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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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April 16, 2007

Via Facsimile 475-4994 and First Class Mail
Docketing Clerk
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, Texas 78701

Re: *Application of the City of Midlothian to Amend CCN No. 11706 and to Cancel CCN No. 11966 in Ellis County, Texas* (SOAH Docket No. 582-06-1029, TCEQ Docket No. 2005-2007-UCR)

Dear Sir or Madam:

Attached are two copies of Wax-Mid, Inc.'s Exceptions to the Proposal for Decision. Please return one file-stamped copy.

Pursuant to 1 Texas Administrative Code section 155.23(1)(C), the original document has been filed with the Chief Clerk of the TCEQ.

Thank you for your assistance in this matter.

Sincerely,

James E. Cousar

James E. Cousar

JEC:jlm

Enclosures

cc: (with enclosure, via facsimile and First Class Mail):
The Hon. Sharon Cloninger, Administrative Law Judge, SOAH
Blas J. Coy, Jr., Counsel for Office of Public Interest, TCEQ
Leonard H. Dougal, Counsel for Lone Elm Water Supply Corporation
Maria S. Sanchez and R. Jo Reser, Counsel for City of Midlothian
Gabriel Soto, Counsel for Executive Director, TCEQ
LaDonna Castañuela, Chief Clerk, TCEQ
Derek Seal, General Counsel for TCEQ

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CHIEF CLERKS OFFICE

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	§ § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

WAX-MID, INC.'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Wax-Mid, Inc. ("Wax-Mid"), Respondent in the above-styled docket, pursuant to 30 TAC § 80.257 timely files these Exceptions to the Administrative Law Judge's Proposal for Decision in this docket. For the reasons set out in these Exceptions, the Proposal for Decision ("PFD") should be withdrawn, a new PFD should be prepared addressing the issues identified in these Exceptions, and the Application of the City of Midlothian should be in all things DENIED.

INTRODUCTION AND SUMMARY

The hearing in this proceeding addressed two potentially dispositive questions:

A. *Did the City meet its burden of proving by a preponderance of the evidence that it is entitled to a CCN amendment under section 13.246 of the Texas Water Code?*

B. *Did the City meet its burden of proving by a preponderance of the evidence that Wax-Mid's rights under the 1986 Order should be revoked?*

The legally and factually correct answer to both of these questions is "No," but the PFD in this case recommends an affirmative answer to the first question. However, no competent evidence in the record establishes that the CCN amendment requested by the City actually is necessary or that there is a need for additional water utility service in the Application Area. The PFD does correctly recommend that the Texas Commission on Environmental Quality ("TCEQ")

take no action with respect to the 1986 Order, and Wax-Mid does not except to that recommendation.

For the reasons set out in these Exceptions, Wax-Mid excepts to the findings in Part X of the PFD, which recommends granting the requested CCN amendment. Wax-Mid specifically excepts to the PFD's frequent reliance on 1) TCEQ staff testimony, which cannot lawfully be a basis for the applicant meeting its burden of proof; 2) cross-examination of the City's witness by the Executive Director's attorney; and 3) erroneously admitted "rebuttal" testimony of the City's witness, Mr. Hastings.

Wax-Mid further excepts to the PFD and to any Final Order based on the PFD because the defects in the hearing record resulting from the decision to proceed without a court reporter in violation of SOAH rules prejudice Wax-Mid's procedural and substantive rights to a fair hearing. In the absence of a legally adequate record, the PFD should be withdrawn.

PART I. ONLY THE CITY HAS THE BURDEN OF PROOF.

TCEQ's contested case rules place the burden of proof on the applicant:

> *The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b)-(d) of this section.* 30 TEX. ADMIN. CODE § 80.17 (subsections (b)-(d) concern rate cases and enforcement cases).

The City was the only movant in this docket, and was required to prove all elements of its CCN claim by a preponderance of the evidence.[1] It failed to do so. Notwithstanding contrary findings in the PFD, many of which are based on supposition by the ALJ about matters outside the record and evidence from agency staff, the City has not met its burden.

[1] Under 30 TAC § 80.127(a)(4) and (h), as further discussed below, it is the applicant and not the agency staff who must meet the relevant burden of proof.

PART II. THE CITY HAS FAILED TO PROVE THAT IT IS ENTITLED TO A CCN AMENDMENT.

Contrary to findings in Parts X(A)2 and X(B) of the PFD, the City failed to establish a mandatory factual predicate – that the CCN amendment the City seeks is necessary – nor did it prove by a preponderance of the evidence that there is a need for additional service in the Application Area – a mandatory consideration in adjudicating CCN applications.

In ruling on the Motions for Summary Disposition, the Administrative Law Judge earlier agreed that the City's pre-filed evidence failed to establish these elements of the City's case. (***See* Order No. 8**). No additional competent evidence admitted at the hearing and accurately reflected in the incomplete hearing record supports the ALJ's new findings on these issues, nor did the ALJ clearly identify any new and competent hearing evidence to justify this reversal. Significantly, the City did not advance any legal rationale that would allow the agency to disregard these mandatory predicates for a CCN. Instead, it chose to ignore the key issue of necessity. To the extent the ALJ has relied on certain incompetent evidence in an already defective record, the PFD is fatally flawed and will not support a valid final order.

A. Under 13.246, Necessity is a Mandatory Finding

The City failed to prove by a preponderance of the evidence that the requested CCN amendment is necessary. The PFD duly lists eight statutory considerations that subsection 13.246(c) of the Texas Water Code require be considered in CCN cases. **(PFD, Parts X(A)1 to X(A)8)**. The larger failure is the City's inability to meet the threshold requirement in subsection 13.246(b), that a "certificate is necessary." (***Id.* at 1-12**).

Under 13.246 of the Water Code,[2] a finding of necessity under subsection 13.246(b) is a separate predicate and a mandatory requirement for granting a CCN application.

> *Section 13.246* ***NOTICE AND HEARING; ISSUANCE OR REFUSAL; FACTORS CONSIDERED***
> *(a)*
>
> * * *
>
> *(b) the commission may grant applications and issue certificates only if the commission finds that a certificate is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue a certificate as requested, or refuse to issue it, or issue it for the construction for only a portion of the contemplated system or facility or extension, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.*
>
> *(c) Certificates of convenience and necessity shall be granted on a non-discriminatory basis after consideration by the commission of* . . . [eight criteria] (emphasis added)

If the issuance of a CCN required only that an applicant address the "considerations" enumerated in subsection 13.246(c), then the necessity requirement subsection 13.246(b) would be rendered meaningless. It is a fundamental principle of statutory construction that, to the extent possible, statutes should not be construed to render statutory provisions meaningless. This principle is embodied in the Texas Code Construction Act's presumption that all parts of a statute are intended to be effective. *See* TEX. GOV'T CODE § 311.021(2).

B. The "Necessity" Findings in the PFD are Speculative and Unsupported

The PFD seems to ignore that § 13.246(b) is a threshold requirement for the requested relief, conflating it with the "consideration" criteria of § 13.246(c). A determination of "necessity" under subsection 13.246(b) may take into account the considerations enumerated in 13.246(c), but "necessity" is not merely the sum of their parts. "Necessity" as a requirement

[2] The relevant statute is section 13.246 as it existed when the City's Application was filed in 2005, prior to the amendments that took effect on January 1, 2006.

calls for a "but for" analysis. The relevant inquiry is: "Without a CCN, could the applicant still provide the service." Thus, even if the City had established that all the considerations in subsection 13.246(c) weighed in favor of amending its CCN (which it did not do), it still failed to meet the burden of proving that an amendment to its CCN was necessary.

In spite of the City's failure to make an evidentiary case for "necessity," the PFD posits four original reasons for stating that a CNN amendment is "necessary" for the service of the public. Wax-Mid notes that these are reasons supplied by the Administrative Law Judge, because the applicant wholly failed to address the question of necessity.

The first reason stated is that "Wax-Mid" is not a public utility. The PFD simply fails to explain why Wax-Mid's status makes a city CCN necessary when the City can already lawfully serve the area in question. The PFD's second stated reason is that Midlothian has already planned to serve the area – a classic reversal of the logical principle of cause and effect. (One might as well say, "I planned a big lunch for you, which proved that you were hungry.") The third posited reason is that other potential suppliers (Wax-Mid, Sardis) may have water supply issues – another non-issue given that the City claims not to have supply issues and agrees it can serve the area now. Finally, the PFD (p. 46) cites speculative pre-filed City testimony about the likely effect of TCEQ's regionalization policy, (which is neither an adopted APA rule nor a statutory CCN criteria). The apparent premise is that the current policy could adversely affect a hypothetical future Wax-Mid construction or plant permit. Putting aside the fact that this is speculation about the possible effect of current "policy" not adopted as an agency rule on a possible future permit application for improvements that have not even been designed – much less applied for – speculation about another utility's future permits simply is not competent evidence to support the present necessity of a CCN amendment.

The PFD similarly posits four reasons for finding a CCN amendment necessary for public safety. The first deals with the City's policy regarding "fire flow demand" within its corporate limits. The PFD states no explanation as to why the City could or would not meet this obligation by providing adequate service in the area with or without a CCN amendment, nor did the City's witness. The second posited reason is an even more speculative and confusing discussion of water pressure provided by a third utility (Sardis) to a facility located outside the Application area (part of the airport). The third stated reason is a supposition that businesses "like the airport paint shop" might decide to locate in the currently undeveloped ECOM area, which is speculation wholly outside the record. The final argument is that if such a speculative high-water demand business located in the ECOM area; and if Wax-Mid were then serving the ECOM area under its CCN; and if Wax-Mid did not provide high pressure water service under its CCN; and if the City had not already built high pressure water service in the area; then it would be inconvenient for the City to run a hypothetical second set of high pressure water lines into the area occupied by the unidentified business. To paraphrase Shakespeare, "Necessity should be made of sterner stuff . . . ."

To summarize, to the minimal extent such evidence or argument was raised by the City, the "fire protection" rationale represents a classic case of self-interference. Nothing in current law requires the City to obtain a CCN in order to run water lines at any desired level of pressure inside the ECOM area. The City seems to be saying: "Make me do what I already can and should do!" The City needs no piece of paper from the TCEQ to carry out its self-imposed fire protection obligation, but whatever the merits of the City's fire protection policy, it is no evidence of need for a CCN amendment.

C. Other Testimony Disproves "Necessity"

There is no dispute that the City is already authorized to provide service in the Application Area without a CCN amendment. Prior to the hearing the Administrative Law Judge ruled that the pre-filed testimony in this case did not establish the necessity element of the City's requested CCN amendment:

> *[T]he City has not shown through the pre-filed testimony of its witnesses and the ED's witness that it has met all criteria in the Texas Water Code and TCEQ Rules to amend its CCN; it has not shown that "a certificate is necessary" or that "there is a need for additional service."* **(Order No. 8)** (emphasis added).

Any additional evidence on this question submitted at the hearing was incompetent to change that prior finding, but the absence of a hearing record means that reliance on such evidence in a final order would be a clear violation of Wax-Mid's procedural and substantive rights.

Only five witnesses at the hearing presented evidence that went beyond their pre-filed testimony. The City's expert, Dr. Victoria Harkins, provided oral testimony on cross examination by the Executive Director, and even if that testimony had been pertinent it is legally incompetent to state factual grounds for a "necessity" finding missing in the City's case. 30 TEX. ADMIN. CODE § 80.127(a)(4) provides: "In a contested case hearing concerning a permitting matter, the executive director shall not rehabilitate the testimony of a witness unless the witness is an agency employee testifying for the sole purpose of providing information to complete the administrative record." (emphasis added). Accordingly, no cross-examination of Dr. Harkness is competent evidence to meet the City's burden of proof.

Wax-Mid's witnesses Dan Luby and Bill Nabors provided oral testimony on cross-examination by the City and by the Executive Director that was cumulative of their pre-filed testimony and added no new facts or issues. The City's fact witness, Ken Pritchett, testified via deposition. The City's one other live hearing witness, Don Hastings, over valid objections stated

by Wax-Mid, was allowed to testify on "rebuttal" examination by the City in response to and cross-examination by Wax-Mid.

The defective record in this case would show that Wax-Mid properly and timely objected to the testimony of Mr. Hastings, but neither provided evidence that the City's requested CCN amendment was necessary. Mr. Luby, Mr. Nabors, and Mr. Pritchett, individuals very familiar with the area for which a CCN amendment is sought, all testified that there is no need for additional service in the Application Area. **(Oral Testimony of Dan Luby; Oral Testimony of William Nabors; Deposition Testimony of Ken Pritchett at13:3 to 14:3, 15: 4 to 16:4, 19:16 to 22:17, 26:20 to 26:24, 29:4 to 24:9, and Ex. KP-2.)** Mr. Pritchett testified that all of the properties that he owns and developed, and Mid-Way Airport, are either already receiving service from the City or Sardis-Lone Elm Water Supply Corp. ("Sardis") or have direct access to City and Sardis water mains. **(Pritchett Deposition Testimony at 13:3 to 14:3, 15: 4 to 16:4, 19:16 to 22:17, 26:20 to 26:24, 29:4 to 24:9, and Ex. KP-2.)** Dr. Harkins also offered the irrelevant observation that there was a church located outside the Application Area that may request service in the future. **(Harkins Oral Testimony,** transcript garbled).

Mr. Hastings, who was not designated as an expert, was supposedly offered to "rebut" testimony of Mr. Nabors on cross-examination, in spite of the fact that Mr. Nabors' cross-examination testimony was consistent with his pre-filed testimony and created no valid basis for "rebuttal." Above and beyond the error of allowing Mr. Hastings to testify as a rebuttal witness, his testimony amounted to speculative expert-type opinions of a witness who was not designated as an expert. However, it is cited by the Administrative Law Judge in the PFD. Hastings' opinion that the Application Area was ripe for development ignored pre-filed factual testimony from the owner, ECOM, that no development was planned or likely in the foreseeable future, and

further ignored the fact that the "ripe" area could already be lawfully served by the City. **(Because of the garbled record, no full and accurate record is available of the testimony of Mr. Hastings, and the objections to it.)**

Significantly, no post-summary disposition witness stated any reason that a CCN amendment was necessary, given that the City already can serve all the Application Area and already is providing water service to every customer in the Application Area that has requested it. The City witnesses did say that they would like to have a CCN. They could not say why one was necessary.

Much of the evidence cited for "necessity" actually supports a finding that the CCN amendment is not necessary: this includes evidence establishing that the City is already lawfully providing adequate water service to the entities that have requested it in the Application Area; that the majority of the Application Area is within the City limits (***Id.***); that the City already has trunk lines within the Application Area; that no other utility holds a CCN for the Application Area; and that the City already has the ability to provide service. Every attempt to prove the statutory considerations that justify a CCN amendment reinforced the obvious fact that no amendment was necessary.

The failure to make a case for necessity under § 13.246(b) was highlighted in the City's Closing Argument by the final conclusory statement: "In addition, the CCN amendment requested is necessary for the service, accommodation, convenience, or safety of the public." **(City's Closing Argument at 12.)** Necessity was an afterthought. The Executive Director was equally conclusory: "Based upon the evidence presented, the City of Midlothian's application to amend current water CCN No. 11706 is necessary for the service, accommodation, convenience and safety of the public." **(Executive Director's Closing Argument at 9.)** As a result, the ALJ

apparently found it necessary in the PFD to search for grounds for the necessity finding that the applicant had simply ignored. However, the cited "necessity" findings in Part X(B) are speculative, circular, outside the record, or simply non-probative.

The continued absence of a factual basis for a finding of necessity is glaring given the Administrative Law Judge's prior ruling that the City had not met its burden on this question. Thus, the PFD finding that a CCN amendment is necessary for the service, accommodation, convenience and safety of the public is error and should be reconsidered in a revised PFD.

D. No Need for Additional Service

Contrary to the PFD's finding on this issue, the City also failed to prove by a preponderance of the evidence any need for additional service in the Application Area. Need for additional service is one consideration under subsection 13.246(c) of the Water Code that the Commission must consider in deciding whether to grant a CCN application. The Administrative Law Judge previously made a factual determination that the City's and Executive Director's pre-filed evidence did not prove a need for additional service:

> *[T]he City has not shown through the pre-filed testimony of its witnesses and the ED's witness that it has met all criteria in the Texas Water Code and TCEQ Rules to amend its CCN; it has not shown that "a certificate is necessary" or that "there is a need for additional service."* **Order No. 8** (emphasis added).

Much of this argument re-illustrated the absence of any evidence of "necessity" under 13.246(b). First, the City pointed out that it was already providing service to several customers in the Application Area and that the owner of the Walnut Grove Tract intends to develop other parts of that property. The cited testimony was evidence of existing lawful service and service capacity through existing facilities, but no evidence of need for additional service.

The second argument was that the City's capability or obligation to provide service is itself evidence of need for additional service, another classic confusion of cause and effect. The

pre-filed testimony that "[t]he City of Midlothian has trunk lines that run along and within the requested area to reach service needs that extend to the east of the City" and that the City is responsible for providing service within its corporate limits is zero evidence of need. **(Executive Director's Closing Argument at 4.)** Evidence that the City has lines and has the obligation to provide service in the Application merely shows capacity to supply – not demand.

The third argument purporting to address additional need was the wrongfully admitted expert "rebuttal" testimony that the City's planning policies establish the need for additional service in the Application Area. **(*See* City's Closing Argument at 3-5, Executive Director's Closing Argument at 4)**, including Mike Adams' pre-filed testimony and Don Hastings' "rebuttal" testimony at the hearing. (***Id.***). Mr. Adams' testified that the City plans to lay water lines in and around the Application area. Mr. Hastings, who was not designated as an expert, and who was not rebutting any prior Wax-Mid testimony, over valid and timely objections stated his opinion that City planners should not rely on the representations of property owners in making planning decisions.

Putting aside for the moment Wax-Mid's objections to Mr. Hastings' testimony, and the fact that Mr. Hastings' testimony is speculative opinion by an individual not designated as an expert, no witness offered evidence of a need for additional service. Opinion testimony cannot rebut fact testimony. Need of any type is a fact questions, including need for additional service. It is a fact that Mr. Pritchett's property did need service, and it is a fact that he requested and obtained service by two water utilities. Mr. Hasting's opinion that the ECOM Tract may need additional service at some point in the near future does not rebut Mr. Nabors' factual testimony that there is no current need and that the owner is not currently planning to develop the property. Mr. Adams' testimony that the City plans to construct water lines near the Application Area

merely confuses the fact of water supply with an assumption that supply creates demand. His testimony provides no evidence of a necessity for additional service on the ECOM Tract.

Mr. Hastings' opinion testimony on "rebuttal" regarding the types of information the City considers in its planning decisions is incompetent evidence that cannot support a finding of necessity. As a matter of law, "planning policies" are not evidence of actual need for utility service. The Water Code limits the Commission's inquiry in a CCN application to the question of necessity and the criteria listed in section 13.246(b) and (c). *See* TEXAS WATER CODE § 13.246. Municipal planning practices and policies are not among the criteria that may be considered in a CCN application. *Id.* Wax-Mid raised this evidentiary objection at the hearing, but Mr. Hastings' incompetent evidence was admitted. However, under § 13.246 the TCEQ lacks statutory authority to consider, much less grant a CCN based on evidence of the City's planning procedures.

To summarize, no evidence in the record establishes need for additional service in the Application Area. To the contrary, the very specific testimony of the City's own witness, developer Ken Pritchett, that there is no need for additional service on the non-ECOM Tracts complements the owner's testimony that there is no need for additional service on the ECOM Tract. The City did not meet its burden of proving a need for additional service in the Application Area, and a contrary fact finding is in error.

PART III. TESTIMONY FROM THE EXECUTIVE DIRECTOR CANNOT BE RELIED ON TO MEET THE BURDEN OF PROOF.

Finally, Wax-Mid points out that the Proposal for Decision repeatedly relies on the Executive Director's testimony to support its findings of fact on which the applicant has the burden of proof. This occurs on pages 36 (Executive Director's Evidence), 37 and 38 (Effect of Granting . . .), p. 40 (Ability to Provide), p. 42 (Feasibility), p. 43 (Financial Ability), and p. 44

and 45 (Probable Improvement). Under 30 TAC § 80.127(h), this testimony was admissible in this docket, but it cannot be cited or relied on to help the Applicant (the City) meet is burden of proof. All such references should be stricken from the PFD, and each such finding should be re-evaluated in its absence.

PART IV. WAX-MID GENERALLY CONCURS WITH THE ALJ'S DECISION NOT TO ADDRESS THE 1986 ORDER.

Although Wax-Mid does not concur with all of the ALJ's discussion concerning the 1986 Order, the resulting conclusion that the TCEQ lacks jurisdiction to consider it in this docket is correct.

PART V. THE ADMINISTRATIVE RECORD IN THIS DOCKET IS DEFECTIVE AND CANNOT SUPPORT THE PFD.

The administrative record in this docket is so defective and incomplete that it will necessarily cause a denial of due process to any party adversely affected by a final order. Wax-Mid raises this legal issue as an exception to the PFD, and will raise the issue again, if necessary, in a motion for rehearing and appeal.

At the hearing in this docket, Wax-Mid was surprised to discover that there was no court reporter present. The hearing had been docketed to last two days. Wax-Mid justifiably relied upon the rules of the State Office of Administrative Hearings, which require that the referring agency provide a court reporter: 1 TAC § 155.43(b) states:

> *Unless otherwise provided by the judge, the referring agency shall provide a court reporter for any proceeding in a docket set to last longer than one day. The court reporter shall prepare a stenographic record of the proceeding, but shall not prepare a transcript unless a party or the judge so requests.*

Although the rules also provide for alternative means of creating a record, they require that a party wishing to do so file and serve a notice of intent at least two days before the proceedings. No party did so.

At the hearing, counsel for Wax-Mid objected to the absence of a court reporter. The Administrative Law Judge advised that the hearing would be tape recorded. Counsel for Wax-Mid restated its timely objection, cited the appropriate rule (1 TAC § 155.41), and asked that the proceeding be delayed to allow the appearance of a court reporter. Wax-Mid's objection was overruled.

Unfortunately, the quality of the resulting tape recording was so defective that there is no accurate or reliable record. Among the audible or partially inaudible segments of the tape are:

- the cross-examination of all witnesses other than Mr. Nabors;
- the "rebuttal testimony of Mr. Hastings;
- and – of particular importance – Wax-Mid's objections to allowing Mr. Hastings to testify as a "rebuttal" witness as well as repeated objections to the scope and speculative nature of his testimony;
- the parties' evidentiary objections;
- the ALJ's rulings on objections to pre-filed testimony and depositions; and
- discussion about the absence of a court reporter and Wax-Mid's resulting objection.

A complete and accurate hearing record is especially important in an APA contested case in which the final order must be supported by "substantial evidence in the record." The "record" of the hearing in this case – other than the largely redundant telephonic testimony of Mr. Nabors – includes more notations of "Objection inaudible," "Question unintelligible" and "Unidentified Voice" than complete and accurate testimony.

Wax-Mid has preserved its rights on the issue of the inadequacy of the record. Wax-Mid objected at the hearing to the absence of a court reporter, it made its own good faith effort to transcribe the defective tapes, and when the City submitted its own flawed and incomplete transcription, Wax-Mid filed a timely objection. The problem of an inadequate record is not attributable to Wax-Mid and Wax-Mid should not be prejudiced as a result.

In *Texas Dept. of Public Safety v. Story*, 115 S.W.3d 588 (Tex.App--Waco 2003, no pet.), the Waco Court of Appeals considered whether a defective record in an administrative case prejudiced an appellant's substantial rights. The record was defective because a videotape disappeared after the hearing. The court first noted that due process requires that a party before a reviewing court have a "meaningful" and "fair opportunity to challenge the accuracy and legal validity of the [ALJ's decision]." *Story*, 115 S.W.3d at 595 (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). The court next observed that it was "at least conceivable" that the missing videotape might disprove the testimony relied upon by the ALJ. *Story*, 115 S.W.3d at 596.

> *At a minimum, the reviewing court ought to have the opportunity to consider the videotape as "a contributing factor in assessing [whether the ALJ committed a] non-evidentiary abuse[ ] of discretion or to determine that the ALJ's decision "is supported by substantial evidence, but is arbitrary and capricious nonetheless." Story, 115 S.W.3d at 595* (quoting Dozier v. Tex. Empl. Commn., 41 S.W.3d 304, 309 n.4 (Tex.App.—Houston [14th Dist.] 2001, no pet.).

The court concluded that due process required a complete record:

> *For this reason, we hold that Story's due process right to a "meaningful" review entitles him to have the complete record filed in the reviewing court even though the portion of the administrative record already on file arguably contains "substantial evidence" supporting the ALJ's determination.* Story, 115 S.W.3d at 595.

This principle that meaningful review requires a complete and accurate record is a well-established component of civil appellate law. *See, e.g., Estate of Arendell*, 213 S.W.3d 496 (Tex.App.—Texarkana 2006, no pet. h.) ("[W]ithout a complete record, it is impossible to review all the evidence presented to the jury or to apply the appropriate evidentiary sufficiency standards in review of [a] case."). Here, without a record of the contested case hearing, neither TCEQ nor a reviewing court can review all of the evidence presented, nor could they determine whether the PFD is supported by substantial evidence.

CONCLUSION

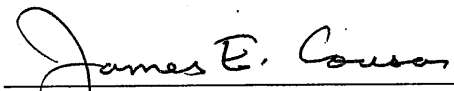
The Administrative Law Judge should withdraw the PFD and recommend denial of the City's Application. The evidence shows that there is no necessity for a CCN amendment (the City is already serving or can lawfully serve the areas it seeks to add to its CCN) and no need for additional service (the developed portions not owned by ECOM are already served by two utilities, and ECOM's undeveloped portion is likely to remain so for the foreseeable future). The evidence actually supports rather than rebuts a finding of "no necessity" and no need for additional service. Consequently, the City has failed to meet its burden of proof by a preponderance of the evidence that it is entitled to a CCN amendment.

Further, Wax-Mid's procedural rights are substantially violated by the absence of an accurate hearing record. The importance of the defective record is highlighted by the fact that the PFD rejects the Administrative Law Judge's original findings on "necessity," presumably based on the hearing.

Wherefore, premises considered, Wax-Mid respectfully requests that the PFD be withdrawn and reissued, that the Application be denied, that this docket be dismissed, and that Wax-Mid be granted all other relief to which it may be entitled.

Respectfully submitted,

THOMPSON & KNIGHT LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following via facsimile and first class mail on April 16, 2007:

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