. Wax-Mid's Argument

1. Wax-Mid May Obtain a CCN Pursuant to the 1986 Order⁶²

At the time the 1986 Order was issued, TEX. WATER CODE ANN. § 13.249 read as follows:

PRELIMINARY ORDER FOR CERTIFICATE. If a public utility desires to exercise a right or a privilege under a franchise or permit that it contemplates securing but that has not as yet been granted to it, the public utility may apply to the commission for an order preliminary to the issuance of a certificate. The commission may then issue an order declaring that it will, on application under such rules as it prescribes, issue the desired certificate, on terms and conditions it designates, after the public utility has obtained the contemplated franchise or permit. On presentation to the commission of evidence satisfactory to it that the franchise or permit has been secured by the public utility, the commission shall issue the certificate.⁶³

Since Wax-Mid has not yet secured both of the permits upon which the TWC conditioned issuance of a CCN, Wax-Mid does not currently hold a CCN under the 1986 Order. However, Wax-Mid claims the 1986 Order is a final order under the Texas Administrative Procedure Act, Chapter 2001, Texas Government Code. The TWC granted specific rights to Wax-Mid that have not been amended, vacated, or revoked. Under the express language of TEX. WATER CODE ANN. § 13.249 and the 1986 Order, the TCEQ (as successor to the TWC) remains obligated, according to Wax-Mid, to issue a CCN to Wax-Mid if it obtains the remaining approval stipulated in the 1986 Order.

⁶² Wax-Mid Closing Argument, at 2-5.

⁶³ See Chapter 795, Session Laws, 69th Legislature – Regular Session at 5953, enacting Section 13.249, Wax-Mid's Closing Statement, Attachment B. Section 13.249 was repealed in its entirety, effective September 1, 1987. See Chapter 539, Session Laws, 70th Legislature – Regular Session at 4310, Wax-Mid's Closing Statement, Attachment C. Wax-Mid argues that the repeal provision did not invalidate, time limit or otherwise restrict approvals already granted under Section 13.249, and it did not affect the ongoing validity of final orders granted by the TWC under Section 13.249.

Wax-Mid argues that the Water Code as it existed in 1986 and in 2005, and as it exists today, contains no statutory criteria for revoking or modifying rights held under an order based on TEX. WATER CODE ANN. § 13.249, such as the 1986 Order. Nor does the Water Code provide criteria or a legal basis for expanding the CCN area of an adjacent utility into an area subject to a preliminary order under TEX. WATER CODE ANN. § 13.249.

2. Revocation Would Be Improper Collateral Attack on 1986 Order

Wax-Mid points out that Midlothian's Application in this case does not address the 1986 Order and the rights that Wax-Mid holds under TEX. WATER CODE ANN. § 13.249 as it existed in 1986. Wax-Mid asserts that Midlothian's pleadings have stated no legal basis to reconsider or re-open the 1986 docket under which the 1986 Order was issued. Wax-Mid questions whether the Commission even has statutory authority to re-open a Section 13.249 order.

Before Wax-Mid's rights under the 1986 Order could be reconsidered in an administrative proceeding, Wax-Mid argues that an applicant would need to ask the TCEQ to reopen Docket 5951 and amend the 1986 Order. Just as important, the agency would need to provide notice advising the parties as to the applicable legal rules and factual criteria for its decision in the contested case. The current statutory criteria for decertification and amendment of a CCN that Midlothian has invoked would not be the controlling legal authority. According to Wax-Mid, the applicant in such a proceeding would need to identify, plead, and prove up a valid legal basis and factual grounds not for decertification, but for modifying rights under a Section 13.249 order.⁶⁴

Wax-Mid states that as a result of discovery, testimony, deposition testimony, and pleadings in this proceeding, it is clear that the parties concur that Wax-Mid's rights at issue in this docket are based not on a CCN but on the express terms of the 1986 Order.⁶⁵ Wax-Mid asserts that because it does not hold a CCN, it is not subject to the statutory remedy of decertification sought by Midlothian

⁶⁴ Wax-Mid's Closing Argument, at 13, footnote 4.

⁶⁵ Wax-Mid characterizes this Preliminary Order for Certificate as a final administrative order.

under TEX. WATER CODE ANN. § 13.254. In Wax-Mid's opinion, if Midlothian wishes to challenge Wax-Mid's rights, its only legal recourse would be to initiate an administrative proceeding seeking to re-open the TWC docket and to amend the 1986 Order.

Under TEX. WATER CODE ANN. § 13.254, as now in effect, the enumerated statutory criteria for revoking a CCN look to whether the holder has met its CCN obligations and protected its CCN rights. A CCN may be revoked or amended if the certificate holder has never provided or is no longer providing continuous and adequate service, among other reasons. Wax-Mid claims that this does not apply to the holder of a TEX. WATER CODE ANN. § 13.249 preliminary order, who has no obligation to provide service and no service area to protect through a cease and desist action. Wax-Mid will become subject to the duties and obligations of a current CCN holder under TEX. WATER CODE ANN. § 13.254 when it complies with the remaining condition and receives a CCN – but not before. By allowing Wax-Mid to delay CCN issuance and to submit construction plans when it is ready to do so, Wax-Mid claims the TWC granted Wax-Mid a different bundle of rights and obligations than those of a CCN holder. Wax-Mid argues that it would be unreasonable and illogical to hold Wax-Mid to the duties of a CCN holder when it does not have a CCN holder's rights. Since the area covered by the 1986 Order was raw land, and since it remains almost entirely raw land 20 years later, granting Wax-Mid the flexibility of a TEX. WATER CODE ANN. § 13.249 order was reasonable and fair.⁶⁶

3. Stock transfer⁶⁷

Wax-Mid's transfer of stock to Blackland Properties took place on August 29, 1986.⁶⁸ Wax-Mid argues that TEX. WATER CODE ANN. § 13.202, which Midlothian claims Wax-Mid violated, did

⁶⁶ According to the 1986 Order, Wax-Mid represented to the TWC that residences could be constructed and water service could be needed as early as mid-summer of 1986.

⁶⁷ Wax-Mid's Closing Argument, at 20-21.

⁶⁸ Nabors pre-filed testimony, Wax-Mid Exh. 3, Attachment 2.

not apply when the stock was transferred. It applied only if a utility purchased stock in another utility, and even that did not require approval:

PURCHASE OF VOTING STOCK IN ANOTHER PUBLIC UTILITY: REPORT. A utility may not purchase voting stock in another utility doing business in this state unless the utility reports the purchase to the commission.⁶⁹

Wax-Mid points out that Blackland Properties was not a utility. Therefore it argues that TEX. WATER CODE ANN. § 13.202 required no action on the part of Wax-Mid in connection with transfer of Wax-Mid's stock. Even if that statute had been applicable, Wax-Mid claims that nothing in TEX. WATER CODE ANN. § 13.202 then or now stated that a violation would cause a TWC permittee to forfeit all its rights, nor did TEX. WATER CODE ANN. § 13.202 create a right of private enforcement by other parties in contested cases. Wax-Mid argues that TEX. WATER CODE ANN. § 13.202 is wholly inapplicable to this docket.

4. Summary

In summary, Wax-Mid's position is that because it does not hold a CCN (1) there is no legal basis to exclude Midlothian from serving areas subject to the 1986 Order; (2) Midlothian's Application states no valid, factual, or lawful basis to modify or amend the 1986 Order; and (3) TCEQ has no factual or legal basis to "decertify" Wax-Mid or add the area in the 1986 Order to Midlothian's CCN. Given the absence of proper notice under the Administrative Procedure Act, and the absence of legal authority for revoking or modifying rights under a Section 13.249 order, Wax-Mid argues that any relief granted to Midlothian in this docket would be an impermissible collateral attack on a final agency order, effectively vacating the 1986 Order.

⁶⁹ See Chapter 795, Session Laws, 69th Legislature – Regular Session. Wax-Mid's Closing Argument, Attachment D.

E. ED's Argument

The ED does not agree with Wax-Mid's contention that the 1986 Order precludes Midlothian's Application from being granted. However, the ED does agree with Wax-Mid that a notice and hearing is required for the revocation of the 1986 Order. Therefore, revocation of the 1986 Order is outside the scope of this proceeding.⁷⁰

F. ALJ's Analysis and Conclusion

The ALJ cannot recommend in lieu of decertification that the Commission take action on the 1986 Order. The Notice of Hearing specifically notified Wax-Mid that Midlothian had requested decertification of CCN No. 11966. The Notice of Hearing – issued before the parties were aware that Wax-Mid does not hold a CCN – did not notify Wax-Mid that revocation of the 1986 Order was at issue. The ALJ concludes that due to lack of notice, revocation of the 1986 Order is outside the scope of this proceeding.

However, nothing in the 1986 Order or cited law prevents the Commission from granting a n application for a CCN covering the same area as the 1986 Order.⁷¹ Therefore, the ALJ concludes that although Wax-Mid might have rights under the 1986 Order to provide water service, those rights do not prevent the Commission from granting Midlothian's Application.

⁷⁰ Information taken from ED's Reply to Wax-Mid's Closing Statements and from the ED's Reply to Midlothian's Closing Argument.

⁷¹ Harkins pre-filed testimony, Midlothian Exh. 1, VRH-6 at 9-17.

**IX. MIDLOTHIAN MAY SERVE THE APPLICATION AREA
WITHOUT A CCN AMENDMENT,
BUT IS NOT PRECLUDED FROM SEEKING A CCN AMENDMENT**

A. Applicable Law

A retail public utility is not required to secure a CCN for an extension into territory contiguous to that already served by it, if the point of ultimate use is within one quarter mile of the boundary of its certificated area, and not receiving similar service from another retail public utility and **not within the area of public convenience and necessity of another retail public utility**;...[emphasis added]. 30 TAC § 291.103(a)(1)(A); TEX. WATER CODE ANN. § 13.243(1).

A municipality which has given notice under TEX. WATER CODE ANN. § 13.255 that it intends to provide retail water service to an area or customers **not currently being served** is not required to obtain a certificate prior to beginning to provide service...[emphasis added] 30 TAC § 291.103(c); TEX. WATER CODE ANN. § 13.242(c).

A municipality can construct, maintain, and operate its water system inside and outside its city limits and may regulate the system in a manner that protects the municipality's interests. LOCAL GOV'T CODE ANN. § 402.001(b).

Mr. Stowe testified that under TEX. WATER CODE ANN. § 13.042(a), Midlothian has exclusive original jurisdiction over all water rates, operations, and service provided by a water utility within its corporate limits. He further noted that local utility service by a municipality and within its boundaries is exempt from regulation by the Commission. A municipality has the right to exercise the same regulatory powers over local service within its boundaries under the same standards and rules as the Commission or other standards or rules not inconsistent with them. TEX. WATER CODE ANN. § 13.082(b). He said Midlothian's city charter vests in it the power to grant franchises to retail public utilities operating within the boundaries of the city.⁷²

⁷² Stowe pre-filed testimony, Midlothian Exh. 7, at 6, line 1, through 7, line 3.

B. Wax-Mid's Argument

Wax-Mid argues that Midlothian's requested CCN amendment is not necessary under TEX. WATER CODE ANN. § 13.246(b), because Midlothian can lawfully serve the Application area without a CCN amendment.⁷³ Wax-Mid is subject to Midlothian's regulatory jurisdiction under TEX. WATER CODE ANN. ch. 13, because nearly all of ECOM's property was annexed by Midlothian in February 2004. Neither Wax-Mid or any other entity currently holds a CCN for any portion of the Application area. The majority of the Application area lies within Midlothian's municipal limits. The remainder of the Application area lies with Midlothian's ETJ and within a quarter mile of CCN No. 11706, Midlothian's existing CCN. In addition, Wax-Mid notes Midlothian does not require a CCN amendment to acquire easements or right-of-way by condemnation, purchase, or negotiation, as shown by the fact that it already has a pipeline across the ECOM tract.⁷⁴

C. ALJ's Analysis and Conclusion

Clearly Midlothian may lawfully provide water service to the Application area without obtaining a CCN amendment. However, no statute or rule precludes Midlothian from seeking to amend its CCN to include the Application area. In the event that Wax-Mid is also entitled to a CCN for the requested area pursuant to the 1986 Order, the law contemplates dual certification of an area.⁷⁵

⁷³ Wax-Mid's Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 7.

⁷⁴ Nabors pre-filed testimony, Wax-Mid Exh. 3, Attachment 9.

⁷⁵ See TEX. WATER CODE ANN. § 13.255, for instance, related to single certification in incorporated or annexed areas, but allowing dual certification.

X. ISSUES PRESENTED

A. Based upon the criteria set out in TEXAS WATER CODE § 13.246 (c) and 30 TAC § 291.102(d), should Midlothian's CCN amendment be granted?⁷⁶

Midlothian offered 13 exhibits, which were admitted, and called six witnesses. Four of Wax-Mid's exhibits were admitted, and Mr. Nabors and Mr. Luby testified on Wax-Mid's behalf. Sardis offered no exhibits and called no witnesses. The ED offered four exhibits, which were admitted, and the testimony of Prabin Basnet, TCEQ Engineering Specialist. OPIC did not participate in the hearing on the merits.

1. Adequacy of service currently provided in the requested area

a. Uncontroverted evidence

Midlothian provides water service to three commercial connections in the Application area, two in the Walnut Grove Center and one at the airport. Other service is provided by Sardis, with whom Midlothian has a contract designating which portions of the Application area each of them will serve.

In the Walnut Grove Center, Midlothian provides both domestic and irrigation water to Whataburger and domestic water to Ennis Business Forms, which has 100-125 employees and would not have located there without sewer service in addition to water service from Midlothian. Both Midlothian and Sardis have water lines in place to serve every property in the 37-acre Walnut Grove tract,⁷⁷ but only Midlothian provides sewer service as well.

⁷⁶ Midlothian also presented evidence through Dr. Harkins pre-filed testimony regarding the effect on land to be included in the certificated area. However, this criterion was added to TEX. WATER CODE ANN. § 13.246 effective September 1, 2005, and to 30 TAC 291.102(d) effective January 5, 2006, after Midlothian's Application was filed in August 2005, so the ALJ will not consider that evidence.

⁷⁷ Adams pre-filed testimony, Midlothian Exh. 2, at 2, lines 23-29, and at 4-5, and Exh. 2; Harkins pre-filed testimony, Midlothian Exh. 1, at 9, lines 2-5; Pritchett pre-filed testimony, Midlothian 5, at 5-8; Pritchett deposition testimony, Midlothian Exh. 6, at 13, line 3 to 14, line 3; at 15, line 4 to 16, line 4; at 19, line 16 to 22, line 17; at 26, lines

Walnut Grove property-owner Mr. Pritchett has been satisfied with the quality and price of water and wastewater service provided by Midlothian to the businesses in the Walnut Grove development; he has received no complaints about the service from tenants.⁷⁸ He prefers that Midlothian continue to provide water service to the Walnut Grove businesses.⁷⁹

Midlothian provides water service to the airport on the tract it acquired with Waxahachie from ECOM. Sardis also has a water line in place and is serving customers at the airport outside the tract Midlothian and Waxahachie acquired from ECOM.⁸⁰ Midlothian provides water to the airport through a 12-inch main, supplying enough volume and pressure to meet the fire protection needs of the paint shop there.

Cam Fearis, airport manager, testified he has been involved with the airport since 1994 in various capacities, including membership on the Airport Board from 1999 to 2005 and as Interim Manager.⁸¹ He said the Board began discussions of how to meet fire protection needs at its November 4, 2003 meeting, and discussed the need at subsequent meetings. The discussions resulted in Juan Martinez, Jr., who was the airport manager at that time, sending a letter to ECOM on November 29, 2004, to find out if Wax-Mid could provide water service; ECOM did not respond to the inquiry.⁸²

Mr. Fearis said the Board then met with Midlothian in late 2004, and Midlothian began providing water and sewer service to the paint shop at the airport in the summer of 2005. Mr. Fearis

20-24; at 29, lines 4-9, at 62, lines 7-15; and KP-2.

⁷⁸ Pritchett pre-filed testimony, Midlothian Exh. 5, at 8.

⁷⁹ *Id.*, Pritchett pre-filed testimony, Midlothian Exh. 5, at 9.

⁸⁰ Adams pre-filed testimony, Midlothian Exh. 2, at 2 and MGA-2; Fearis pre-filed testimony, Midlothian Exh. 4, at 6-7; Harkins pre-filed testimony, Midlothian Exh. 1, at 9; and Pritchett pre-filed testimony, Midlothian Exh. 5, at 7.

⁸¹ Fearis pre-filed testimony, Midlothian Exh. 4, at 4; and CF-1.

⁸² *Id.*, CF-2.

explained that the paint shop is the only airport facility currently receiving service from Midlothian, and that such service was necessary because Midlothian was the only provider who had adequate water volume and/or pressure to meet fire protection needs. Sardis serves all airport facilities except the paint shop.⁸³

Mr. Fearis said nobody from Wax-Mid approached him about providing water service to the airport, even after Mr. Martinez' November 29, 2004 letter was sent to ECOM. He said if Wax-Mid cannot provide adequate water volume or pressure, the paint shop would have to be closed. He also said Midlothian collects wastewater from the paint shop, and sewer service from Midlothian is vital to the future growth of the airport.⁸⁴

Mr. Fearis is satisfied with the quality and cost of Midlothian's water and wastewater service to the paint shop at the airport. He said he has received no complaints from airport tenants regarding Midlothian's service, and it is his preference for Midlothian to continue providing utility service to the airport.⁸⁵

b. Analysis and conclusion

Midlothian established that the service being provided to its three customers in the Application area is adequate.

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 8.

2. Need for additional service to the requested area

a. Midlothian's argument

Midlothian argues that a need for additional service exists in the Application area, as evidenced by the fact that Midlothian is providing water service to three commercial customers in the requested area.⁸⁶

Mr. Pritchett, owner of the Walnut Grove Center, testified by deposition that since 1992 he has developed six real estate projects in the Midlothian area including very high-end residential homes and several commercial developments.⁸⁷ His largest commercial project is on the land he bought from ECOM at the corner of Walnut Grove Road and U.S. Highway 287. The Walnut Grove tract, located on the north and south sides of Highway 287, is located in the Application area as well as Wax-Mid's area.⁸⁸ Ennis Business Forms' corporate headquarters and Whataburger are located in Walnut Grove Center North. An outpatient center for Methodist Hospital, a restaurant called McDaddy's, and a professional office building are located in Walnut Grove Center South. Mr. Pritchett said a second professional office building is planned. Mr. Pritchett intends to sell this land to other similar commercial businesses in the near future.⁸⁹ He said he bought the acreage from ECOM on June 14, 2001, and dealt with Mr. Nabors at ECOM.⁹⁰

Mr. Pritchett described his efforts to obtain water service for Walnut Grove Center North and Walnut Grove Center South.⁹¹ Mr. Pritchett said representatives of ECOM informed him the

⁸⁶ Harkins pre-filed testimony, Midlothian Exh. 1, at 9, lines 6-10.

⁸⁷ Pritchett deposition, Midlothian Exh. 6, at 6, line 1 through 7, line 11.

⁸⁸ Pritchett pre-filed testimony, Midlothian Exh. 5, at 4.

⁸⁹ Pritchett deposition, Midlothian Exh. 6, at 47, lines 20-24.

⁹⁰ Pritchett pre-filed testimony, Midlothian Exh. 5, at 5.

⁹¹ *Id.* at 3.

property was within a CCN held by Wax-Mid, which was owned or controlled by ECOM, but that Wax-Mid had no water facilities and no means or intention of providing water to the land. Mr. Pritchett said he was not concerned because he knew from prior development activities that water was probably available from Midlothian or Sardis. Ennis Business Forms and the professional office building initially received water service from Sardis.⁹² Later, several businesses in the Walnut Grove development applied for wastewater service from Midlothian, who agreed to provide it if they would also use Midlothian's water service. As a result, several businesses discontinued service with Sardis and switched to Midlothian, but two businesses did not.⁹³

Mr. Pritchett said in his discussions with Mr. Nabors and Mr. Luby, both of ECOM, during the time water lines were being extended to Walnut Grove, they were "very particular that I extended all of those utilities and made it available for future growth onto their property." Mr. Pritchett said "[t]hey just wanted to make sure they were stubbed" . . . "so we spent a lot of money making sure that there was a stub available both for Sardis, for Midlothian, and for sewer."⁹⁴

Additionally, Midlothian's Deputy City Manager Mr. Hastings provided testimony at the hearing on the merits that shows that the Application area is ripe for development. He said the area is bounded on the south by a four-lane divided highway and on the west by a future six-lane highway. Another four-lane divided highway is planned to cross this property. The property is strategically located within commuting distance to Dallas-Ft. Worth and between the two growing suburban cities of Midlothian and Waxahachie. Finally, Mr. Pritchett, a former Mid-Way Airport Board member, testified by deposition that the expansion of the airport depends on water and sewer services provided by Midlothian to this area.⁹⁵

⁹² *Id.* at 6.

⁹³ *Id.* at 7.

⁹⁴ Pritchett Deposition, Midlothian Exh. 6, at 44, lines 6-25 and at 45, line 1.

⁹⁵ *Id.* at 27, line 5 to 28, line 19.

b. Wax-Mid's argument

Wax-Mid argues there is no need for additional service in the Application area because every entity needing or requesting retail water service is already being lawfully served by Midlothian, Sardis, or both.⁹⁶ The only remaining property in the Application area is the ECOM tract, which is undeveloped. ECOM does not intend or expect to develop the tract in the foreseeable future,⁹⁷ so does not currently need water service. Mr. Luby, vice-president of ECOM, testified that development of ECOM's property in the Application area is still a number of years away.⁹⁸

Wax-Mid asserts that if the Application is denied, it can provide water service to any potential developments within the Application area. Mr. Nabors, president of ECOM, said Wax-Mid intends to provide retail water service to the ECOM tract. He pointed out that as an active corporation in good standing, Wax-Mid has the ability to provide water utility service within its service area.⁹⁹ For the approximately 12 acres of the Application area not owned by ECOM, retail water service can be provided by Wax-Mid pursuant to its agreement with Sardis.¹⁰⁰

Wax-Mid argues that ECOM has not requested water service, does not expect to develop its property in the foreseeable future. When development does occur, would prefer to request service through Wax-Mid.¹⁰¹

⁹⁶ Wax-Mid's Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 7, citing Adams pre-filed testimony, Midlothian Exh. 2, at 2, 4-5, and MGA-2; Harkins pre-filed testimony, Midlothian Exh. 1, at 9; Nabors pre-filed testimony, Wax-Mid Exh. 3, at 12; Nabors testimony at hearing; Pritchett pre-filed testimony, Midlothian Exh. 5, at 5-8; Pritchett deposition, Midlothian Exh. 6, at 13, line 3 to 14, line 3, at 15, line 4 to 16 line 4; at 19, line 16 to 22, line 17; at 26, line 20 to 26, line 24; at 29, lines 4-9; at 52, lines 5-13; and KP-2.

⁹⁷ Nabors pre-filed testimony, Wax-Mid Exh. 3, at 12, and Nabors testimony at hearing.

⁹⁸ Pre-filed testimony of Dan A. Luby, as redacted November 15, 2006, Wax-Mid Exh. 2 at 4, lines 5-6, and at 5, lines 12-16.

⁹⁹ Nabors pre-filed testimony, Wax-Mid Exh. 3, at 8, lines 1-4.

¹⁰⁰ Wax-Mid's Responses to Midlothian's First Request for Disclosure, Harkins pre-filed testimony, Midlothian Exh. 1, VRH-5, Interrogatory No. 8, at 9.

¹⁰¹ Nabors testimony at hearing on the merits.

c. ED's arguments

In presenting the ED's position on Midlothian's Application, Mr. Basnet testified there is a need for additional water service in the Application area. He said Midlothian is currently serving three connections in the Application area. He said Wax-Mid has never constructed a system and is not providing utility service in the Application area.¹⁰²

In response to Wax-Mid's Closing Statement, the ED said Midlothian has established that the need for additional service exists by showing: (1) Ennis Business Forms, Whataburger, and the airport are currently receiving water service from Midlothian in the requested area¹⁰³ (2) a request for water and sewer service by the airport manager to ECOM on November 29, 2004¹⁰⁴; and (3) the location of emerging activity centers within Midlothian's corporate limits and the Wax-Mid area consisting of the airport, along with office, retail, and medical activity centers, joined by a four-lane divided highway bounded to the south, an anticipated six-lane highway bounded to the west, and a four-lane divided highway to cross the area as testified to by Mr. Hastings.

The ED refutes Wax-Mid's contention that no evidence has been presented to support a need for additional service in the proposed area as required under TEX. WATER CODE ANN. § 13.246(c). A need for service does not necessitate a formal request for service, but may be shown by other methods. Further, the requirement is not predicated on the Wax-Mid's notion that "... Wax-Mid will seek TCEQ approval of water system construction plans when the ECOM tract is ready for development" or Wax-Mid's preference that "[w]hen development occurs, ECOM would prefer to obtain water utility service through a related [Wax-Mid] utility,...rather than through the City [of Midlothian]."¹⁰⁵ Based on the evidence in the record, the ED has determined that Midlothian has

¹⁰² Basnet pre-filed testimony, ED Exh. 4, at 8, lines 174-178.

¹⁰³ *Id.* at 7, lines 166-169.

¹⁰⁴ Harkins pre-filed testimony, Midlothian Exh. 1, VRH-3.

¹⁰⁵ Wax-Mid Closing Statement, at 4-6, and 9.

met its requirement to establish a need for additional service within the corporate limits of Midlothian.

d. Analysis and conclusion

The ALJ finds Midlothian proved there is a need for additional service in the Application area. No other retail public utility provides water service to the area. Sardis and Midlothian have reached an agreement designating which parts of the Application area each will serve. While ECOM has not requested water service from Midlothian, it has indicated that its property will be developed some day, at which time water service will be needed. Mr. Pritchett plans to sell more lots for commercial development in the Walnut Grove Center North. The ALJ recommends a finding that sufficient need for additional service exists to justify the proposed CCN amendment.

3. Effect of granting the amendment on Midlothian and on any retail public utility of the same kind already serving the proximate area

a. Uncontroverted evidence

Granting Midlothian's requested CCN amendment will increase the area for which Midlothian is obligated to provide continuous and adequate water service and for which it must respond to requests for service within an appropriate time frame. Wax-Mid will not be affected because it has not satisfied the requirements of the 1986 Order for issuance of CCN No. 11966. Notice was provided to all other neighboring utilities, none of which protested the Application or showed an interest in serving the Application area.¹⁰⁶

The uncontroverted evidence is that Midlothian will be able to better plan and provide service to the eastern area of its corporate limits and beyond if the Application is granted. Because the

¹⁰⁶ Basnet pre-filed testimony, ED Exh. 4, at 8, lines 180-196.

Application area is in Midlothian's corporate limits, the City is already obligated to provide municipal services such as police and fire protection there.¹⁰⁷

The Application area is not within the CCN area of any retail public utility except for Sardis, with whom Midlothian has a contract designating their respective service areas.¹⁰⁸ Granting the proposed amendment would have no adverse effect on neighboring utilities, none of which protested Midlothian's application or applied for a CCN for the Application area.¹⁰⁹

b. Analysis and conclusion

Midlothian proved the effect of granting the CCN amendment would be non-existent as to neighboring utilities, and would allow the City to better plan and provide service to the eastern area of its corporate limits. Because Midlothian is obligated to provide fire protection in the Application area, it must have a reliable water system in place. As demonstrated in the following sections of this Proposal for Decision, Midlothian has access to much more water than it currently uses, and the ability as a municipality to raise funds through taxes to pay for adequate infrastructure to provide the required services. Therefore, the ALJ recommends a finding that the effect of granting this application will be positive on the recipient of the certificate and will not negatively affect any retail public utility serving the proximate area.

¹⁰⁷ Harkins pre-filed testimony, Midlothian Exh. 1, at 9, lines 11-21.

¹⁰⁸ *Id.* at 9, lines 11-21.

¹⁰⁹ Basnet pre-filed testimony, ED Exh. 4, at 8, lines 195-196.

4. Ability to provide adequate service

a. Uncontroverted evidence

Midlothian has the capability to provide continuous and adequate service in the requested area, because:

(1) Midlothian has included the area in its long range water supply plans, as well as in its Water Master Plan;

(2) maintains large raw water contracts with the Trinity River Authority for amounts in excess of its current needs, so it is in a position to address growth in the area; and

(3) employs a full-time staff of certified water operators, engineers and administrative professionals to maintain and operate its water system.¹¹⁰

Initially, with the infrastructure in place, Midlothian will not need to expand its facilities to provide service to the Application area.¹¹¹ Midlothian has a 12-inch diameter water line that runs along a portion of the southern boundary of the Application area and then traverses the area to the airport. In addition, Midlothian has a 16-inch diameter line that runs along Walnut Grove Road, between U.S. Highway 287 and F.M. 1387, adjacent to the western portions of the Application area.¹¹²

Over time and as the area develops, additional water lines and infrastructure will be necessary. Per Midlothian's Water Master Plan and Impact Fee CIP [Capital Improvement Project], a proposed 16-inch diameter water line is planned for the Application area and will be extended north from U.S. Highway 287 to F.M. 1387, as well as a 12-inch diameter water line along the

¹¹⁰ Adams pre-filed testimony, Midlothian Exh. 2, at 3, lines 24-32; Harkins pre-filed testimony, Midlothian Exh. 1, at 10, lines 1-8.

¹¹¹ *Id.* at 4, lines 15-19.

¹¹² *Id.* at 3, lines 34-42.

eastern boundary. Midlothian plans to expand its water treatment plant, based on growth projections, existing wholesale contracts and recent additional raw water acquisition.¹¹³

Midlothian entered into an Ellis County regional water supply contract with the Trinity River Authority of Texas in 1991.¹¹⁴ The contract was amended in February 2005¹¹⁵ to allow Midlothian to purchase 1.5 million gallons per day (MGD) the first year with future increases of up to 7 MGD per year for municipal purposes only and within the area served by Midlothian's municipal water system.

Midlothian has a surface water treatment capacity of 12.196 MGD, and is required to provide 7.01 MGD to its retail and wholesale customers, leaving excess capacity to serve additional customers.¹¹⁶ Midlothian has wholesale water contracts to provide water to Rockett Special Utility District, Mountain Peak Special Utility District, the City of Grand Prairie, and the City of Venus.¹¹⁷ Currently, Midlothian provides approximately 250,000 gallons per day of treated water to Sardis on an emergency basis to help Sardis meet current peak day demands. Other than this emergency basis, Midlothian does not have a wholesale contract with Sardis.¹¹⁸

¹¹³ *Id.* at 4, lines 22-33.

¹¹⁴ Midlothian's Application, Midlothian Exh. 13, Attachment 7.

¹¹⁵ *Id.*, Attachment 7.

¹¹⁶ Basnet pre-filed testimony, ED Exh. 4, at 9, lines 199-206.

¹¹⁷ Adams pre-filed testimony, Midlothian Exh. 2, at 3, lines 44-45, and at 4, lines 1-3.

¹¹⁸ *Id.* at 4, lines 4-13.

Midlothian's water system was rated as "superior" and it had no outstanding violations as of the compliance investigation conducted November 10, 2005.¹¹⁹ Midlothian currently provides service that meets and exceeds state requirements for potable water service.¹²⁰

b. Analysis and conclusion

Midlothian proved it has the ability to provide adequate service in the Application area, now and into the future through its raw water contracts and ability as a municipality to fund infrastructure improvements through taxes and bonds. Midlothian's water system, which has a superior rating, is run by a full-time professional staff.

5. Feasibility of obtaining service from an adjacent retail public utility

a. Uncontroverted evidence

Upon notice of Midlothian's Application, no neighboring retail public utility protested or expressed interest in serving the Application area. The only retail public utility holding a CCN in the Application area is Sardis, which has reached an agreement with Midlothian setting out which parts of the area each will serve. Wax-Mid is not certificated to provide water service in the Application area. ECOM has stated it has no immediate plans to develop its property, although Mr. Nabors and Mr. Luby have stated Wax-Mid will either directly serve the ECOM property or contract with Sardis to serve the property. Presumably Wax-Mid plans to obtain a CCN pursuant to the 1986 Order when the ECOM property is developed, but at this time, Wax-Mid is not a water service provider.

¹¹⁹ Harkins pre-filed testimony, Midlothian Exh. 1, at 7, lines 19-21; and VRH-2; the Application, Midlothian Exh. 13, Attachment 4.

¹²⁰ *Id.* at 10, lines 1-8.

Mr. Pritchett testified that he has been involved with the airport since 1995, when he became a tenant. He served on the Airport Board from 2000 to 2003, and was involved in procuring water service during recent development that included constructing new hangars and a paint facility. He said he investigated whether the airport could obtain water service from Sardis, Waxahachie, and Midlothian.¹²¹ He did not investigate obtaining service from Wax-Mid, because he knew from his interaction with ECOM on the Walnut Grove project that Wax-Mid did not have any facilities or an intent or ability to provide water service.¹²² He said he investigated service from Sardis, but the Board chose to go with Midlothian because Sardis did not have a 12-inch main near the area, but the 12-inch main Midlothian was building to serve the Walnut Grove project could be extended a short distance to serve the airport.¹²³

Mr. Basnet testified it is not feasible to obtain water service from adjacent retail public utilities. He said the adjacent retail public utilities are Wax-Mid, which has no facilities to provide water service, and Sardis, which receives treated water from Midlothian on an emergency basis and has not expressed an interest in serving the Application area.¹²⁴

b. Analysis and conclusion

Midlothian proved that obtaining water service from an adjacent retail public utility is not feasible for the Application area. Midlothian and Sardis have already reached an agreement designating which parts of the Application area they will serve, Wax-Mid does not have a CCN, and no other retail public utility has expressed an interest in serving the Application area.

¹²¹ Pritchett pre-filed testimony, Midlothian Exh.5, at 10.

¹²² *Id.* at 11.

¹²³ *Id.* at 11. The 12-inch main was needed to provide adequate volume and/or pressure for fire protection at the airport paint shop.

¹²⁴ Basnet pre-filed testimony, ED Exh. 4, at 9, lines 208-216.

6. Financial ability of the applicant

a. Uncontroverted evidence

Midlothian is a home rule municipality with the power of taxation and the ability to issue bonds for design and construction of utility improvements.¹²⁵

A Financial and Managerial Checklist (FM Checklist)¹²⁶ prepared by Dan Smith, TCEQ staff member, on December 30, 2005, is based on a review of Midlothian's water system audit for the fiscal year ended September 30, 2004. He found total assets of \$93.1 million, non-current liabilities of \$63 million, and net assets of \$30.2 million, for a debt-to-equity ratio of 2.1:1. He noted the ratio to be relatively high, but said cash flow is adequate to provide a debt-service-coverage-ratio of 1.33:2. He said required annual principal and interest payments for 2005 is \$5,063,266 and for 2006 is \$5,314,977, and no additional projections were required.

Mr. Basnet testified on behalf of the ED that Midlothian has demonstrated its financial and managerial capability to provide continuous and adequate service in the Application area, based on the FM Checklist and Midlothian's pre-filed testimonies and discovery responses.¹²⁷

b. Analysis and conclusion

The evidence establishes that Midlothian has the financial ability to provide water service to the Application area.

¹²⁵ Adams pre-filed testimony, Midlothian Exh. 2, at 4, lines 35-40.

¹²⁶ ED Exh. 1, attached to Basnet pre-filed testimony, ED Exh. 4.

¹²⁷ Basnet pre-filed testimony, ED Exh. 4, at 9, lines 219-223, and at 10, lines 224-225.

7. Environmental integrity

a. Uncontroverted evidence

The environmental integrity of the Application area will be temporarily disturbed if Midlothian constructs water facilities there, but it appears no additional facilities will be constructed at this time.¹²⁸ In addition, Midlothian utilizes surface water, which is commonly preferred to over the use of groundwater,¹²⁹ as far as preserving environmental integrity.

b. Analysis and conclusion

The ALJ recommends a finding that granting the Application would have no significant effect upon environmental integrity.

8. Probable improvement in service or lowering of costs to consumers in the area resulting from granting of the certificate

a. Uncontroverted evidence

Midlothian already provides water service to three customers in the Application area, and there will be no change in their service or its cost if the Application is granted. Midlothian's current rates, as set by its City Council, will be applicable to any person or entity served in the Application area.¹³⁰ The cost to customers will be lower than the costs associated with development of a new public water supply system.¹³¹

¹²⁸ *Id.* at 10, lines 227-231.

¹²⁹ Harkins pre-filed testimony, Midlothian Exh. 1, at 11, lines 1-3.

¹³⁰ Basnet pre-filed testimony, ED Exh. 4, at 10, lines 233-238.

¹³¹ Harkins pre-filed testimony, Midlothian Exh. 1, at 11, lines 4-11.

The minimum water bill for the first 2,000 gallons for all accounts inside the city limits ranges from \$20.66 per month for a 3/4" meter to \$98.15 for a six-inch meter, and for customers outside the city limits ranges from \$24.57 for a 3/4" meter to \$116.70 for a six-inch meter.¹³²

Dr. Harkins testified there will be an improvement of service because service would be available from Midlothian, a capable and proven water supply provider. She said the cost to customers would be the same as that to current customers of Midlothian since the requested area is within the corporate limits of the City.¹³³ The FM Checklist prepared by Mr. Smith provides that "this city likely can provide service the most efficiently and at the least cost to the proposed new customers in the requested area."¹³⁴

b. Analysis and conclusion

Midlothian proved that granting the CCN amendment will result in an improvement in service – because there currently is none – but not in a lowering of costs. However, customers in the Application area will pay the same rates as charged to current Midlothian customers in the city limits, and a slightly higher cost outside the city limits.

B. Midlothian's CCN Amendment Is Necessary for the Service, Accommodation, Convenience, or Safety of the Public

The commission may amend a CCN only after finding that an amendment is necessary for the service, accommodation, convenience, or safety of the public. 30 TAC § 291.102(c); TEXAS WATER CODE § 13.246(b). The Texas Water Code and Texas Administrative Code enumerate eight separate criterion which the Commission must consider in making its decision to grant an application for a CCN amendment. TEX. WATER CODE ANN. § 13.246(c); 30 TAC § 291.102(d). Neither the statute

¹³² Midlothian Application, Midlothian Exh. 13, at 3-44.

¹³³ Harkins pre-filed testimony, Midlothian Exh. 1, at 11, lines 6-9.

¹³⁴ Basnet pre-filed testimony, ED Exh. 4, at 2.

nor rules place any more importance on one criterion than another. The ALJ finds Midlothian has met its burden of proof pursuant to TEXAS WATER CODE § 13.246 (b) and 30 TAC § 291.102(c).

Although Midlothian may lawfully serve the Application area without obtaining a CCN amendment, the Commission is not precluded from granting the amendment, and should do so for the following reasons:

- (1) The amendment is necessary for the service of the public.
 - (a) Wax-Mid is not a retail public utility as defined at TEX. WATER CODE ANN. 13.002(23) and does not have the ability or capability to provide adequate and continuous service to the 1986 Order portion of the Application area at this time.
 - (b) Midlothian has been proactive in its planning for utility service in the Application area through the recent installation of large water distribution mains and sanitary sewer lines and associated appurtenances within its eastern corporate limits. Midlothian's soon-to-be adopted water and sewer master plans include service to the Application area.¹³⁵
 - (c) ECOM has no immediate plans to develop its tract, but plans to do so at some point in the future, at which time it will not seek water service from Midlothian, but rather plans to contract for water service with Sardis or provide its own water service pursuant to Wax-Mid's 1986 Order. But Sardis is already under contract with Midlothian to purchase water on an emergency basis to meet its peak demand; there is no evidence to show where Sardis would obtain more water to serve additional customers on the ECOM tract.
 - (d) In Dr. Harkins' opinion, due to the Commission's policy regarding regionalization of water service,¹³⁶ even if Wax-Mid were to submit a plan for construction of a water system, Wax-Mid would have to request service from neighboring utilities before the plan could be approved. In her opinion, approval for construction of a new public water system would be doubtful

¹³⁵ Adams pre-filed testimony, Midlothian Exh. 2, at 6, lines 4-10, and Midlothian's Water and Sewer Master Plan, which includes the Application area, at MGA-2.

¹³⁶ Harkins pre-filed testimony, Midlothian Exh. 1, at 14, lines 14-23; and VRH-8, at 3.

based upon the availability of service from Midlothian, a neighboring utility, which is currently providing service in part of the requested area and has large mains and trunk lines in and around the Application area.

- (2) Midlothian's requested CCN amendment is necessary for public safety.
- (a) Midlothian is required to provide for and meet fire flow demand within its corporate limits, which is not the case for other providers, including water supply corporations such as Sardis.¹³⁷
 - (b) Sardis did not have a large enough water line to accommodate the need for fire protection at the airport paint shop, while Midlothian did. Although Sardis provides water to some of the airport, it did not have a 12-inch main to provide water to the airport paint shop, and would have had to change much of its infrastructure at a cost of many hundreds of thousands, maybe millions, of dollars, to do so.¹³⁸ At best, Sardis could have provided service through an eight-inch line.¹³⁹
 - (c) If businesses requiring as much fire protection as the airport paint shop wish to locate in the ECOM area as it is developed, the water capacity that Midlothian has the ability and obligation to provide will be needed.
 - (d) If ECOM were to provide water service to its development through Wax-Mid, it would be inconvenient for Midlothian to have to run a second set of water lines onto ECOM's tract simply to provide enough volume and pressure for fire protection.

After evaluating the evidence and the relevant factors to be considered in determining whether to amend a CCN, the ALJ concludes that Midlothian's Application should be granted.

¹³⁷ Adams pre-filed testimony, Midlothian Exh. 2, at 5, lines 34-46.

¹³⁸ Pritchett deposition, Midlothian Exh. 6, at 62, line 22 through 63, line 12.

¹³⁹ *Id.* at 67, line 5 through 68, line 16.

C. Summary of the ALJ's Analyses

The evidence shows that Midlothian's requested CCN amendment is necessary for the service, accommodation, convenience, or safety of the public. The ALJ recommends that the Commission grant the CCN amendment.

XI. ALLOCATION OF TRANSCRIPT COSTS

The hearing in this matter lasted less than one day, and a court reporter was not present.

XII. CONCLUSION

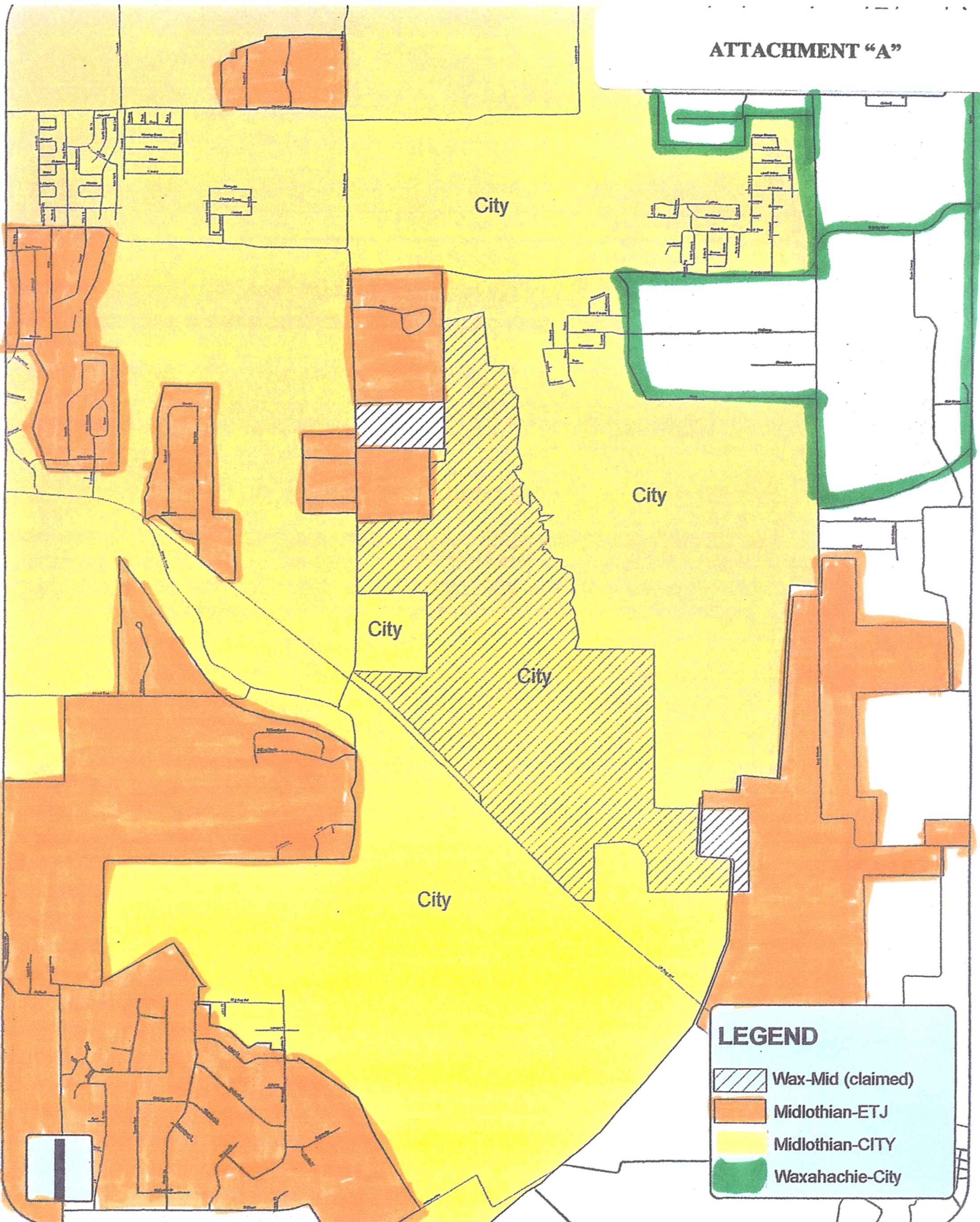
Based on the evidence presented in this case, the ALJ recommends that Midlothian's CCN amendment application be granted, but that Midlothian's request to decertify Wax-Mid's CCN No. 11966 be denied, because Wax-Mid does not hold a CCN. The ALJ recommends that the Commission adopt the attached Findings of Fact, Conclusions of Law, and Ordering Paragraphs.

SIGNED March 27, 2007.



SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

ATTACHMENT "A"



City

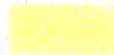
City

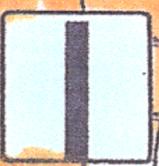
City

City

City

LEGEND

-  Wax-Mid (claimed)
-  Midlothian-ETJ
-  Midlothian-CITY
-  Waxahachie-City



TEXAS WATER COMMISSION



ATTACHMENT "B"

AN ORDER on the Application of Wax-Mid, Inc.
for a Certificate of Convenience and
Necessity to Provide Water Utility
Service within Ellis County--
Docket No. 5951

On July 1, 1986, the Texas Water Commission considered the application of Wax-Mid, Inc. for a certificate of convenience and necessity to provide water utility service within Ellis County, Texas. The application was presented to the Commission with an Examiner's Report (Proposal for Decision) by Deborah Miller, Attorney, a Public Utility Commission Administrative Law Judge, who conducted an adjudicative public hearing concerning the application on January 21, 1986.

The Administrative Law Judge designated the following parties to the proceeding: Wax-Mid, Inc; the City of Waxahachie; Sardis-Lone Elm Water Supply Corporation; and the City of Midlothian. The City of Waxahachie later withdrew from the proceedings, and the City of Midlothian was later dismissed as a party from the proceeding without objection.

After considering the Examiner's Report and the evidence and arguments presented, the Texas Water Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On October 1, 1984, Wax-Mid, Inc. (Wax-Mid) filed an application for a certificate of convenience and necessity (CCN) to provide water utility service within Ellis County.
2. On October 15, 1984, Sardis-Lone Elm Water Supply Corporation (WSC) filed a letter protesting this application. This letter was treated as a motion to intervene.
3. WSC's motion to intervene was granted at a prehearing conference held on November 12, 1984, and confirmed by written Order signed on November 19, 1984.
4. On December 21, 1984, Wax-Mid filed a motion to amend its certification application to reduce the requested service

- area. This motion was granted by Order signed on January 7, 1985.
5. On January 15, 1985, Wax-Mid filed a second motion to amend its application by a further reduction, which was granted by Order signed on January 17, 1985.
 6. The hearing on the merits in this docket, originally scheduled to begin on February 5, 1985, was indefinitely continued at the request of the applicant, by Order signed on February 1, 1985.
 7. On June 26, 1985, Wax-Mid filed a third motion to amend its certification application, reducing the requested area still further, to that depicted on Wax-Mid Exhibit No. 6. This motion was granted by Order signed on July 2, 1985.
 8. The hearing on the merits was held on January 21, 1986.
 9. WSC was given the opportunity to file as a late-filed exhibit a copy of water map WM 37.5-75 found in its certificate file No. 10058, in order to attempt to substantiate its contention that it has a certificate to provide service to the entire area surrounded by its facilities. This exhibit, which was assigned Sardis-Lone Elm Exhibit No. 3, was never filed.
 10. Briefs were filed on March 13, 1986. No reply briefs were filed.
 11. Newspaper notice was published in The Waxahachie Daily Light on October 17 and 24, 1984.
 12. All neighboring water utilities within five miles of the requested service area (Rockett Water Supply Corporation, Sardis-Lone Elm Water Supply Corporation, Buena Vista Water Supply Corporation, and Mt. Peak Water Supply Corporation) received personal notice of the filing of this CCN application.
 13. All neighboring cities providing water utility service within five miles of the requested service area

(Waxahachie, Midlothian, and Red Oak) received personal notice of the filing of this certification application.

14. Wax-Mid Exhibit No. 6 shows the service area requested as of the commencement of the hearing, which includes land south of U.S. 287.
15. At the conclusion of the hearing on the merits, counsel for Wax-Mid orally reduced Wax-Mid's requested service area to that shown on the Shive-Hattery Engineers map, entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and attached to the testimony of Wax-Mid witness Kammerer admitted as Wax-Mid Exhibit No. 2. Counsel for Wax-Mid further agreed that Wax-Mid was not seeking to have WSC decertificated from any portions of its certificated service area included within the territory requested by Wax-Mid.
16. Counsel for Wax-Mid also stated on the record his agreement with the imposition of the two conditions recommended by staff witness Eckhoff to be satisfied prior to the granting of an actual certificate of convenience and necessity to Wax-Mid, namely that Wax-Mid submit evidence that it has obtained approval of its proposed tariff and a construction approval letter from the Texas Department of Health.
17. Wax-Mid's requested service area is the Diamond J Ranch, which consists of approximately 1,700 acres. Development of this area will occur in increments of 80 acres per year, spread over 10 to 20 years. Residential service could be required as early as mid-summer 1986.
18. Black Land Properties will develop the Diamond J Ranch as a planned residential development.
19. The proposed development needs to have a large water source available that could be upgraded as necessary to meet the developer's needs. If Wax-Mid's CCN application is denied, development plans would be halted for the present time.

20. To accommodate the ultimate levels of occupancy, Wax-Mid proposes two separate wells, each having a capacity of 500 gallons per minute, with adjacent storage and pumping facilities. Initially, only one well would be drilled. Underground water mains would be constructed as required. The second well would be drilled and connected to the distribution system when required by the level of development.
21. The water supply would be obtained by drilling a deep well in the Trinity Sand Aquifer. Well No.1 would be approximately 2750 feet deep to penetrate the aquifer. Well No. 2 would be longer since it will be situated on higher ground, but its penetration into the aquifer will be similar to that of Well No. 1.
22. It is anticipated that the water to be obtained from these wells will be suitable for domestic consumption with only limited treatment.
23. Prior to distribution, the water will be cooled, the hydrogen sulfide will be removed, and it will be chlorinated for disinfection purposes.
24. The water from Well No. 1 will be stored in a 100,000-gallon steel ground storage tank. It will then be withdrawn as needed and pumped into a 5,000-gallon steel pressure tank prior to entering the distribution lines.
25. Pumps, electrical controls, disinfection facilities, and miscellaneous other equipment will be housed in a concrete masonry building. The well and storage site will be fenced.
26. When Well No. 2 is constructed, an elevated water storage will be installed for use in providing domestic water service and fire protection.
27. The water distribution lines will be sized to allow for future growth and extensions to various parts of the development. The main trunk feeder lines will be 8-inch PVC pipe with branch lines to development areas of 6-inch

PVC pipe. The minimum size main will be 4-inch PVC pipe to allow for fire hydrant attachment.

28. The water system will comply with rules and regulations and minimum design criteria of the Texas Department of Health.
29. Black-Land intends to eventually install some type of sewer system in the Diamond J Property.
30. Wax-Mid has selected Mr. Arthur Black to be the operator of its water system. Mr. Black has a Class A water license and a Class B sewage license. He has 25 years experience in the water service area.
31. It is uncontroverted that Wax-Mid is capable of constructing and operating a water utility in its requested service area that will meet state standards.
32. WSC's opposition to Wax-Mid's application was predicated on WSC's belief that it is certificated to serve the entire area requested by Wax-Mid.
33. WSC does not have any facilities in the requested area shown on Wax-Mid Exhibit No. 6 and is not providing any service to that area.
34. WSC does not presently have the capacity to serve even 160 houses in the first 80-acre increment to be developed in Wax-Mid's requested area.
35. WSC has a certificated facility that runs north from U.S. 287 along the County Road on the western boundary of Wax-Mid's requested area. The certificate map for WSC shows the facility to be on the west side of the road. If the location of this facility as shown is correct, the overlap of Wax-Mid's requested service area with WSC's certificate would be very small. If the facility is in actuality located on the east side of the road, the overlap would be approximately 200 feet by 2,500 feet.
36. Due to the small area of potential overlap, major facilities will not be duplicated.

37. It is necessary for the service, accommodation, convenience or safety of the public to grant Wax-Mid a certificate of convenience and necessity to the geographic area contained within the dotted and dashed line on the map prepared by Shive-Hattery Engineers entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and attached to the testimony of Wax-Mid witness Kammerer admitted as Wax-Mid Exhibit No. 2, because there is presently no existing service in this requested area.
38. Since there is presently no existing service in the requested area, this non-existing service is inadequate to meet the needs of Black Land's proposed development.
39. Since counsel for Wax-Mid agreed that the certificate should be conditional upon Wax-Mid obtaining approval of its proposed tariff and a construction approval letter from the Texas Department of Health, the Texas Water Commission should issue an Order preliminary to the issuance of certificate of convenience and necessity, pursuant to PURA Section 57 and Section 13.249 of the Texas Water Code, as amended, declaring that the certificate of convenience and necessity will be awarded after Wax-Mid has presented satisfactory evidence showing that the two conditions have been met.
40. Certificate of Convenience and Necessity No. 10050 issued to Sardis-Lone Elm Water Supply Corporation by final Order entered in Docket No. 22 on December 6, 1977 is a facilities certificate rather than an area certificate. WSC was granted a certificate to its facilities and a 400-foot-wide corridor surrounding its distribution lines.
41. Since the area requested by Wax-Mid is presently uncertificated and unserved, it is probable that service will be improved by the granting of the requested certificate, which will enable Wax-Mid to begin constructing a system

to provide service to the planned Black Land's development.

42. Since service is presently unavailable in the requested area, it is not necessary to evaluate whether the granting of this CCN will lower the cost to consumers in this area.
43. No evidence was presented relating to the factors of community values, recreational and park areas, historical aesthetic values, or environmental integrity.

CONCLUSIONS OF LAW

1. The Public Utility Commission had jurisdiction over the matters considered herein pursuant to PURA Sections 50, 52, and 54, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1986).
2. The Texas Water Commission assumed jurisdiction over the matters considered herein on March 1, 1986, pursuant to Sections 13.242, 13.244, and 13.246, Texas Water Code, as amended.
3. Sardis-Lone Elm Water Supply Corporation is an Article 1434a water supply corporation as defined by PURA Section 3(u) and Section 13.002(18) of the Texas Water Code, as amended. WSC is a retail public utility as defined by PURA Section 49(a) and Section 13.241(1) of the Texas Water Code, as amended, that provides water service to the public.
4. The newspaper notice published by Wax-Mid on October 17 and 24, 1984, complies with the requirements of P.U.C. PROC. R. 21.24(c)(1).
5. Notice mailed to all cities and neighboring utilities providing the same utility service within five miles of the requested service area complies with the requirement of Item No. 6 of the water certificate of convenience and necessity application and with P.U.C. PROC. R. 21.24(c)(2).

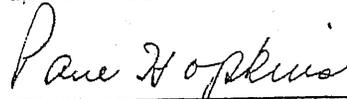
6. WSC was granted intervenor status pursuant to P.U.C. PROC. R. 21.24.
7. It is necessary for the service, accommodation, convenience, or safety of the public to grant Wax-Mid a certificate of convenience and necessity to those portions of the Diamond J Ranch encompassed by the dotted and dashed line on the Shive-Hattery Engineers map entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and attached to the testimony of Michael L. Kammerer admitted into evidence as Wax-Mid Exhibit No. 2, so that the development planned by the Black Land Corporation can proceed and water service will be available to persons who will reside in that area as it becomes developed. Thus the requirements of PURA Section 54(b) and of Section 13.246(b) of the Texas Water Code, as amended, have been met.
8. Because counsel for Wax-Mid agreed with the Commission staff's recommendation that the certificate of convenience and necessity granted to Wax-Mid be conditioned upon Wax-Mid obtaining approval of its proposed tariff from the Texas Water Commission and a construction approval letter for the Texas Department of Health, it is appropriate to issue an Order preliminary to the issuance of a certificate of convenience and necessity pursuant to PURA Section 57 and Section 13.249 of the Texas Water Code, as amended. Upon the presentation to the Texas Water Commission of evidence that Wax-Mid has obtained the two required items, a certificate of convenience and necessity should be issued.
9. Certificate of Convenience and Necessity No. 10050 issued to WSC in Docket No. 22 is a PURA Section 53 "grandfather" certificate that grants to WSC the right to provide service to a corridor within two hundred feet (200) of any point along its distribution lines.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS WATER COMMISSION THAT:

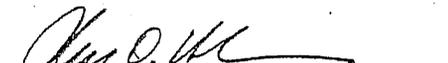
1. Wax-Mid, Inc. is ISSUED an Order preliminary to the issuance of a certificate of convenience and necessity for that portion of the Diamond J Ranch contained within the dotted and dashed lines on the Shive-Battery Engineers map entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and admitted into evidence as part of Wax-Mid Exhibit No. 2. Wax-Mid will be granted a certificate of convenience and necessity upon presentation to the Texas Water Commission of satisfactory evidence showing that Wax-Mid's proposed tariff has been approved and that it has obtained a construction approval letter from the Texas Department of Health. This presentation shall be made by filing the required documents with the Texas Water Commission, to be docketed and reviewed by that Commission's staff.
2. The Chief Clerk of the Texas Water Commission shall forward a certified copy of this Order to all parties.
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.

Signed this 1st day of July, 1986.

TEXAS WATER COMMISSION


Paul Hopkins, Chairman


Ralph Roming, Commissioner


John O. Houchins, Commissioner

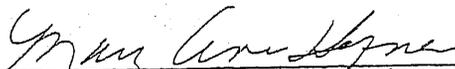
ATTEST:


Mary Ann Hefner, Chief Clerk

STATE OF TEXAS X
 X
COUNTY OF TRAVIS X

I, Mary Ann Hefner, Chief Clerk of the Texas Water Commission, do hereby certify that the attached and foregoing is a true and correct copy of an Order of the Commission dated July 1, 1986, on an application of WAX-MID, Inc., for a Certificate of Convenience and Necessity (Docket No. 5951), the original of which is on file in the office of the Commission.

Given under my hand and the seal of the Texas Water Commission, this the 3rd day of July, 1986.



Mary Ann Hefner, Chief Clerk
Texas Water Commission

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER GRANTING APPLICATION OF THE CITY OF MIDLOTHIAN TO AMEND CCN NO. 11706 AND DENYING ITS REQUEST TO DECERTIFY WAX-MID'S CCN NO. 11966 IN ELLIS COUNTY, TEXAS; TCEQ DOCKET NO. 2005-2007-UCR; SOAH DOCKET NO. 582-06-1029

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application of the City of Midlothian (Midlothian) to amend Certificate of Convenience and Necessity (CCN) No. 11706 and to decertify Wax-Mid, Inc.'s (Wax-Mid's) CCN No. 11966 in Ellis County. The application was presented to the Commission with a Proposal for Decision by Sharon Cloninger, Administrative Law Judge (ALJ or Judge) with the State Office of Administrative Hearings (SOAH).

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

FINDINGS OF FACT

Procedural History

1. The City of Midlothian (Midlothian) is a municipality operating a retail public water utility system serving connections within Ellis County, Texas.

2. Midlothian holds Certificate of Convenience and Necessity (CCN) No. 11706 issued by the Commission for water utility service in Ellis County, Texas.
3. On August 30, 2005, Midlothian filed an application with the Commission for an amendment to CCN No. 11706, seeking to expand its authorized service area to encompass an additional area (the Application area) of approximately 1,135 acres in Ellis County, Texas.
4. The requested area is located approximately five miles southeast of downtown Midlothian, Texas, and is generally bounded on the north by FM 1387; on the east by North Prong Creek and the Mid-Way Regional Airport; on the south by US Highway 287; and on the west by South Walnut Grove Road.
5. On September 30, 2005, Midlothian mailed notice of its application to neighboring utilities within two miles of its requested area (Wax-Mid, the City of Waxahachie, Mountain Peak Special Utility District, and Sardis-Lone Elm Water Supply Corporation) and landowners in the requested area (ECOM Real Estate Management, Inc., Alma Ann Seale, Ken Pritchett Properties and Sarah Jane Properties LP).
6. On October 5, 2005, and October 12, 2005, Midlothian published notice of its application for a CCN amendment in the *Waxahachie Daily Light*, a newspaper regularly published and generally circulated in Ellis County, Texas.
7. The notice was adequate to describe the area to be added to Midlothian's CCN.
8. After hearing requests were filed, the Chief Clerk, on December 14, 2005, referred the Application to SOAH for a contested-case hearing.
9. On March 8, 2006, the Chief Clerk mailed a Notice of Public Hearing to the parties in SOAH Docket No. 582-06-1029, TCEQ Docket No. 2005-2007-UCR.

10. On April 4, 2006, a preliminary hearing on the application was held before ALJ Mike Rogan at SOAH in Austin, Texas.
11. On May 15, 2006, the Chief Clerk referred to SOAH the Petition of Wax-Mid, Inc., Certificate of Convenience and Necessity (CCN) No. 11966, Requesting a Cease and Desist Order Against the City of Midlothian, CCN No. 11706, in Ellis County, Texas, under TCEQ Docket No. 2006-0487-UCR.
12. On May 31, 2006, Wax-Mid's Petition was consolidated with Midlothian's Application for hearing purposes under SOAH Docket No. 582-06-1029.
13. On November 14, 2006, Wax-Mid filed a request to withdraw its Petition, which was granted on November 16, 2006.
14. An evidentiary hearing in the proceeding was conducted by ALJ Sharon Cloninger at SOAH in Austin, Texas, on November 28, 2006.
15. The hearing record closed January 26, 2007.

Whether the Application Proved Compliance with the Legal Standards

Adequacy of service currently provided in the requested area

16. Midlothian is currently providing water service to three commercial businesses in the requested area, and has provided continuous and adequate service to its existing service area located adjacent to the requested area.
17. Midlothian provides water service with enough volume and pressure to meet the Mid-Way Regional Airport paint shop's fire protection needs.
18. The customers are satisfied with the quality and cost of Midlothian's water service.
19. Midlothian currently provides adequate service in the requested area.

Need for additional service in the requested area

20. No other retail public utility provides water service to the requested area.
21. While ECOM Real Estate Management, Inc., which owns 1,050 acres in the requested area, has not asked for water service from Midlothian, it has plans to eventually develop its property, at which time water service will be needed.
22. The owner of Walnut Grove Center North, where two tenants currently receive water service from Midlothian, has plans to sell more lots for commercial development.
23. There is a need for additional service in the requested area.

Effect of granting the amendment on Midlothian and on any retail public utility of the same kind already serving the proximate area

24. The effect of granting Midlothian's requested CCN amendment will be non-existent as to neighboring utilities, none of whom have protested Midlothian's Application or applied for a CCN in the requested area.
25. The effect of granting the CCN amendment on Midlothian would be to allow it to better plan and provide service to the eastern area of its corporate limits, and to install a water system adequate for the fire protection it is obligated to provide in the Application area.

Ability to provide adequate service

26. Midlothian has included the requested area in its long-range water supply plans, as well as in its Water Master Plan.
27. Midlothian maintains large raw water contracts with the Trinity River Authority for amounts in excess of its current needs, so it is in a position to address growth in the requested area.
28. Midlothian employs a full-time staff of certified water operators, engineers and administrative professionals to maintain and operate its water system.

29. Midlothian has the ability to provide adequate water service to the requested area.

Feasibility of obtaining service from an adjacent retail public utility

30. No other retail public utility has expressed an interest in serving the requested area.

31. Wax-Mid does not have water lines or facilities in place to provide service.

32. Obtaining water service from an adjacent retail public utility is not feasible for the requested area.

Financial ability of the applicant

33. Midlothian is a home-rule municipality with the power of taxation and the ability to issue bonds for design and construction of utility improvements.

34. Midlothian's water system audit for the year ended September 30, 2004, showed total assets of \$93.1 million, non-current liabilities of \$63 million, and net assets of \$30.2 million, for a debt-to-equity ratio of 2.1:1, and cash flow adequate to provide a debt-service-coverage-ratio of 1.33:2.

35. Midlothian has the financial ability to provide water service to the requested area.

Environmental integrity

36. The environmental integrity of the requested area will be temporarily disturbed if Midlothian constructs water facilities there, but no additional facilities will be constructed at this time.

37. Midlothian uses surface water, which is commonly preferred over the use of ground water as far as preserving environmental integrity.

Probable improvement in service or lowering of costs to consumers

38. Granting the CCN amendment will result in an improvement in service, because there currently is none to most of the requested area.

39. Provision of service to the requested area would result in improvement of service since service will now be available from a capable and proven provider of water.
40. The cost to customers will be the same as it is to current Midlothian customers since the requested area is within the corporate limits of Midlothian.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case under TEX. WATER CODE ANN. ch. 13.
2. SOAH has jurisdiction over all matters relating to the conduct of the hearing in this proceeding, including preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Midlothian published notice and provided notice to neighboring utilities and affected parties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 13.246 and 30 TEX. ADMIN. CODE (TAC) § 291.106.
4. Midlothian has shown that the CCN amendment is necessary for the service, accommodation, convenience or safety of the public as set forth in TEX. WATER CODE ANN. § 13.246 and 30 TAC § 291.102(d).
5. Under TEX. WATER CODE ANN. §§ 13.246(b) and 13.241(a) and (b), the Commission has jurisdiction to approve Midlothian's Application if it finds that:
 - Midlothian has the financial, managerial, and technical capability to provide continuous and adequate service;
 - Midlothian is capable of providing drinking water that meets the requirements of Health and Safety Code Chapter 341 and the Water Code; and
 - Midlothian has access to an adequate supply of water.

6. In making those determinations, the Commission is directed by TEX. WATER CODE ANN. § 13.246 (c) to consider:

- the adequacy of service currently provided to the requested area;
- the need for additional service to the requested area;
- the effect of the granting of a certificate on the recipient of the certificate and on any retail public utility of the same kind already serving the proximate area;
- the ability of the applicant to provide adequate service;
- the feasibility of obtaining service from an adjacent retail public utility;
- the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
- environmental integrity; and
- the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate.

7. Midlothian had the burden of proving that the Commission should approve its Application. 30 TAC § 291.12.

8. Based on the above Findings of Fact, and pursuant to TEX. WATER CODE ANN. §§ 13.241(a) and (b) and 13.246, Midlothian's application should be approved.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Midlothian's application to amend CCN No. 11706 is GRANTED.
2. Midlothian's application to decertify CCN No. 11966 is DENIED, because Wax-Mid, Inc., does not hold a CCN.
3. The Executive Director of the Texas Commission on Environmental Quality shall amend the official maps of Ellis County to reflect this decision.
4. All motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby DENIED for want of merit.

5. The Chief Clerk of the TCEQ shall forward a copy of this Order to all parties and issue to Midlothian an amended CCN that conforms to this Order.
6. 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.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and § 2001.144 of the Administrative Procedure Act.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman