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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution
August 11, 2008

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application of the City of Meridian to Amend its Water and Sewer Certificate of Convenience and Necessity Nos. 10884 and 20349 in Bosque County, Texas, Application Nos. 35057-C and 35058; SOAH Docket No. 582-06-1367; TCEQ Docket No. 2005-2089-UCR

Dear Ms. Castañuela:

Please find enclosed the original and eleven copies of the Executive Director's Exceptions to the Proposal for Decision. Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Stefanie Skogen".

Stefanie Skogen
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

TCEQ DOCKET NO. 2005-2089-UCR
SOAH DOCKET NO. 582-06-1367
APPLICATION NOS. 35057-C AND 35058-C

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CHIEF CLERKS OFFICE

APPLICATION OF THE CITY OF
MERIDIAN TO AMEND ITS WATER
AND SEWER CERTIFICATE OF
CONVENIENCE AND NECESSITY
(CCN) NOS. 10884 AND 20349 IN
BOSQUE COUNTY, TEXAS,
APPLICATION NOS. 35057-C AND
35058-C

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BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

NOW COMES the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files these exceptions to the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) with regard to the City of Meridian's applications to amend water and sewer CCN Nos. 10884 and 20349. The applications were filed pursuant to section 13.244 of the Texas Water Code and title 30, section 291.105 of the Texas Administrative Code. In support of the ED's position in this matter, the ED shows the following:

I. OVERVIEW

In his PFD, the ALJ recommended that the Commission grant the City of Meridian its applications to amend its water and sewer CCNs in their entirety. The ED cannot support the ALJ's recommendation. While the ED agrees that the City's CCNs should be amended to incorporate any areas from the City's corporate boundaries and extraterritorial jurisdiction (ETJ) that are not currently in its CCNs, the City has fallen short of meeting its burden of proof with regard to all the area outside the City's ETJ, especially with regard to the need for additional service in that area. The ED will discuss through these exceptions why the Commission should reach the same conclusion. To facilitate the discussion, any headings appearing in the exceptions refer to specific headings in the PFD.

II. EXCEPTIONS

A. Procedural History, Overview, and Legal Standards

1. Overview

Attachment 1 to the PFD is the map of the requested area¹ the City originally submitted with its water CCN application. As the PFD states, the City has amended the area requested in its applications to remove Mr. Jeffrey Hewlett's property and incorporate the settlement agreement it reached with Mustang Valley Water Supply Corporation (WSC).² Therefore, Attachment 1 is no longer an accurate depiction of the requested area. Rather, the maps designated as Attachment JEH-11 to Exhibit APP-2A reflect the applications as they stand today.

2. The Legal Standards for Certification

Prior to the implementation of House Bill 2876, 79th Legislature, 2005, the effect on the land to be included in the certificated area was not a factor considered in CCN amendment cases. Because the City's application was filed before January 1, 2006, that factor was not considered in this case.³

B. Discussion

1. Adequacy of Existing Service

If the PFD is correct and only service provided by a retail public utility (RPU) is to be considered for this factor, then the failure rate of OSSFs in the region, which goes from the Texas-Oklahoma border to the Gulf of Mexico,⁴ is irrelevant. The only thing that would matter is

¹ While the requested areas for the water and sewer CCN applications are different because the current water CCN is larger than the current sewer CCN, the outer boundaries of both requested areas are the same. Therefore, the ED refers to the requested areas in the singular throughout these exceptions.

² Proposal for Decision at 2 (July 22, 2008).

³ Effect on the land was added as a factor to be considered for applications to grant or amend a CCN as part of House Bill 2876. Act of May 29, 2005, 79th Leg., R.S., H.B. 2876, § 6 (codified at TEX. WATER CODE ANN. § 13.246 (Vernon 2008)). The changes made by House Bill 2876 apply to applications to amend a CCN filed with the TCEQ on or after January 1, 2006. *Id.* § 15(1).

⁴ The City is located in Region 4 in the cited study. Ex. APP-4 attach. DWC-4 at 1.

the adequacy of *existing* service provided by an RPU. There does not appear to be any issues with service that is being provided by either the City or Mustang Valley WSC in the requested area. A large portion of the requested area is currently not receiving water or sewer service from any RPU, but that does not establish that existing service in those areas is inadequate. Just because someone does not possess something does not mean that the amount that person possesses is inadequate; it simply means they do not have any. Therefore, the lack of service in and of itself does not signify inadequacy.

2. Need for Additional Service

This factor has been the main point of contention in this case as it relates to the requested area outside the City's ETJ. According to the PFD, the City has demonstrated a need for additional service in this area because there are requests for service scattered diffusely throughout the area, and the population in and around the City is steadily growing. If there were requests for service scattered throughout that entire area, then the City would have demonstrated a need for additional service in that area. However, large portions of the requested area do not have requests for service nor are supported by any other evidence that shows a need for additional service in those portions.

Looking at the ED's recommended map, the ED has excluded a majority of the southwest and southeast portions of the requested area as well as the area between State Highways 144 and 174 in the north central portion of the requested area.⁵ As shown on the property boundary map submitted by the City, the majority of the southwest and southeast portions of the requested area and the area between S.H. 144 and 174 do not contain any requests for service.⁶ In other words, no one has expressed a desire to obtain service from the City in those areas.

⁵ Ex. ED-13.

⁶ Ex. ED-12.

Looking at the requests for service as a whole provides further support for excluding those areas from the amended CCNs. Based on the original acreage amounts provided by the City, the eleven written requests for service and one additional request for service covered a total of 733.24 acres, or 1.15 square miles.⁷ This is out of the 32 square miles the City has requested for its water CCN and 35.8 square miles for its sewer CCN.⁸ When the City provided revised acreage information after the initial hearing on the merits, the acreage amount increased to 1,726 acres, or 2.7 square miles.⁹ In other words, there is still a significant difference in size between the requested area and the area covered by the requests for service. The ED excluded certain areas from the CCNs, thereby bringing these numbers closer together. He did not follow the property boundaries of the requests for service exactly; he included surrounding areas and followed boundaries such as roads, the City's ETJ, and the current CCN boundaries to provide clear boundaries to the amended CCNs. The ED's CCN boundaries are actually less artificial than the giant rectangle drawn by the City. If the Commission is concerned about potential customers on the opposite side of a road not being in the CCN, then it could grant another 200 feet (i.e. two-thirds of a football field) on that side of the road so any establishments, such as houses or businesses, along the road will be included. However, the City will be able to serve those properties even if the opposite side of the road is not included in the CCNs, as a City can provide retail utility service without a CCN.

The PFD also cites population growth as a reason to grant the entire requested area. The population of the City has been projected to grow from 1,491 in the year 2000 to 1,852 by the

⁷ Ex. Hewlett-5.

⁸ Ex. ED-1; Ex. APP-1 at APP0779. These amounts do include parts of the City's ETJ for both the water and sewer CCNs.

⁹ Ex. ED-12.

year 2030, but that growth is only for the City's corporate boundaries.¹⁰ It is also not a significant amount of growth, being only 361 people over thirty years. The growth is actually projected to slow after that, with the City acquiring only sixty-nine more people by the year 2060.¹¹

As for the area outside the City's corporate limits, the claim that this area's population is growing at a faster rate than the City's population is unsubstantiated.¹² The numbers that the City used for its extrapolation are not specific to the area surrounding the City; they are from areas located throughout Bosque County and were applied to the City based on a weighted average calculated in some fashion without specifying exactly where and how much this supposed growth will occur.¹³ Basically, the numbers needed to be more specific to the requested area to demonstrate a possible need for additional service in the near future. This is a small city surrounded by rural area, not a buzzing metropolis surrounded by populous suburbs. The City has not provided any information to show that this description will change any time soon. While it is possible that the population of the areas excluded by the ED are growing, the population figures provided do not demonstrate that conclusively.

The PFD also raises the issue of long-term planning for the provision of service to the entire requested area. This really is not a need for additional service issue but rather an effect of granting the CCN on the City issue. As it relates to the effect issue, all RPUs run into planning issues when designing their systems. Not only do they have to determine the best way to provide service to their current customers, but they have to figure what costs they want to incur now in anticipation of possibly taking on more customers in the future. This can relate to area already in

¹⁰ Transcript of Hearing at 99 (Oct. 3-4, 2007).

¹¹ Ex. APP-3 attach. KDM-5 at 2.

¹² Executive Director's Closing Argument at 9 (Nov. 16, 2007).

¹³ Ex. APP-10.

the RPU's CCN, if they have one, as well as to areas surrounding its CCN. This is a gamble that the RPU engages in, as it may never serve more customers where it thought it might in the future but end up getting requests for service where it did not anticipate receiving any. If an RPU has a CCN and wants to expand its service area, it can apply to amend its CCN at any time. In the case of a municipality, it can serve without amending its CCN because it does not need a CCN to provide retail service to begin with.

In this particular case, the City will have to decide for itself how it wishes to proceed based on the CCN the Commission awards to it. On one hand, the City and the PFD argue that there are no other RPUs who could possibly serve the requested area, but on the other hand, they argue that the City needs to protect itself from other RPUs who may want to serve the area. How can the City be in danger of someone else serving this area if there is no one else who can serve it? If there really is no one else who can serve the area the ED has excluded from the CCN amendments, then there is no reason why the City cannot continue to plan to serve those areas in the future if it truly believes there will be future customers in those areas. However, if there is someone else who could serve those areas while there is currently no one requesting service there, then it provides further support to the ED's position that the City should not obtain a CCN for those portions of the requested area. Furthermore, the City will end up with a defined service area whether the Commission adopts the PFD or the ED's recommendation. If the City chooses to provide service only within its CCN, then it will simply be making plans for a smaller area under the ED's recommendation.

While the topographical map provided by the City shows how the drainage patterns of the area could be used when designing a sewer system, the fact that some of the requested area has been excluded by the ED does not prevent the City from using those tributaries when designing

its sewer system. A CCN defines where an RPU can provide service, not where it can place its collection lines. The City could still install its collection lines in the excluded areas if its sewer system design calls for it to do so. Furthermore, the area tributaries only assist the City's sewer system design north of the City. The City's treatment plant is located at Pecan Street and Main Street, which is near the center of the requested area.¹⁴ The arrows on the map that show which direction the tributaries flow reveal that any tributaries located south of the treatment plant would be flowing away from it and, therefore, would not allow the City to follow the natural drainage pattern in the southern half of the requested area.¹⁵

As for economies of scale and costs of providing additional service in the excluded areas, those matters relate to the probable improvement in service or lowering of costs to consumers in the area rather than the need for additional service. Having said that, the assumption that the economies of scale will work in the customers' favor with regard to the provision of water service and the installation of distribution and collection lines and other facilities is that more and more customers will receive service from the City. If these future customers never materialize or are few in number, then the City's customers will be stuck paying the higher costs associated with the new infrastructure. As the PFD states, there is no evidence in the record regarding how many potential customers are located in the requested area or any planned or anticipated future subdivision development in the area.¹⁶

While section 13.246(c) of the Texas Water Code and title 30, section 291.102(d)(2) of the Texas Administrative Code do not specify a minimum level of need that must be demonstrated by an applicant, this factor has proven itself to be a significant one. If there is no need for additional service in a particular area, then why would an RPU need a CCN for that

¹⁴ Ex. APP-12.

¹⁵ Ex. APP-17.

¹⁶ Proposal for Decision at 12 (July 22, 2008).

area? The RPU would have no one to serve there. The fact that there may be people residing or operating businesses in an area is not enough to show a need for additional service in that area, as that would be true of almost any area. There must be something more showing that the need exists now or in the near future. The City simply has not provided enough information to demonstrate this need in the areas excluded by the ED in his recommendation.

3. The Effect of Granting a Certificate on Meridian and on Any Retail Public Utility of the Same Kind Serving the Proximate Area

As the ED stated in section II.B.2 above, the lowering of costs is based on the assumption that the City will take on enough new customers to offset the costs of providing additional service. Regarding the City's new surface water supply, the City will be utilizing this new supply whether the Commission grants the requested area or not. Therefore, this is not an effect of granting the CCN on other RPUs; it is simply the effect of the City obtaining a supplemental water supply. The City also stated that its ability to coordinate development in and around the City would economically benefit the area around the City, including other RPUs in the proximate area.¹⁷ However, the City presented no evidence to support this statement. Regarding the agreement between Mustang Valley WSC and the City, the City will actually be serving tracts, or have the right of first refusal for tracts, that are less than one acre in size in addition to non-residential, non-agricultural tracts.¹⁸

The PFD does not discuss the feasibility of obtaining service from an adjacent RPU factor in a separate subsection, but it does touch on this factor in this subsection. Overall, evidence regarding feasibility was limited and did not indicate definitively whether or not it is feasible to obtain service from an adjacent RPU. The only evidence really was the distance of

¹⁷ Ex. APP-4 at 19:11-13.

¹⁸ Ex. APP-2A attach. JEH-13 at APP0861.

neighboring RPUs from the City.¹⁹ This information may show where the office for an RPU or center of a municipality is located, but it does not show where the RPUs' facilities are located. Mustang Valley WSC may be located 3.6 miles from the City, but its facilities extend as far as the City's current CCN.

4. Probable Improvement in Service or Lowering of Costs to Consumers in the Area

The ED addressed this factor in section II.B.2 above.

III. CORRECTIONS TO THE ORDER

The following addresses various parts of the Order which need to be corrected due to factual errors:

- Finding of Fact No. 7 should be corrected to state that the preliminary hearing was on May 2, 2006.
- Finding of Fact No. 26 should be corrected to state that the City's discharge permit number is 10113-002.
- Finding of Fact No. 27 should be corrected to state that Mustang Valley WSC is currently providing water service in both the overlap area and the dual certification area.
- Finding of Fact No. 28 should be corrected to state that the City will serve tracts that are less than one acre in size as well as non-residential, non-agricultural tracts.
- Finding of Fact No. 33 should be corrected to state that there are three RPUs with facilities located within two miles of the requested area. They are Childress Creek WSC, City of Morgan, and Mustang Valley WSC.²⁰
- Conclusion of Law No. 3 should be corrected to state that notice to neighboring utilities and affected parties was required by section 13.246 of the Texas Water Code and title 30,

¹⁹ Proposal for Decision at 11.

²⁰ Ex. APP-1 attach. F.

section 291.106 of the Texas Administrative Code, and notice to all landowners was required by Commission Order dated October 21, 2004.

- Conclusion of Law No. 7 should be corrected to reflect that the City has amended its application to incorporate the settlement agreement with Mustang Valley WSC and exclude Mr. Hewlett's property. Therefore, even if the Commission chooses to grant the entire requested area, it will be granting the area requested after those amendments, not as set out in the published notice.
- Ordering provision No. 2 also should be corrected to reflect that the City has amended its application to incorporate the settlement agreement with Mustang Valley WSC and exclude Mr. Hewlett's property. Therefore, even if the Commission chooses to grant the entire requested area, it will be granting the area requested after those amendments, not as set out in the published notice.

IV. CONCLUSION

The ED's analysis as a whole addresses the concern that the City is simply asking for far too large an area based mainly on the limited need for additional service in the requested area. Granting a CCN to an RPU prevents customers in the area from obtaining service from another RPU and other RPUs from expanding their own service areas. Placing such restrictions on the acquisition and provision of utility service should not be done lightly, and the applicant needs to show that there is a reason for giving it the right to possess a CCN for a particular area. The ED has reviewed these CCN applications and believes that the City has not met its burden of proof for the entire requested area. Therefore, the ED recommends that the Commission grant the water and sewer CCN amendments to the City as depicted in Exhibit ED-13.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

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By Stephanie Skogen
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CERTIFICATE OF SERVICE

I certify that on August 11, 2008, a copy of the foregoing document was sent by first class mail, agency mail, electronic mail, and/or facsimile to the persons on the attached Mailing List.


Stefanie Skogen, Staff Attorney
Environmental Law Division

Mailing List
City of Meridian
SOAH Docket No. 582-06-1367
TCEQ Docket No. 2005-2089-UCR

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

STATE OFFICE OF ADMINISTRATIVE

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