State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

March 17, 2009

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: ***SOAH Docket No. 582-06-2663; TCEQ Docket No. 2006-0631-UCR; Application of the City of McKinney to Amend Certificate of Convenience and Necessity No. 20071 in Collin County***

Dear Mr. Trobman:

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 7, 2009**. Any replies to exceptions or briefs must be filed in the same manner no **later than April 13, 2009**.

This matter has been designated **TCEQ Docket No. 2006-0631-UCR; SOAH Docket No. 582-06-2663**. 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 seven 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,

Lilo D. Pomerleau
Administrative Law Judge

LDP:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CITY OF MCKINNEY

SOAH DOCKET NUMBER: 582-06-2663

REFERRING AGENCY CASE: 2006-0631-UCR

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ LILO D. POMERLEAU

REPRESENTATIVE / ADDRESS	PARTIES
SCOTT HUMPHREY ATTORNEY TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF PUBLIC INTEREST COUNSEL P.O. BOX 13087 AUSTIN, TX 78711-3087 (512) 239-6960 (PH) (512) 239-6377 (FAX) shumphre@tceq.state.tx.us	OFFICE OF 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)	TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
EMILY W ROGERS ATTORNEY BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MCDANIEL, LLP 816 CONGRESS, Ste 1700 AUSTIN, TX 78701 (512) 472-8021 (PH) (512) 320-5638 (FAX) erogers@bickerstaff.com	CITY OF MCKINNEY

BRIAN MACLEOD
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0750 (PH)
(512) 239-0606 (FAX)
bmacleod@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CYNTHIA KAMINSKY
ENGINEER/PROFESSOR
2782 BRIAR TRAIL
MC KINNEY, TX 75069
(972) 898-3910 (PH)
(972) 542-4077 (FAX)
ck27bt-mckinneyccn@yahoo.com

FRED HERBERT

ROBERT AND KAREN FINCH

JOHN POWELL, SR.

CYNTHIA KAMINSKY

---

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-06-2663
TCEQ DOCKET NO. 2006-0631-UCR

APPLICATION OF THE CITY OF MCKINNEY TO AMEND CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 20071 IN COLLIN COUNTY	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY, OVERVIEW, AND LEGAL STANDARDS 1

A. Procedural History 1
B. Overview 2
C. The Legal Standards for Certification 5

III. DISCUSSION 6

A. Adequacy of Existing Service 6
B. Need for Additional Service 8

1. Arguments and Testimony Concerning Need 8
2. Analysis Concerning Need 11
3. Analysis Concerning ED's Proposal 13

C. The Effect of Granting a Certificate on McKinney and on Any Retail Public Utility of the Same Kind Serving the Proximate Area 17

D. The Ability of the Applicant to Provide Adequate Service 18

1. Applicant's Technical Capability 18
2. Applicant's Managerial Capability 20
3. Applicant's Financial Capability 21

E. Feasibility of Obtaining Service from an Adjacent Retail Public Utility 23

F. The Financial Stability of McKinney 24

G. Environmental Integrity 24

1. Compliance History 25
2. Comparing the Environmental Impact of Septic Versus Centralized Sewer Systems 26

3. Environmental Affect of a Centralized System 28

H. Probable Improvement in Service or Lowering of Costs to Consumers in the .... Area 30

IV. ADDITIONAL CONTESTED ISSUES 31

A. Application Requirements 31
B. Allocation of Transcription Costs 33

V. CONCLUSION 33

VI. ADDITIONAL FACTS 33

SOAH DOCKET NO. 582-06-2663
TCEQ DOCKET NO. 2006-0631-UCR

APPLICATION OF THE CITY OF MCKINNEY TO AMEND CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 20071 IN COLLIN COUNTY	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

The City of McKinney (McKinney or the City) seeks to amend its sewer certificate of convenience and necessity (CCN) to increase the area in Collin County where it would be certificated to provide retail sewer utility service. The Administrative Law Judge (ALJ) finds that the application satisfies the regulatory criteria and recommends that the requested amendment be approved.

II. PROCEDURAL HISTORY, OVERVIEW, AND LEGAL STANDARDS

A. Procedural History

McKinney filed its application with the Texas Commission on Environmental Quality (TCEQ or Commission) on July 21, 2005. After protests were filed, the Commission's Chief Clerk referred the application to the State Office of Administrative Hearings (SOAH) for a contested-case hearing. ALJ Lilo D. Pomerleau held a preliminary hearing on July 19, 2006, at which jurisdiction was established and the following parties were designated: the City of McKinney (represented by Emily W. Rogers and William D. Dugat III); City of Princeton (Princeton)(represented by Arturo D. Rodriguez, Jr.); MA BB Owen, LP (represented by R. Matthew Molash); Boa Sorte, LLC (Boa Sorte)(represented by Martin Rochelle); Cynthia Kaminsky, John Powell, Sr., Robert and Karen Finch, and Fred Herbert (Landowners)(represented pro se); the Executive Director (ED) of the TCEQ (represented by Brian MacLeod); and the Office of Public Interest Counsel (OPIC) of the TCEQ (represented by Scott A. Humphrey).

The hearing on the merits was originally set for March 26, 2007. On October 13, 2006, the ALJ granted McKinney's motion to consolidate with another pending SOAH docket, *Application of the City*

of Princeton to Amend its Certificates of Convenience and Necessity in Collin, County, SOAH Docket No. 582-06-1641, TCEQ Docket No. 2006-0044-UCR. Princeton and McKinney sought CCNs for an overlapping area. A hearing in the consolidated proceeding was set for April 23, 2007, but was continued in order to accommodate settlement negotiations. As a result of these negotiations, the City filed an amended application to reflect the agreement reached between it and the Town of Fairview, the Cities of Princeton and Melissa, and Boa Sorte.[1] These entities withdrew as parties to this proceeding.[2] The consolidated proceeding was severed, and the hearing on the merits concerning McKinney's amended application convened on October 28-29, 2008. The record closed on January 20, 2009.

B. Overview

McKinney is a Texas municipality located in Collin County. McKinney's CCN application requests certification for areas surrounding the City's currently certificated area, which includes McKinney's current city limits, extending to include most of its extraterritorial jurisdiction (ETJ).[3] With some exceptions, the requested area overlaps the area for which McKinney holds a water CCN.[4] In 2006, the City had over 100,000 residents and a statutory ETJ of five miles, although because of proximity to neighboring cities and boundary agreements, the ETJ does not extend five miles in all directions.[5] As of September 30, 2006, it provided sanitary sewer service to 32,796 connections, a

---

[1] On January 9, 2007, MA BB Owen, LP (MA BB) filed a notice of withdrawal of protest of McKinney's application and was dismissed as a party to the consolidated case.

[2] McKinney Ex. 23, James supplemental at 4. As a result of negotiations, McKinney withdrew the following areas from the requested area: (1) an area no longer in McKinney's ETJ per a boundary agreement with the Town of Fairview; (2) tracts of land owned by Boa Sorte, LLC; (3) an area near Princeton; and (4) tracts of land near the City of Melissa. These areas are defined on a map, by the above-listed numbers, on McKinney Ex. 25.

[3] McKinney's city limits at the time it filed its application are shown on the map attached to the application, Attachment 5C. Since that filing, McKinney has annexed additional territory. A new map showing the city limits is found at McKinney Ex. 9.

[4] McKinney Ex. 2, Neff direct at 11; McKinney Ex. 6, map.

[5] McKinney Ex. 2, Neff direct at 11.

significant increase from the 14,707 connections provided in September 30, 2001. Of those 32,796 connections, McKinney served approximately 17,500 customers in the requested area.[6]

According to McKinney, the City's rapid growth rate over the last ten years provided the impetus for it to accommodate growth in an orderly manner. The City completed a Comprehensive Plan, adopted March 2004, which covers both the city limits and the ETJ and guides policies related to land use, transportation, urban design, parks and recreational facilities, and water and wastewater infrastructure. When McKinney updated its Comprehensive Plan in 2004, it also updated its Water Master Plan and its Wastewater Master Plan. McKinney's CCN request is a result of the City's Comprehensive Plan; its Wastewater Master Plan, which addresses McKinney's sewer collection system; and its five-year Capital Improvement Plan, which plans funding for facilities that the City anticipates needing in the near term. The City uses the Comprehensive Plan as a general guide to development and instituting polices related to land use, transportation, urban design, parks and recreation, and infrastructure.[7] McKinney seeks to certify the requested area to protect its current and future developments in wastewater infrastructure and to provide for proper future development.[8]

Municipalities are not required to possess a CCN in order to provide water or sewer utility service.[9] Nevertheless, there is no applicable prohibition against municipalities applying for and receiving CCNs. Moreover, possessing a CCN prohibits other retail public utilities from providing service in that certificated area and allows a municipality to protect its investment in infrastructure.[10]

---

[6] McKinney Ex. 14, Fung direct at 15; ED Ex. 1, Dickey direct at 5.

[7] McKinney Ex. 1, Att. 3, Comprehensive Plan, at 1; Ex. 2, Neff direct at 14.

[8] McKinney initial brief at 3-4.

[9] *See* 30 TEX. ADMIN. CODE § 291.101(a) (requiring only utilities, utilities operated by affected counties, and water supply or sewer service corporations to possess a CCN to provide service). A "retail public utility" is defined in section 291.3(39). A "utility" is defined in section 291.3(51). A municipality is a retail public utility but not a utility. *Also see*, ED Ex. 1, Dickey direct at 5. A municipal applicant is required to fully satisfy the regulatory requirements.

[10] ED Ex. 1, Dickey direct at 7; Tr. at 102.

McKinney was one of a group of municipalities that formed the North Texas Municipal Water District (NTMWD). It uses NTMWD for the treatment of water and wastewater, disposal of solid waste at its landfill, and the construction of interceptors.[11]

Landowners protesting this application live outside the city limits but within McKinney's ETJ. Landowners argue that McKinney failed to show that the portion of the requested area where they live (Contested Area) meets the standards for certification. The Contested Area is located to the south of U.S. Highway 380 and east of Texas Highway 5 between Wilson Creek and the East Fork of the Trinity River. It is also southeast of Collin County Regional Airport.

Landowners strongly oppose the City's 2004 Comprehensive Plan, arguing that it was developed in secret and ignored input from landowners in the Contested Area.[12] Under the Comprehensive Plan, the Contested Area, which begins to the south of the airport, is designated as "light manufacturing."[13] Landowners dispute this designation, arguing that the area used to be depicted as large lot estates. They fear that McKinney, which does not have zoning authority in its ETJ, will use CCN approval to "achieve a set of development rights it desires and can usher in industrial development" for the Contested Area.[14] Landowners believe McKinney failed to meet its burden of proof in this case.

The ED agrees with Landowners, in part, claiming that Applicant presented weak evidence supporting the need for additional service in the Contested Area. The ED proposes that the CCN be granted for all the requested area, including the Contested Area, except for those lots owned by the Landowners. OPIC recommends that the CCN be granted for the entire requested area.

---

[11] McKinney Ex. 12, Carr direct at 10, 12.

[12] *See* Tr. at 52, McKinney witness Regie Neff acknowledged some landowner opposition to the plan but also testified that the plan was developed with landowner input as well. Tr. at 51.

[13] Tr. at 134.

[14] Landowners reply brief (titled "Objections to McKinney's Closing Arguments") at 3.

C. The Legal Standards for Certification

The statutes and rules in place when McKinney filed its application on July 21, 2005, apply to this matter. Chapter 13, Subchapter G, of the Texas Water Code sets the legal standards for the granting of an amendment to a CCN. The Commission may issue the CCN amendment only after finding that the certificate is necessary for the service, accommodation, convenience, or safety of the public.[15] The Commission must "ensure that the applicant posses the financial, managerial, and technical capability to provide continuous and adequate service."[16]

The primary substantive requirements applicable to this proceeding are set out in TEX. WATER CODE § 13.246 and in the Commission's rules at 30 TEX. ADMIN. CODE § 291.102(d). The latter provides:

> (d) In considering whether to grant or amend a certificate, the commission shall also consider:
>
> (1) the adequacy of service currently provided to the requested area;
>
> (2) the need for additional service in the requested area;
>
> (3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment and on any retail public utility of the same kind already serving the proximate area;
>
> (4) the ability of the applicant to provide adequate service;
>
> (5) the feasibility of obtaining service from an adjacent retail public utility;
>
> (6) the financial ability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
>
> (7) environmental integrity; and

---

[15] TEX. WATER CODE § 13.246(b).

[16] TEX. WATER CODE § 13.241(a).

(8) the probable improvement in service or lowering of cost to consumers in that area.

III. DISCUSSION

Set out below are the regulatory factors, found in 30 TEX. ADMIN. CODE § 291.102(d), that the Commission is required to consider when granting or amending a CCN.

A. Adequacy of Existing Service

McKinney currently provides sewer service in its existing certificated area, which includes the older part of the city and a portion of the requested area. The current system has lines ranging from 6 to 42 inches in diameter, six lift stations, and interceptors at Wilson Creek and East Fork. McKinney has a wholesale wastewater agreement with NTMWD and does not have its own wastewater discharge permit.[17] As a member city of the NTMWD, McKinney has voting rights, membership on the board, and different rates than do customer cities. Jack Carr, Director of Engineering for McKinney, testified that it is much better to tie into a regional wastewater system because it reduces overhead, operational costs and limits discharge to only one point, which is monitored. He further indicated that the City coordinates with the NTMWD for planning purposes.[18]

McKinney witness Regie Neff, former Assistant City Manager, testified that McKinney successfully operates an ever expanding sewer system.[19] She stated that the City has staff, systems, and facilities currently in place and those assets are geared for continuing expansion. She noted that capital improvements are an ongoing function and are reliably constructed. She also indicated that the City

---

[17] McKinney Ex. 12, Carr direct at 7-8; McKinney Ex. 1, Application at 9.

[18] Tr. at 270-272; 281; McKinney Ex. 12, Carr direct at 10, 12.

[19] Ms. Neff was employed by McKinney at the time she filed her direct testimony but was no longer in that position at the time of the hearing, when testifying for the City.

developed a Comprehensive Plan and a Wastewater Master Plan to guide development and necessary infrastructure.[20]

In portions of the requested area where McKinney does not provide service (this includes the Contested Area), there is no retail service available. Some of the residents there use on-site septic systems.[21]

McKinney contends there is no adequate retail sewer service in the requested area, except in the areas where McKinney is already providing service to 17,500 customers. Moreover, the City indicates it has a long history of successfully expanding is system to meet the needs of development.[22]

The ED and OPIC do not indicate any concerns with the adequacy of service that the City currently provides to its customers. Landowners point out that service via septic systems is adequate for areas with estate-type residences. Landowners argue that the residents in the Contested Area oppose converting the area to industrial use or to developing the area into small city lots. However, they concede that if the area develops into small city lots, then sewer would be required.[23]

McKinney has shown that it provides adequate service to its existing customers. The evidence is not conclusive that, for areas served by septic system, the service is inadequate merely because service is not being provided by a retail public utility. Septic systems can serve a certain-sized (larger) lot. However, if a development is planned with lot sizes smaller than one acre or in a manner that triggers the City's subdivision ordinance; septic systems could not be used. Under such a scenario, service could be inadequate. However, the granting of a CCN in the requested area increases the

---

[20] McKinney Ex. 1, Neff direct at 24.

[21] McKinney Ex. 12, Carr direct at 8; Landowners' Ex. 1 at (printed number) 40.

[22] McKinney Ex. 14, Fung direct at 15. Ms. Fung testified that the City's sewer connections more than doubled in five years from 2001 to 2006.

[23] Landonwers reply brief at 13 (titled Landowner's Objections to McKinney Closing Arguments).

options available to area landowners. Increasing the options—allowing customers to obtain service from a proven, centralized sewer service provider—will result in better service.

B. Need for Additional Service

1. Arguments and Testimony Concerning Need

Landowners note that McKinney has no requests for sewer service in the Contested Area. They contend that there is no showing of growth—no industrial or residential permits issued—in the Contested Area. Landowners contend that, with the NTMWD sewer lines in both the Wilson and Trinity forks areas, no other utility service will want to serve this area.[24] Thus, Landowners argue that there is no need to grant a CCN amendment.

During the discovery process, Landowners asked the City why it needs "formal control via amending its CCN for the unincorporated areas located in the south/southeast/ and east of the city?" The City responded as follows:

> McKinney's authority within its extraterritorial jurisdiction is not derived from a CCN. Rather, its authority within the ETJ is granted to it and limited by state law, including but not limited to Chapter 212 of the Texas Local Government Code relating to the regulation of subdivisions of land.
>
> The CCN does not allow McKinney "control" of incorporated areas in and around the city. The CCN is a license granted by the TCEQ that will allow McKinney to provide retail sewer service to the exclusion of other retail public utilities. As a condition of the CCN, a CCN holder is obligated to provide continuous and adequate retail sewer service to all qualified service applicants within the certificated area. **The CCN will allow McKinney to plan for the provision of sewer service so that it can accommodate the growth in an orderly manner, ensuring that all infrastructure required to support that development is provided in a timely manner and at**

[24] *See* Tr. at 412-412.

necessary levels to ensure the safety and convenience of the current and future citizens. (Emphasis added.)[25]

The ED contends that the City offered sufficient evidence showing a general trend of growth and a need for service in the requested area. But the ED suggests that the evidence of need for service in the Contested Area, where Landowner's reside, is not as strong. Again, the Contested Area is in the southeast portion of the requested area and, under the City's Comprehensive Plan, is deemed an area of light industry and mixed use. The ED points out that there are no requests for service or subdivision plat requests in the Contested Area, and the City cannot point to a specific growth pattern in this particular region of the ETJ. Accordingly, the ED recommends excluding from the CCN amendment the land owned by protestant landowners (more specifically, any lots owned by Cynthia Kaminsky, John Powell, Sr., Robert and Karen Finch, and Fred Herbert).

OPIC cites to the substantial growth trends in the area as evidence of the need for additional service.

McKinney witness Brian C. James, Deputy Director of Development Services, testified that from 1990 to 2000, McKinney experienced an annual population growth of 15%. The City's population grew approximately 11% every year since 2001. McKinney had just over 50,000 people in the year 2000. In 2005, the City added 10,120 new residents and, as of January 1, 2006, McKinney estimated its population to be over 104,000 people. Among cities with a population over 50,000, McKinney had the highest growth rate in the United States between 2000 and 2003, according to the U.S. Census Bureau. McKinney estimates that its population will grow to approximately 250,000 to 260,000 in 2030. Mr. James believes that the growth in the Dallas/Fort Worth Metroplex continues to push up through Collin County, and the City's rapid growth creates unique challenges in trying to provide for necessary city services in a timely manner.[26]

---

[25] Landowners' Ex. 1 at 275.

[26] Ex. 7, James direct at 14, 16. *See also* McKinney Ex. 1, Application, Att. 2; Ex. 2, Neff direct at 15.

At the time McKinney filed its application, it had approximately 29,105 residential, commercial, and industrial sewer service connections. It estimated that approximately 17,500 of these are in the requested service area. It anticipates that it will have approximately 41,387 sewer connections by 2014 and 97,340 sewer connections when it achieves ultimate build-out. Build-out will be achieved when nearly all the residential development in the ETJ is complete. McKinney anticipates that it will have a population of 360,000 people at build-out.[27]

McKinney anticipates that the land use in the requested area will include a mix of industrial, commercial, and residential areas, as well as community villages, office parks, and suburban mixed uses. Mr. James testified that most of the tracts in the requested area (McKinney's ETJ) are large lot, estate-type residences (two to ten acres) and farms. He believes that most of the land is held by long-term property owners who have held the land in their families for years. He also believes there are land tracts owned by developers, who may be speculating that the property value will increase. In looking toward the future, Mr. James stated that centralized sewer service will be necessary because most of the development will be dense and could not be supported by septic.[28]

In 2005, McKinney approved 3,471 building permit applications for new construction. As of October 31, 2006, it approved 2,858 building permit applications. McKinney is experiencing urban-type development with three to four houses per acre and lot sizes that are between 6,000 and 7,500 square feet. This type of development requires sanitary sewer not septic system service because the lot sizes are too small to accommodate septic systems. Mr. James also noted that McKinney is experiencing industrial and large-scale office development. He indicated that the people moving into McKinney and Colin County are typically young families or couples in their 20's and 30's, who are employed in the Cities of Dallas, Richardson, or Plano. He believes that the future growth patterns will be a continuation of those in the past few years: residential housing, apartments, retail, office and service uses, similar to the Arboretum in the City of Austin.[29]

---

[27] McKinney Ex. 1, Application, Att. 2; Ex. 7, James direct at 15.

[28] McKinney Ex. 7, James direct at 12.

[29] McKinney Ex. 7, James direct at 13-15.

McKinney witness Ms. Neff also testified that the CCN is required for orderly development. She explained that if a single landowner requests sewer service from the City, and there has been no plan for sewer service in that area, that landowner may get supplied but not under a orderly, planned process. Ms. Neff believes that there is a need for a centralized system—which anticipates and is able to provide properly-sized connections.[30]

McKinney argues that it must plan and provide for development. The City also suggests that developers, landowners, and neighboring utilities need certainty about who will be the area service provider. According to McKinney, granting the request for a CCN amendment ensures that the City will be able to plan for and meet the sewer service needs in the requested area. Both McKinney and OPIC argue that the CCN amendment should be granted for the entire requested area.

2. Analysis Concerning Need

McKinney demonstrated that it is experiencing steady growth within its city limits and its ETJ. It is reasonable for the City to anticipate and plan for growth by securing a CCN that encompasses most of its ETJ. If granted, the CCN will clarify the City's responsibilities, facilitate orderly growth, and provide more choice to landowners currently using septic systems. The ALJ finds that McKinney presented an adequate showing of a need for service, given the strong area growth.

The ALJ acknowledges Landowners argument that the City presented opinion testimony about future development. It is important to note, however, that the opinion testimony was that of Ms. Neff, a former assistant city manager, who worked for the City for approximately 11 years, and Mr. James, who has worked for the city 10 years as Deputy Director of Development Services, Director of Planning, Senior Planner, and Planner.[31] The ALJ found persuasive both their testimony and the factual evidence that the McKinney area is experiencing rapid and sustained growth.

---

[30] Tr. at 92.

[31] Additionally, Mr. James holds a Master of Public Administration and is pursuing his Ph.D. in Public Affairs. McKinney Ex. 2, Neff direct at 4, Ex. 26, Neff errata; Ex. 7, James direct at 3-4, Ex. 27, James errata.

In presenting its application, McKinney did not present detailed numbers, data, or testimony that focused on growth in particular areas within its ETJ. Rather, the growth data pertained to the areas within the City itself and its entire ETJ. Thus, the only evidence pertaining to growth in particular regions of the City's ETJ was developed during cross examination. For instance, Mr. James admitted that some areas have not experienced as much growth pressure because they may not have a well-developed road, water, or sewer network. However, he reiterated that there is growth occurring all over the region.[32]

Mr. James showed familiarity with area growth trends. He responded to questions about the exclusion of the Boa Sorte development tract from the City's requested area, explaining that it was a large, contiguous tract, which has a slower growth pattern that is driven by the location of the Trinity River and attendant floodplain.[33] Although Mr. James did not go into the details of the Boa Sorte/McKinney settlement, in his opinion, the City should have CCN "coverage" over all land within the City's limits and ETJ because it would allow for comprehensive planning.[34]

Mr. James pointed out that there is less development activity in the Boa Sorte area than there is in the Contested Area. For instance, Mr. James stated that two entities developed properties near the airport: the Simpson Strong-Tie facility and the IESI expansion facility. However, he agreed that this development did not necessarily reflect a trend. Mr. James indicated that any growth into the Contested Area would likely flow southward, from the airport because the southern section of the Contested Area is bordered by Wilson Creek, the Trinity River, and floodplains.[35]

Mr. James refused to speculate that growth can be accurately predicted in a particular area because developers consider a variety of factors when deciding where to locate—for instance, what

---

[32] Tr. at 166-168.

[33] Tr. at 170-172

[34] Tr. at 176.

[35] Tr. at 176-177. During review of Mr. James' testimony, it is helpful to see Landowners' Ex. 2 at Bates 16, handwritten page 42.

property is available for sale, for what amount, what is the time horizon for development, how much land will be included in the development, and whether there is access to roadway networks and existing businesses.[36] Ultimately, Mr. James admitted that there are some areas within the City's ETJ that are growing less rapidly than others, including the area to the far north of McKinney, the Boa Sorte area, and the Contested Area.[37]

The ALJ concludes there is a need for McKinney to plan for and serve additional customers that will be gained as a result of the requested area's rapid growth. The ALJ found McKinney's witnesses to be credible and knowledgeable. In particular, Mr. James adequately explained that he could not pinpoint exactly where development would occur next, nor would he admit that the two developments in the Contested Area constituted a trend. However, the testimony of the City's planner and former city manager that it is prudent and reasonable for McKinney to anticipate and plan for area growth was uncontroverted and persuasive.

3. Analysis Concerning ED's Proposal

As noted above, the ED suggests that Landowners' properties should be excluded from the CCN because the evidence of need for service in that particular area of the ETJ is weak. The ED's witness, Mr. Dickey, testified that, after weighing several factors, the objections of the landowners were sufficient for him to recommend excluding their properties from the CCN's service area. Mr. Dickey opined that the evidence of need for service in the Contested Area was not "extremely compelling"; he gave more weight to the objections of the land owners because they were "the best judge of whether the effect on the land will be good or bad."[38] Mr. Dickey further stated that allowing the land to be used in the most flexible fashion was a determining factor for his recommendation. The ED acknowledges that granting the CCN would give Landowners more sewer service options;

---

[36] Tr. at 178-180.

[37] Tr. at 201-203, 205.

[38] ED Ex. 1 at 13.

however, because Landowners have vehemently stated a preference to be excluded from the CCN, this preference should be given deference.

The ED points out there is a policy trend at the Commission and in the legislature to allow landowners more input in determining whether or not their land should be included in a CCN. In October 2004, while considering a petition for rulemaking, the Commission issued an order requiring direct notice to be provided to all landowners on any CCN application.[39] More importantly, the ED notes that the 79th Legislature passed a number of laws concerning the rights of landowners in CCN cases.[40] The ED strongly suggests that these actions evidence a trend in Texas to honor the desires of landowners and give them more opportunity to be heard.

The ED admits that sound policy does not promote the creation of "doughnut holes" (areas where a CCN surrounds a small area that is exempted from the CCN) in CCNs. The ED distinguishes his recommendation in this instance because the landowners want to be excluded and they prefer septic-system service. The ED admits that there is no map in evidence detailing the particular properties within the Contested Area that should be excluded. However, the ED argues that McKinney should be able to generate a map upon order of the Commission, based upon the testimony of Fred Hebert, who identified his and other landowners' property using plat maps.[41] The ED contends that the record contains the bare bones necessary to generate a map, and argues that the lack of a definitive map should not weigh against the recommendation.

Mr. Hebert testified at the hearing on behalf of Landowners. He stated that he represented a whole community of landowners who protest this application.[42] He believes that McKinney has not proven a need for the line in the Contested Area because no other utility service is going to seek to

---

[39] *Decision of the Commission Regarding the Petition for Rulemaking Filed by the Greater Houston Builders Association*, Docket No. 2004-1397-RUL.

[40] *See Tex. Water Code* §§ 13.246, 13,254, 13.2451, and 13.246.

[41] *See* ED Ex. 2.

[42] Tr. at 378-381.

serve the area. He testified that the area he lives in is pristine, bordered to the south by two river tributaries, and should not be developed. Rather, the City should include a buffer zone between the airport area and the Contested Area.[43]

When Mr. Hebert was asked if he would prefer to have his property exempted from the CCN, he replied that:

> [If] I came back to my neighbors and told them, "Hey, I've taken care of myself but yet I've thrown you to the wolves," I think that would be deemed as a very selfish and despicable act on my part in relation to my neighbors' well-being.[44]

Mr. Hebert admitted that he was not designated as a party representative so he could not give an opinion as to what other area landowners or even the landowners who were named as parties to this case would want.[45] Clearly, Mr. Hebert does not want the Contested Area to be certificated. In their brief, Landowners clarified that they do not want their properties exempted from the CCN amendment. Rather, Landowners request that the entire Contested Area be exempted from the CCN based on McKinney's failure to provide the necessary information, documentation, and evidence required to prove its application.

The ALJ finds that it is preferable but not necessary to have a map in evidence before the Commission makes a decision in this matter, and agrees that the lack of a definitive map should not weigh as a factor against the ED's recommendation. However, the ALJ believes the facts in this particular CCN do not weigh in favor of excluding particular properties within the Contested Area:

- The general growth in Colin County and the region as a whole applies to the Contested Area as well as any other area in the region.
- McKinney is seeking only to certificate land within its ETJ.

---

[43] Tr. at 413-419

[44] Tr. at 390-391.

[45] Tr. at 391.

- There is a need to plan ahead for future development within the City's ETJ.

- Unless the current land use of a property changes, no one residing in McKinney's ETJ and requested area, including Landowners and their neighbors, will be required to take service from McKinney in the event that a CCN application is granted.

- McKinney has existing wastewater facilities in the area (two TNMWD interceptors along Wilson Creek and the East Fork of the Trinity River that serve McKinney) that would serve the Contested Area.

- There are specific growth pressures from the McKinney airport moving south and southeast (specifically, the Simpson-Strongtied facility and the IESI expansion facility) in the Contested Area.

- There is no compelling reason to treat the Contested Area differently than other areas within the ETJ, and specifically the area north of McKinney's city limits, which is not showing immediate or specific signs of growth.

- There is no compelling reason to treat certain landowners who received party status different from their neighbors, whom reside in the Contested Area, and whom also object to McKinney's application.

- No other utility appears interested in serving the area. Because Wilson Creek and the East Fork of the Trinity River create natural physical barriers, it is more feasible to obtain centralized service from McKinney than from any other service provider.

- Certificating all of the Contested Area protects future landowners and gives them more options should they wish to develop their property and/or change to a centralized service provider.

In response to the ED's policy argument, McKinney argues that new legislation at TEX. WATER CODE § 13.246(h) only provides additional rights to landowners with large tracts of land. Specifically, it requires notice to be given to landowners owning a tract of land that is at least 25 acres and allows these landowners to elect to be excluded from the CCN by providing timely notice to the Commission.[46] McKinney notes that this legislation was adopted after it filed this application. The ALJ concurs with McKinney that this legislation does not apply to this application, which was filed before the statute was amended. The policies cited by the ED are entitled to consideration, but they do

[46] The property of John Powell, Sr. is over 25 acres in size. Tr. at 384.

not outweigh the facts when considered pursuant to the statutory factors applicable to this CCN application.

For these reasons, the ALJ does not adopt the recommendation of the ED to carve out or exempt the properties of the named Landowners. Rather, the ALJ finds it is appropriate to grant McKinney's request for a CCN for the entire requested area.

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

Mr. Carr, the City's Director of Engineering, testified that, in areas where McKinney already provides service, the granting of the CCN amendment will not affect the cost or quality of service McKinney currently provides to its customers. He stated that in areas where there currently is no sewer service, the provision of sewer service by the City will be an improvement.[47]

McKinney argues that a centralized sewer system increases the option for landowners in the requested area: (1) the sewer CCN will provide the landowners with some certainty about who will provide centralized sewer service for their property, should they want to develop it in a way that does not support septic systems;[48] (2) developer-landowners will benefit from the continuity in services because McKinney holds the water CCN for most of the requested area;[49] and (3) landowners who are currently using septic systems will not be obliged to obtain sewer service from the City.

The ED notes that an amendment adding territory to the City's sewer CCN will increase and define the area and connections that McKinney is obligated to serve. It will prevent other retail public utilities from serving the area. The ED suggests that granting the CCN request will obligate the City to provide continuous and adequate service and to respond to request for service in an appropriate time

---

[47] McKinney Ex. 12, Carr direct at 21.

[48] McKinney Ex. 7, at 26; ED Ex. 1 at 10.

[49] McKinney Ex. 6, map.

frame. The ED states that there should be no significant effect from granting McKinney's application on any retail public utilities already serving the proximate area: such utilities were notified of the application, and only Princeton filed a protest. However, Princeton has withdrawn from this case.

OPIC notes that McKinney is not seeking to provide service outside its ETJ. Thus, OPIC concludes there will be no adverse effects on neighboring utilities.

There is no evidence that granting McKinney's request for a CCN amendment will have a negative effect on neighboring utilities. McKinney is the only retail public utility currently serving the area, and the granting of the amendment will define the area McKinney must serve, protect McKinney from encroachment, and provide additional choices for landowners in the requested area. The evidence supports a finding that granting of the CCN amendment will not affect the cost or quality of service McKinney currently provides.

D. The Ability of the Applicant to Provide Adequate Service

1. Applicant's Technical Capability

Landowners argue that McKinney failed to provide sufficient evidence that the City has access to adequate sewer treatment capacity, through NTMWD, to meet McKinney's current and future service needs. They also argue that McKinney does not have specific plans in place for build out (*i.e.*, exact size and place of sewer lines) in the Contested Area. Landowners stress that the City clearly has plans to transform the Contested Area to an industrial zone; thus, McKinney should have provided "full disclosure of wastewater treatment system planning, construction, timelines and costs for industrial sewer build-out in the identified area."[50]

There is no support in the record for Landowners' arguments. Rather, the evidence indicates that McKinney has the technical capability to provide continuous and adequate service.

---

[50] Landowners reply brief (titled Landowner's Objections to McKinney Closing Arguments) at 7.

- **McKinney successfully operates a large and expanding sewer system.**

McKinney's current wastewater system is composed of lines ranging from 6 to 42 inches, six lift stations, and two NTMWD interceptors at Wilson Creek and East Fork, which transport McKinney's wastewater to NTMWD's wastewater treatment facilities. The City does not own any treatment facilities or otherwise treat its own sewage. Rather, NTMWD treats all of McKinney's wastewater, which is carried through the interceptors to two of its plants.[51]

At build-out, McKinney anticipates needing approximately 353,000 feet of sewer line ranging from 6 to 60 inches at a cost of approximately $41 million. McKinney anticipates serving, at build-out, approximately 395,000 people or about 150,000 connections.[52] Mr. Carr testified that McKinney has set minimum infrastructure design requirements for construction of its facilities. He noted that these plans are developed and reviewed by licensed engineers. He believes that the Wastewater Master Plan, adopted by McKinney, is based on growth assumptions established by the City's Comprehensive Plan. In his opinion, the Wastewater Master Plan ensures facilities will be constructed and sized to meet the need of the City's customers.[53]

- **McKinney is a member city of NTMWD, which is required to meet all of McKinney's wastewater treatment needs.**

Mr. Carr testified that McKinney is a member city of NTMWD, NTMWD is required to meet all of McKinney's wastewater treatment needs. He routinely meets with NTMWD to discuss system demands and growth, changes to McKinney's Wastewater Master Plan, and any major developments occurring in McKinney. NTMWD uses this information to plan for improvements and expansions.

---

[51] McKinney Ex. 12, Carr direct at 7, 10-11; Tr. at 239. Landowners argue that it is misleading to identify the NTMWD interceptors as part of McKinney's wastewater collection system. The ALJ disagrees. NTMWD's relationship to McKinney is part and parcel of the City's overall wastewater collection system.

[52] McKinney Ex. 12, Carr direct at 19.

[53] McKinney Ex. 12, Carr direct at 20.

According to Mr. Carr, NTMWD has always met McKinney's wholesale sewer treatment needs, and he anticipates it will always be able to do so in the future.[54]

- **McKinney has an Engineering Division, with responsibility to oversee City planning, design, and construction.**

As Director of Engineering, Mr. Carr is responsible for day-to-day direction of the Engineering Department's operation. The division provides engineering support in areas of water, wastewater, streets, drainage, and traffic engineering. The division has 11 licensed engineers and two engineers in training. It also hires outside consultants to design capital projects and to conduct the City's water and wastewater studies.[55]

2. Applicant's Managerial Capability

No party disputes McKinney's managerial capability to provide service. McKinney notes that it has a Water and Wastewater Division with nearly 50 employees. Harlyn Farrell, Water/Wastewater Superintendent for the City, testified that the division is responsible for the day-to-day operation and maintenance of the sewer system, including repairs, replacement, preventive cleaning, and inspecting the sewer lines via small television cameras. The division is also responsible for responding to customer complaints.[56]

Mr. Farrell established that McKinney's operation and maintenance of its wastewater collection system is capable and adequate. The Water and Wastewater Division:

- Employs a Supervisory Control and Data Acquisition System (SCADA), which monitors via computer the City's six wastewater lift stations.

---

[54] McKinney Ex. 12, Carr direct at 12-13.

[55] McKinney Ex. 12, Carr direct at 5-6.

[56] McKinney Ex. 20, Farrell direct at 5-7.

- Performs preventative cleaning in a systemic fashion, grid by grid, to ensure that the entire system is cleaned over a period of several years.
- Annually contracts with a root control company.
- Responds to complaints and performs repairs.[57]

The City has adopted as a pretreatment ordinance, a grease trap requirement in its plumbing code, and design criteria in its subdivision ordinance. Ordinances are enforced through the Code Enforcement Division. McKinney has also adopted an Emergency Response Plan for its sewer system in the event of various emergency situations.[58]

McKinney established that it has the managerial ability to provide continuous and adequate service.

3. Applicant's Financial Capability

Landowners argue that McKinney failed to provide a cost/benefit analysis for the proposed CCN. They contend that it is impossible to determine whether McKinney has the ability to pay for the supporting infrastructure without a cost/benefit analysis. Further, Landowners argue that City had a budget shortfall and, with the current economy, McKinney's credit liquidity and revenue stream will be adversely affected.

At the hearing, McKinney witness Jennifer Fung, Executive Director of Finance and Administrative Services, testified about the City's new 2009 sewer rate and budget for fiscal year (FY) 2008-2009.[59] Ms. Fung stated that the City's operating budget for its water and wastewater utility fund for FY 2008-2009 is $50.6 million; the City's capital improvement budget for FY 2008-2009 is

---

[57] McKinney Ex. 20, Farrell direct at 7-8.

[58] McKinney Ex. 20, Farrell direct at 8-11.

[59] *See* McKinney Ex. 31 (ordinance adopting the budget) and Ex. 30 (new sewer rates). These exhibits were updated discovery documents responsive to the ED's requests and provided to the parties approximately two weeks before

$14.4 million. Also, Ms. Fung provided the City's updated comprehensive annual financial report (audit) for the FY ending September 30, 2007. The total assets for the water and wastewater utility fund were $289.5 million, and liabilities totaled $74.6 million, resulting in total net asset worth of $214.9 million. Total operating revenues are $35.2 million and total operating expenses are $31.4 million.[60] Ms. Fung testified that McKinney had a balanced budget in 2007, with its revenue exceeding expenses by more than half a million dollars. If the City identifies a capital improvement project and needs money to fund it, the City will issue bonds. Using FY 2007 net revenues, McKinney's bond coverage ratio is 1.75 times, with 197 days of reserve in the general fund and 58 days of reserve in the water and wastewater fund at the end of FY 2007.[61]

Ms. Fung testified that McKinney has a strong financial position, with a strong bond rating, a high bond coverage, sufficient operating reserves, and a strong debt to equity ratio. She stated that the City updates its wastewater master plan to cope with growth and ensure adequate funding of capital improvements. She also noted that the City conducts rate studies to ensure that the utility fund is self-supporting and able to operate and maintain the system.[62]

Landowners questioned Ms. Fung concerning how the City will charge for sewer in areas where McKinney does not supply sewer customers with water. Ms. Fung testified that, in order to bill a customer that takes only sewer service, the City either obtains the actual water usage from the water provider or estimates the usage and uses a fixed rate. Ms. Fung also stated that there are different meters for irrigation use (which does not use the sewer system) and residential consumption meters.[63]

---

hearing. They were admitted over Landowners' objection.

[60] Tr. at 300-301; McKinney Ex. 32 at 26-28. Numbers are rounded up or down based on the audit rather than the testimony.

[61] Tr. at 304-305; 328-329, 302.

[62] McKinney Ex. 14, Fung direct at 17.

[63] Tr. 314, 317.

Although Landowners have concerns about the City's financial stability, the evidence does not support their position. No additional studies, such as a cost-benefit analysis, are needed. Ms. Fung provided evidence as to the City's sound financial position for the FY ending September 30, 2005, and updated its analysis using data for the FY ending September 30, 2007.[64] There is sufficient and uncontroverted evidence that McKinney has the financial means to provide continuous and adequate service.

E. Feasibility of Obtaining Service from an Adjacent Retail Public Utility

McKinney argues that it is more feasible to obtain sewer service from the City than from any other adjacent retail public utility:

- McKinney currently provides service to a large portion of the requested area.[65]
- In the portions of the requested area where McKinney does not provide service, there is no other retail sewer service available.[66]
- No other City or retail public utility protested this application, except for Princeton, which settled with McKinney and withdrew its protest.[67]
- McKinney seeks a CCN amendment for an area that is within its ETJ. Because any development within the City's ETJ will be required to meet McKinney's subdivision standards, it will be more feasible to obtain service from McKinney.[68]
- McKinney has boundary agreements with the cities of Prosper, Celina, Weston, Frisco, Allen, Fairview, Melissa, and Princeton. Thus, the City is able to plan for the provision of service within the established boundaries.[69]

---

[64] McKinney Ex. 19 and 32.

[65] McKinney Ex. 1, Application Att. 2 at 2.

[66] McKinney Ex. 1, Application at 6; Att. 5B.

[67] ED Ex. 1, Dickey direct at 8-9.

[68] McKinney Ex. 7, James direct at 18.

[69] McKinney Ex. 7, James direct at 7-8; ED Ex. 1, Dickey direct at 7.

- McKinney's system is mostly a gravity flow system, with gravity carrying most of the wastewater downhill to NTMWD's system. Using gravity is cheaper because it eliminates the need to construct, operate, and maintain lift stations to pump wastewater uphill. Thus, any system that would need to use lift stations would likely be more expensive than McKinney's.[70]

No party suggests that another retail public utility could serve the requested area. NTMWD has sewer lines in the area, and McKinney has a contract with NTMWD to accept and treat the wastewater generated within the area. There is no evidence to suggest that any other retail public utility wants to serve the area or could obtain approval to use the NTMWD system currently in place. ED witness Mr. Dickey opined that McKinney is the most feasible retail public sewer utility for the requested area.[71] The ALJ agrees.

F. The Financial Stability of McKinney

As stated above, McKinney provided substantial evidence concerning its financial stability. It specifically provided evidence concerning the adequacy of its past and current finances, including its debt-equity ratio. The ED and OPC agree that McKinney has the requisite financial stability for approval of the CCN amendment.

G. Environmental Integrity

Landowners raise a number of arguments and concerns that the granting of the CCN amendment will have an adverse affect on the environmental integrity of the requested area. They question whether the City's application meets the burden of proof, allege that McKinney has a history of polluting and ignoring environmental regulations, and question the evidence suggesting that centralized sewer systems are monitored and, therefore, likely to have less adverse impact on the environment that septic systems. These arguments are considered, but the ALJ notes that Landowners presented no expert witnesses or reliable evidence to support their concerns.

---

[70] McKinney Ex. 12, Carr direct at 9; Tr. at 273-274.

[71] ED Ex. 1, Dickey direct at 8-9.

1. Compliance History

Landowners argue that McKinney has failed to prove that its sewer system has a favorable compliance history. They contend that EPA violations were not considered, resulting in an inaccurate historical record of McKinney's sewer system performance. They argue that McKinney used to release sewage into Wilson Creek at night and allowed grease buildup in its pipes.

McKinney responds by noting that it does not have a TCEQ compliance history for wastewater because it does not own and operate a treatment plant or have a wastewater discharge permit.[72] McKinney witness Harlyn Farrell, Water and Wastewater Superintendent, testified that the City contracts with NTMWD to monitor noncompliance with EPA wastewater requirements. He explained that NTMWD is required to follow EPA regulations, including the issuance of permits to dischargers if the levels of discharge require such. For example, Mr. Farrell testified that there are two categories of industrial users that, pursuant to the EPA, are required to comply with the City's pretreatment ordinances: (1) a categorical user (one that has the potential to discharge metals and chemicals); and (2) a significant user (one that discharges 25,000 gallons or more per day). If permit limits or requirements are not met, EPA requires NTMWD to notify the public by publication in local newspapers.[73]

Additionally, Mr. Farrell testified that McKinney has a pretreatment ordinance that sets limits on discharges to the system. He explained that the purpose of pretreatment is to prevent the introduction of pollutants into the publicly-owned treatment works. NTMWD administers this program, taking samples, inspecting the system, permitting dischargers, and issuing notices of violation. Mr. Farrell stated that the City pursues enforcement of the pretreatment standards when necessary. At the hearing, Mr. Farrell indicated, for example, that NTMWD has an enhanced treatment method to prevent the leaching of lead or copper from the City's sewer lines. Moreover, on an annual basis, both Mr. Farrell's and the NTMWD's staff inspect existing facilities monitored under city

---

[72] McKinney initial brief at 26, citing 30 TEX. ADMIN. CODE § 60.1.

[73] Tr. at 336-341.

ordinance and look for new establishments (including review of billing records or water usage) to determine if they require monitoring. Mr. Farrell stated that he is unaware of any requirement for sampling or monitoring of septic systems.[74]

The uncontroverted evidence indicates that McKinney, through contract with NTMWD, has a system in place to prevent, monitor, and indentify the discharge of dangerous pollutants. There is no evidence that NTMWD has a poor compliance history.

McKinney witness Mr. Carr testified that it would be preferable from an environmental perspective to have one large system serve the area than multiple smaller systems because one system can be more closely monitored. This testimony was echoed by that of Mr. Farrell. McKinney operates under a regional system with all waste sent to the NTMWD treatment plant, which has one of the more stringent discharge permits in the state.[75]

There is no convincing evidence that McKinney has a poor compliance history.

2. Comparing the Environmental Impact of Septic Versus Centralized Sewer Systems

Landowners contend that there is no evidence that septic systems are a nuisance, spread disease, or otherwise damage the environment. They argue that McKinney did not present an analysis of "the environmental impact of changing to sewer from septic."[76] The ALJ notes that the granting of a CCN amendment does not require landowners who are currently served by septic systems to switch to centralized systems unless they develop their property. The granting of a CCN amendment does not require new landowners who buy properties currently served by septic to switch to sewer, unless such a property is developed in a manner that triggers the City's subdivision ordinance. Outside the City's

---

[74] McKinney Ex. 20, Farrell at 9-10; Tr. at 340, 345.

[75] McKinney Ex. 12, Carr direct at 8.

[76] Landowners reply at 19, titled "Landowner's Objections to McKinney Closing Arguments."

limits, in the ETJ, the City lacks authority to require a landowner to connect to its sewer system.[77] There is no requirement that McKinney present an analysis to support the testimony of its expert witnesses, who stated that a centralized, monitored waste treatment system is generally better than individual septic systems from an environmental perspective. The ALJ further notes that the ED's witness, Mr. Dickey, also gave more weight to a centralized system, when considering the impact to the environment.[78]

McKinney presented evidence that it designs and constructs lines that are appropriately sized to accommodate anticipated flow at ultimate build out. Mr. Carr testified that the lines are sized appropriately and monitored after they are in service. The City periodically checks the actual flow in the mains to ensure the availability of adequate capacity. Mr. Carr also affirmed that, with new construction, all contractors are required to comply with McKinney's storm water ordinance and obtain any necessary permits from state and federal agencies. The design of new sewer mains includes provisions for stormwater runoff to minimize the effect on the environment.[79]

The City also presented evidence that it has an Emergency Response Plan in the event of a catastrophic emergency situation such as water system contamination and bioterrorism, bomb threats, facility sabotage, explosions, tornados, flooding, and loss of the SCADA system. Mr. Farrell trains his staff and oversees any implementation of the plan, if used.[80]

The ED contends that, if a CCN amendment is granted, the duty of the City to provide continuous and adequate sewer service to the requested area would tend to improve the environmental integrity of the area because centralized sewer service provides superior monitoring and oversight. ED witness Mr. Dickey stated that a business such as a gas station or dry cleaner may be required to obtain

---

[77] *See* TEX. LOCAL GOV'S CODE ANN. § 214.013(a)(2).

[78] Tr. at 362.

[79] McKinney Ex. 12, Carr direct at 22-23.

[80] McKinney Ex. 20, Farrell direct at 10-11.

a permit to operate, but is not required to conduct testing. However, he noted that a centralized sewer system is required to take samples and is able to track any pollution to the discharge point. He concluded that a centralized system is superior to septic, with regards to the area environment.[81]

The ALJ finds that McKinney's centralized sewer system and NTMWD's wastewater treatment and disposal is generally superior to individual septic sewer systems. Under the City's CCN, the sewer system will undergo regular inspection, monitoring, and engineering and agency oversight, which is easier with a single point of discharge. It will also be subject to future planning, taking into account area growth.

3. Environmental Affect of a Centralized System

Landowners are concerned that McKinney failed to provide final build-out plans for the requested area and made no environmental study of the requested area's ecosystems, endangered species, and old growth forested areas. Landowners protest that without knowing where the infrastructure will be placed, the environmental impact cannot be assessed. They contend that McKinney ignores environmental regulations and do not feel assuaged by the testimony of McKinney's witnesses that, when a need for additional sewer lines is established, the impact on the environment will be taken into account when determining the placement of the lines.

It is undisputed that any construction associated with putting in new sewer lines will have an impact on the environment. However, this impact will occur if a centralized sewer system is built by any provider. ED witness Mr. Dickey testified that any disturbance to the land from construction of the sewer lines is temporary.[82] The ED asserts that a CCN does not authorize the installation of infrastructure, and the arguments raised by Landowners are speculative, unpersuasive, and irrelevant. According to the ED, the CCN only creates a duty for the holder to provide continuous and adequate service to landowners and customers within the area of certification.

---

[81] Tr. at 363-364.

[82] ED Ex. 1, Dickey direct at 9.

At the hearing, Mr. Carr presented an overview of the construction process if the CCN is approved. He explained that the plans submitted with the application would not be authorized by the CCN request, even if the CCN is approved. Rather, if there is a request for service in the certificated area, infrastructure expansion of the large interceptors in the Wilson Creek and East Fork line will be undertaken by NTMWD, because those interceptors are owned and operated by NTMWD. Any lines built to serve individual properties would be constructed by McKinney through the development of the property.[83] Mr. Carr explained that the City currently has a plan for future sewer development, taking into account the size of the area basins, the sewer mains, and other general information. At a later date, in response to a particular need of the proposed development, his team will survey and analyze the topography and route. Then, he and his team will work with different agencies, such as the Texas Historical Commission and the U.S. Corps of Engineers, if necessary. When doing a detailed survey, the City engineers will take into consideration the configuration of the line and the environment, such as the location of old-growth trees. The oversight of this planning process resides with McKinney, and its actions must conform to local, state, and federal law.[84]

Landowners are skeptical because the planning process, as explained by Mr. Carr, has no procedures for involving residents and other "knowledgeable people."[85] Although Mr. Carr testified he would take into consideration input from area landowners concerning environmental concerns, Landowners suggest that any input will remain in a reference file.

The ALJ acknowledges the Landowners' concerns. However, at the hearing, the City witness responsible for complying with applicable environmental statutes testified that the City would comply with such regulations during the construction of future sewer systems. This testimony was not controverted. The ALJ concurs with the City and the ED that granting the CCN amendment will not deteriorate environmental integrity and would improve it with respect to the centralized sewage collection system.

---

[83] Tr. at 238-239.

[84] Tr. at 246-250.

[85] Landowners' reply brief at 21.

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

Landowners argue that there is no data, analysis, or proof to support the statements of McKinney's witnesses that providing a centralized sewer collection system is an improvement of service. If the CCN amendment is granted, they are concerned that they will be subject to City ordinances and be required to pay for the sewer system whether or not they are connected to it. Specifically, Landowners are also worried that the McKinney Utility Impact Fee Ordnance applies to landowners with sewer septic systems.

As noted by McKinney and OPIC, there is no legal basis for the argument that the granting of a CCN amendment would subject Landowners, who reside outside the municipal limits, to city ordinances. There is no legal basis for Landowners' fear that the granting of a CCN amendment would endow McKinney with the ability to tax or collect revenue from those residing outside the City. McKinney argues that a city's ordinances are only effective inside the corporate limits unless the Texas Legislature authorizes an extension. For example, notes McKinney, cities have been given the authority to govern the subdivision of property within their ETJ.[86]

Landowners also contend that the average annual cost for septic systems may be cheaper than the City's sewer service. However, there is no direct comparison in the record and insufficient evidence to make a finding that sewer systems cost less than centralized systems. Landowners testified to the approximate costs of septic systems in the Contested Area. They estimate that it costs approximately $150 for a single tank to be cleaned out, and tanks are cleaned out generally every three years. Installation costs were not addressed.[87]

---

[86] McKinney reply brief at 5, citing TEX. LOCAL GOV'T CODE ANN. § 212.003. McKinney also notes that Cities are permitted to charge water and wastewater impact fees for new development in the ETJ as long as the area is included in the service area of the impact fee study. *See* TEX. LOCAL GOV'T CODE ANN. § 395.001(9). Cities may also extend sewer facilities outside the municipal boundaries to sell sewer service and to contract with persons outside the city limits to permit them to connect to the utilities on terms the municipality considers to be in its best interest. *See* TEX. LOCAL GOV'T CODE ANN. § 402.001(c).

[87] Landowners' Ex. 1 at 40.

The current rates charged by McKinney, which are adopted by ordinance, have a base and minimum of $10.50 per customer, plus a fee for usage, calculated based on a customer's water usage. The City-adopted rate will be applicable to any person and/or entity requesting service from McKinney.[88] Although the costs for septic systems may be cheaper, there is no requirement that a septic-system user switch to McKinney's centralized system, if the CCN amendment is approved.[89] Rather, the granting of the CCN amendment would provide another service option for a septic system user.

Both Mr. Carr, on behalf of the City, and Mr. Dickey, on behalf of the ED, testified that granting the CCN for sewer service would require the City to serve any customer that requests service, provide more options to landowners that wish to develop their property, and allow customers to seek assistance from the Commission. In areas where McKinney already provides service, the granting of the CCN will not affect the cost or the quality of service currently provided.[90]

The ALJ finds that the granting of McKinney's application will increase options for area users, require the City to serve any customer seeking centralized sewer service, and allow City customers to seek assistance from the Commission. Because no sewer customer is required to take service, if a customer wants centralized sewer service, any increase in rates is by customer choice.

IV. ADDITIONAL CONTESTED ISSUES

A. Application Requirements

Landowners argue that McKinney failed to include in its application a metes and bound survey certified by a licensed state land surveyor or a registered professional land surveyor, citing 30 TEX.

---

[88] Tr. at 313.

[89] Granting McKinney's request to amend its CCN does not expand or change the City's authority to charge a person or require a property owner that owns property outside the city limits to connect and use a city's sewer system. *See* TEX. LOCAL GOV'T CODE ANN. § 214.013(a)(2).

[90] McKinney Ex. 12, Carr direct at 21; ED Ex. 1, Dickey direct at 10; Tr. at 355-356.

ADMIN. CODE §§ 291.105 and 291.106(f) and TEX. WATER CODE § 13.244(d). As noted by McKinney, the requirements to provide a written boundary description by metes and bound survey, Texas State Plane Coordinate System, verifiable landmarks, or recorded plat were added to the CCN requirements by the Texas Legislature in 2005, but were not applicable to applications filed before January 1, 2006. Thus, McKinney's application is not required to comply with this requirement. However, McKinney's application does comply with the newer requirements. McKinney provided a written description of the requested area using both verifiable landmarks and the Texas State Plane Coordinate System.[91] McKinney also provided the Commission with a standard map projection and corresponding metadata.[92] The ALJ concludes that Landowners' argument is unsupported by the evidence.

Landowners argue that McKinney failed to provide a capital improvement plan covering the requested CCN area, as required by TEX. WATER CODE § 13.244(d)(3). In response, McKinney notes that it provided its 2004 update to its Wastewater Master Plan in its application. McKinney witness Mr. Carr discussed the use of the Wastewater Master Plan and stated that it "includes a capital improvement plan for the construction of interceptor mains providing the capacity required to meet the needs of the projected development activity."[93] He testified that the Wastewater Master Plan provides a comprehensive plan for the development of McKinney's sewer system to serve at build-out conditions. The plan projects the location and land use for future development. It provides cost estimates of needed facilities from 2004 through 2014, and at build-out.[94] The ALJ agrees with McKinney that the Landowner's complainants on this issue are without merit.

---

[91] *See* McKinney Ex. 1, Application at Att. 5E.

[92] McKinney Ex. 1, Application at Att. 6.

[93] McKinney Ex. 12, Carr direct at 11.

[94] McKinney Ex. 12 at 15; *see* Ex. 1, Att. 4. at Fig. 5-1, 5-3, 5-4, and 6-1.

B. Allocation of Transcription Costs

The City requests that half of the total transcription costs of $2,272.65 be allocated to Landowners.[95] The City argues that the ALJ ordered a transcript and all parties have benefited from it. The City notes that all parties participated equally in the hearing, thus, Protestants should be required to pay their share.

The ALJ finds that McKinney has a demonstrated financial ability to pay for the transcript and benefitted most directly from it because it allowed the City to cite to the record in establishing its entitlement to the requested CCN areas. Landowners disagreement with the City appears to have begun with the development of the City's 2004 Comprehensive Plan. Participation in the City's CCN application, which arose from the Comprehensive Plan, is a continuation of Landowners' input into the City's planning process. The ALJ notes that Landowners were required to travel to Austin for the hearing and preliminary hearing, over objection, incurring personal expense. Accordingly, after consideration of the factors set out in 30 TEX. ADMIN. CODE § 80.23, the ALJ does not recommend assessing transcription costs on Landowners.

V. CONCLUSION

The City's application meets all requirements for issuance of a sewer CCN for the entire requested area. Accordingly, the ALJ recommends that the Commission adopt the attached Proposed Order approving the requested amendments to the City's certificates of convenience and necessity.

VI. ADDITIONAL FACTS

In addition to the facts discussed above, the Findings of Fact contained in the attached Proposed Order include other established facts that are necessary to show compliance with regulatory

---

[95] These costs were calculated before the June 4, 2008 hearing session, for which a transcript has been prepared.

requirements applicable to this proceeding. These additional facts were not seriously contested and are incorporated by reference into this Proposal for Decision.

SIGNED March 17, 2009.

LILO D. POMERLEAU
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER granting in part the Application of the City of McKinney to Amend Sewer Certificate of Convenience and Necessity (CCN) No. 20071 in Colin County, Texas; SOAH Docket No. 582-06-2663; TCEQ Docket No. 2006-0631-UCR

On _____, 2009, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application of the City of McKinney to amend Sewer Certificate of Convenience and Necessity (CCN) No. 20071 in Colin County, Texas.

Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a preliminary hearing on the Application on July 19, 2006, and a contested case hearing on the merits of the Application on October 28 and 29, 2008. ALJ Pomerleau prepared a proposal for decision (PFD), which recommended that the Commission approve the Application. The following are the Parties to the proceeding: the City of McKinney; the Executive Director (ED) of the Commission; the Office of Public Interest Counsel (OPIC) of the Commission; and Cynthia Kaminsky, John Powell, Sr., Robert and Karen Finch, and Fred Herbert (Landowners).

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

FINDINGS OF FACT

Procedural History

1. The City of McKinney (McKinney) is a retail public utility.

2. McKinney has applied to the Commission to amend its sewer CCN number 20071 to provide sewer service in Collin County, Texas.

3. McKinney's application was filed on July 21, 2005.

4. Notice of the application was published in the *McKinney Courier-Gazette* on August 24 and 31, 2005.

5. Notice of the application was mailed by McKinney on September 7, 2005, to municipalities and neighboring utilities providing similar service within two miles of the area for which certification was sought, and on September 12, 2005, to all landowners in the requested area.

6. Notice of the public hearing on the application was mailed on June 27, 2006, by the Chief Clerk of the Commission to McKinney and all interested parties.

7. A preliminary hearing was held on July 19, 2006. Designated as parties at the preliminary hearing were McKinney; the ED; OPIC; Boa Sorte, LLC, (Boa Sorte); City of Princeton (Princeton); MA BB Owen, LP (MA BB); and Cynthia Kaminsky, John Powell, Sr., Robert and Karen Finch, and Fred Herbert (the Landowners).

8. On October 13, 2006, the ALJ granted McKinney's motion to consolidate with another pending SOAH Docket No. 582-06-1641, TCEQ Docket No. 2006-0044-UCR, *Application of the City of Princeton to Amend its Certificates of Convenience and Necessity in Collin, County.* Princeton and McKinney sought CCNs for an overlapping area. Parties to the consolidated proceeding included those named in the McKinney proceeding plus Culleoka Water Supply Corporation (Culleoka); North Collin Water Supply Corporation (North Collin); Tim Bennett Engineering & Construction, Inc.; Billy Jo Donihoo; David Strawn; the Felicia Saigling Estate and W.N. Saigling, Jr.; and Robert Gammenthaler.

9. A telephonic prehearing conference was held on November 8, 2006.

10. A hearing in the consolidated proceeding was set for April 23, 2007.

11. On January 9, 2007, MA BB filed a notice of withdrawal of protest of McKinney's application. On January 11, 2007, MA BB was dismissed as a party to the consolidated case.

12. On January 19 and 23, 2007, Culleoka and North Collin, respectively, filed motions to withdraw their protests. The ALJ granted the motions on January 24, 2007, dismissing the water supply corporations as parties to the consolidated case.

13. On February 5, 2007, McKinney filed an amendment to its application removing Area 1, territory excluded pursuant to an agreed judgment concerning the boundary with the Town of Fairview, and Area 2, a tract of land owned by Boa Sorte.

14. The hearing initially set for April 23, 2007, in the consolidated case was continued to May 21, 2007.

15. On February 20, 2007, Boa Sorte filed a motion to withdraw its protest because it had settled with McKinney. This request was granted on February 22, 2007, and Boa Sorte was dismissed as a party.

16. On April 4, 2007, Princeton and McKinney filed a joint motion to abate the hearing schedule and hearing date pending settlement negotiations. This request was granted.

17. On May 14, 2008, McKinney amended its sewer CCN application, removing the areas protested by Princeton. That same day, McKinney and Princeton filed a joint motion to sever the CCN consolidated application. This motion was granted on May 19, 2008.

18. On June 24, 2008, Princeton filed a motion to withdraw its protest from the McKinney application. This motion was granted June 27, 2008.

19. On June 30, 2008, McKinney again amended its application to exclude territory near the City of Melissa.

20. On June 27, 2008, the parties were given notice of the date, place, and time of the hearing on the merits.

21. The Hearing on the Merits was conducted on October 3-4, 2007. The record closed on January 20, 2009.

Description of the Applicant

22. McKinney is a municipality located in Collin County, Texas.

23. McKinney currently holds sewer CCN No. 20071.

24. McKinney was one of a group of municipalities that formed North Texas Municipal Water District (NTMWD). McKinney is a member city of NTMWD and has voting rights, board membership, and different rates than customer cities.

25. NTMWD provides wastewater treatment services to McKinney.

Compliance with the Legal Standards
The adequacy of service currently provided to the requested area.

26. McKinney is currently the only sewer service provider within the area requested by McKinney.

27. As of September 30, 2006, McKinney provided sanitary sewer service to 32,796 connections. Of these connections, approximately 17,500 are located in the requested area.

28. McKinney has a history of successfully expanding its system to meet the needs of development.

29. McKinney has a wholesale wastewater agreement with NTMWD.

30. If the requested area is developed into small city lots, centralized sewer service will be necessary.

The need for additional service in the requested area.

31. Currently, most of the tracts in the requested area that have not already developed are large lot estate type residences (two to ten acres) and farming.

32. As the requested area develops, it will have a mix of industrial, commercial, and residential areas, including community villages, office parks, and suburban mixed use.

33. Centralized sewer will be necessary because most of the development will be dense developments that cannot be supported by septic systems.

34. Among cities with a population over 50,000, McKinney had the highest growth rate in the entire United States between 2000-2003, according to the U.S. Census Bureau.

35. In 2005, McKinney approved 3,471 building permit applications for new construction. In 2006, McKinney approved 2,858 building permit applications.

36. McKinney had an annual population growth of 15% between 1990 and 2000. This growth is continuing.

37. In 2000, McKinney had just over 50,000 people. McKinney has experienced an average growth rate of approximately 11% every year since 2001. In 2005, McKinney added 10,120 new residents, and, as of January 1, 2006, McKinney's population was over 104,000 people.

38. The addition of new residents is likely to continue with the platting of additional subdivisions throughout McKinney's city limits and ETJ.

39. McKinney's population will likely range between 250,000 and 260,000 in 2030.

40. At ultimate build-out, McKinney will likely have a population of 360,000 people.

41. The kind of development McKinney is seeing is urban-type development with three to four houses per acre and lot sizes that are between 6,000 and 7,500 square feet.

42. McKinney is also seeing service-type commercial developments from corner grocery stores to larger lifestyle centers or power centers. McKinney is getting industrial and large-scale office uses.

43. It is likely these growth patterns (*i.e.* typical urban style developments with residential housing development between 3 and 4.5 units per acre, apartments, retail, office, and service type uses) will continue because growth and development in the northeastern portion of the Dallas/Fort Worth Metroplex continues to move into Collin County as people seek new housing and job opportunities.

44. Centralized sewer service is critical to the continuation of the denser urban-type development that McKinney has seen since 2000 because lots in urban-type developments are too small for septic systems or the use is not one that is appropriate for septic systems.

45. Because of the rapid, urban-type growth and the necessity to plan for that growth, there is a need for sewer service in the area.

46. The area to the south of U.S. Highway 380 between Wilson Creek and the East Fork of the Trinity River, referred to as the Contested Area, may move towards light industrial land uses because of its proximity to the regional airport.

47. Development is pushing toward the Contested Area from the west with the relocations of Simpson Strong-Tie and IESI facilities near the airport.

48. There is a need for service in all of 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.

49. In areas where McKinney already provides service, the granting of the CCN will not affect the cost or the quality of service McKinney currently provides to its customers.

50. In areas where McKinney does not currently provide service, the granting of the CCN to McKinney will enable McKinney to continue to plan for and meet the future needs in the requested area. And because McKinney has and continues to plan for providing service, the additional territory will not adversely affect McKinney.

51. The installation of a centralized sewer system will increase the options for the landowners in the requested area, as well. The sewer CCN will provide the landowners with some certainty about who will provide centralized sewer service for their property should they want to develop their property in such a way that does not allow them to use septic systems.

52. If McKinney is certificated to the requested area, McKinney would be obligated to provide service to landowners who request service and who are qualified applicants; however, landowners who are currently served by septic systems would be under no obligation to obtain service from McKinney as a result of the granting of this CCN amendment.

53. Developer-landowners will also benefit from the continuity in services provided. McKinney holds the water CCN for most of the requested area. A developer will only need to deal with one entity for both of those services.

54. The granting of the CCN amendment to McKinney for the requested area will not negatively affect neighboring and adjacent utilities, such as the Cities of Frisco, Celina, Weston, Melissa, Princeton, Fairview, Prosper, Allen, and Plano.

55. The requested area is in McKinney's city limits and ETJ.

56. Granting McKinney's request for a CCN amendment would not have an adverse effect on neighboring utilities, as there is no other utility currently certificated to provide services in the requested area. No other utility is providing service in the requested area, and none has expressed interest in doing so.

The ability of the applicant to provide adequate service.

57. McKinney has historically provided, and is currently providing, adequate sewer service in its CCN territory.

58. McKinney's current wastewater system is composed of lines ranging from 6 to 42 inches in diameter, six lift stations, and the Wilson Creek and East Fork interceptors, which are large lines that transport McKinney's wastewater to the NTMWD wastewater treatment facilities.

59. At build-out, McKinney anticipates needing approximately 353,000 feet of sewer line ranging from 6 inches to 60 inches at a cost of approximately 41 million dollars.

60. McKinney anticipates serving, at ultimate build-out, approximately 395,000 people, or about 150,000 connections.

61. NTMWD provides wastewater treatment services to McKinney and constructs some interceptor mains through contracts with McKinney. NTMWD treats all of McKinney's wastewater.

62. NTMWD is required to meet all of McKinney's wastewater treatment needs, has never failed to meet the wholesale sewer treatment needs of McKinney, and has sufficient sewer treatment capacity to treat McKinney's wastewater at McKinney's ultimate build-out.

63. Through NTMWD, McKinney has access to an adequate sewer treatment capacity to meet McKinney's current and future sewer service needs, including the area McKinney is requesting to be certificated.

64. McKinney's Engineering Division oversees the planning, design, and construction of public improvements; it employs 11 licensed engineers and two engineers in training. McKinney also hires outside consultants to design capital projects to which the McKinney staff provides support.

65. McKinney has a Wastewater Master Plan that provides for facilities in McKinney's requested area.

66. The Wastewater Master Plan projects the location, size, timing, and cost for improvements to McKinney's wastewater collection system, and the system components are constructed per the plan.

67. The Master Plan is used in making recommendations for infrastructure needs that should be included on McKinney's five-year rolling capital improvements program (CIP) for its sewer system. The CIP makes available financial resources necessary for the infrastructure improvements as recommended by the Wastewater Master Plan.

68. McKinney's Water and Wastewater Division employs nearly 50 people.

69. The operation and maintenance of the wastewater collection system by the Water and Wastewater Division includes the performance of regularly scheduled and unscheduled repairs of the wastewater main system, wastewater main line cleaning, internal pipe line inspections, lift station maintenance, and new line installations.

70. McKinney uses a Supervisory Control and Data Acquisition System (SCADA), which is a computerized automated control system that monitors McKinney's lift stations, to assist in its operations.

71. McKinney responds to complaints and performs repairs.

72. McKinney has the technical capability to provide continuous and adequate service to the requested area.

73. McKinney requires its Water and Wastewater Division employees to take various safety, professional development, and Texas Commission on Environmental Quality approved water/wastewater training.

74. McKinney's operators are cross-trained to ensure that McKinney has numerous employees with experience working on sewer system.

75. McKinney in-house Engineering Division oversees the design and construction of McKinney's facilities.

76. McKinney has adopted an emergency response plan, which provides guidance to the utility personnel in the event of an emergency and describes the responsibilities and procedures to mitigate against, prepare for, respond to, and recover from a temporary disruption in water and wastewater services that threatens the public health and safety in the local area.

77. McKinney's billing department, which is part of the McKinney Financial Services Department, currently employees 19 people to process the bills and read, replace, and install new meters.

78. McKinney has adopted ordinances to construct, operate, and maintain its wastewater system, including ordinances regulating extension of service, pretreatment of wastewater, the subdivision of property, and the payment of service and impact fees. These ordinances together serve to assist McKinney in the management of its system.

79. The size and extent of the lines are determined by our Engineering Department based on McKinney's standards and identified capital improvements such as lift stations.

80. McKinney has a water/sewer impact fee ordinance which establishes fees for new development based on the demand the new development places on our water/ sewer infrastructure. It funds a portion of the water/sewer capital improvements for new development.

81. There are three primary plans that guide and direct McKinney in the development of its wastewater system: the Comprehensive Plan, the Wastewater Master Plan, and the Capital Improvements Program (CIP).

82. The Comprehensive Plan is used as a general guide to development and provides the information on growth and development necessary to determine infrastructure needs over time.

83. McKinney uses the Wastewater Master Plan to guide the development of its sewer system to ensure infrastructure is in place as development occurs.

84. McKinney has also prepared and annually updates a five-year CIP to plan for the funding of the facilities McKinney anticipates needing in the near term. The CIP is affordable because it

is based on a set of growth and financial assumptions, with debt issuance projections reviewed by McKinney's outside financial advisors to ensure that the proposed debt service is within McKinney's projected financial capacity.

85. McKinney has adopted billing procedures to protect the municipal utility and the customers.

86. McKinney regularly reviews its rates to make sure the sewer rates charged will generate enough revenue to support the payments under its contract with NTMWD, as well as McKinney's operating and capital improvements costs.

87. Based on the evidence shown, McKinney has the managerial capability to provide continuous and adequate service now and in the future to all of the requested area

The feasibility of obtaining service from an adjacent retail public utility.

88. Within the area that McKinney has requested, it is more feasible to obtain sewer service from McKinney than from any other adjacent retail public utility.

89. McKinney currently provides service to a large portion of the requested area.

90. In the portions of the requested area where McKinney does not provide service, there is no other retail sewer service available.

91. While there are numerous utilities surrounding the area, there is no evidence that any of the other utilities want to provide service to the area.

92. The CCN area is within McKinney's current city limits and ETJ boundaries, which will ultimately be incorporated into the city limits of McKinney.

93. McKinney has not requested territory outside its ETJ.

94. Developers and other people seeking to subdivide property must obtain subdivision approval from McKinney and comply with McKinney's subdivision ordinances.

95. Because the area is within McKinney's city limits and ETJ, and because any developer will be required to meet McKinney subdivision standards, it will be more feasible to obtain service from McKinney than from another city whose standards may vary and who has no legal ability to annex into the area without McKinney's consent.

96. McKinney also has boundary agreements with the cities of Prosper, Celina, Weston, Frisco, Allen, Fairview, Melissa, and Princeton. By establishing these ultimate boundaries, McKinney is able to plan for the provision of service to the requested area and to clearly establish which political entity has jurisdiction.

97. From an engineering perspective, it is also more feasible to obtain sewer service from McKinney than any adjacent retail public utility because McKinney's system is, for the most part, a gravity flow system that carries the wastewater downhill to NTMWD's system.

98. Using gravity to carry waste downhill is cheaper because it eliminates the need to construct, operate, and maintain lift stations to pump the wastewater uphill.

99. In the Contested Area, McKinney has existing wastewater facilities in a part of the area and McKinney's wholesale wastewater service provider, NTMWD, has two interceptors that serve McKinney that run along Wilson Creek and the East Fork of the Trinity River.

100. Based on the evidence presented, McKinney is the most feasible retail public sewer utility in the requested area.

The financial stability of the applicant, including if applicable, the adequacy of the applicant's debt-equity ratio.

101. As of September 30, 2008, McKinney provided sewer service to 37,418 connections.

102. McKinney's operating budget for its water and wastewater utility fund for fiscal year 2008-2009 is $50.6 million, and the capital improvements budget for 2008-2009 is $14.4 million.

103. The 2006-2007 Comprehensive Annual Financial Report reports the following for McKinney's water and wastewater utility fund:

Total Assets — $289.5 million;

Total Liabilities — $74.5 million;

Total Net Assets — $214.9 million;

Total Operating Revenues — $35.1 million; and

Total Operating Expenses — $31.4 million.

104. McKinney maintains operating reserves to provide a source of working capital to meet cash flow needs, offer a cushion against revenue shortfalls and unanticipated expenditures, provide an accumulation of funds for capital projects to avoid/reduce bond sales, produce investment income, and contribute to a favorable bond rating.

105. McKinney has an AA+ bond rating and McKinney also maintains higher-than-required bond coverage.

106. McKinney has a number of sources at its disposal to fund the expansion of its system, including revenue bonds, impact fee contributions, developer contributions, and fund balances (pay-as-you go method).

107. McKinney's CIP identifies the projects to be started each year of the budget and the funding sources for the projects, thus ensuring all capital improvements are properly funded.

108. McKinney has a strong financial position, strong bond rating, high bond coverage, sufficient operating reserves, and strong debt to equity ratio.

109. McKinney has the financial capabilities to provide continuous and adequate service to the requested area and is financially stable.

Environmental integrity.

110. The environmental integrity of the requested service area will be improved by McKinney's provision of a centralized sewer system.

111. To prevent sanitary overflows, McKinney designs and constructs lines that are appropriately sized to accommodate the anticipated flow at ultimate build-out and monitors the condition of its mains and periodically checks the actual flow in the mains to ensure adequate capacity is available.

112. McKinney conducts internal televising work to identify defects, repairs identified defects, and conducts routine lift station inspections.

113. On an annual basis, McKinney contracts with a root control company that removes root growth, which can cause leaks and line breaks.

114. McKinney ensures that emergency situations are investigated or responded to in less than one hour and repairs are generally made within ten days.

115. For more catastrophic emergency situations, such as water system contamination and bioterrorism, bomb threats, facility sabotage, explosions, tornados, flooding, and loss of the SCADA system, McKinney has an Emergency Response Plan which describes the responsibilities and procedures necessary to mitigate against, prepare for, respond to, and

recover from a temporary disruption in water and wastewater services that threatens the public health and safety in the local area.

116. McKinney has also adopted a pretreatment ordinance and grease trap requirements in order to protect the integrity of the sewer system, employees, and the environment. McKinney contracts with NTMWD to administer the program. NTMWD takes samples, inspects the system, permits dischargers who are required to obtain a pretreatment permit, and issues notices of violation. McKinney pursues enforcement of the pretreatment standards when necessary.

117. McKinney's contractors constructing new sewer facilities are required to comply with McKinney's stormwater ordinance and are required to obtain any and all necessary permits from the state and federal agencies.

118. McKinney also includes in the design of sewer mains provisions for stormwater runoff to minimize the effect on the environment and all of its projects are designed, constructed, and maintained in accordance with all local, state, and federal regulations.

119. When McKinney initiates design and alignment of a wastewater facility, it will conduct on-the-ground surveys to identify issues such as stands of trees, archeological sites, or any other features that might affect construction and alignment. This information, along with requirements that may be imposed by various agencies, such as the Texas Historical Commission or the Army Corps of Engineers, is evaluated to determine the most appropriate location for a facility. When possible, McKinney will avoid sensitive areas and heavy masses of trees. All of these steps help to minimize any adverse effects the construction of sewer lines might have on the environmental integrity.

120. McKinney's system is a regional system and sends its wastewater to a regional treatment plant, which is more closely monitored than multiple smaller systems or septic systems.

121. NTMWD's treatment plant has one of the more stringent discharge permits in the state.

122. Granting McKinney's CCN amendment application will not have an adverse effect on environmental integrity.

The probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate.

123. In the areas where there is currently no sewer service, the provision of retail sewer service by McKinney will be an improvement because it will require McKinney to provide continuous and adequate service to all qualified applicants.

124. In areas where McKinney already provides service, the granting of the CCN will not affect the cost or the quality of service McKinney currently provides to its customers.

125. Amendments to McKinney's sewer CCN are necessary for the service, accommodation, convenience, or safety of the public.

McKinney's Application

126. McKinney provided a written description of the requested area using both verifiable landmarks and the Texas State Plane Coordinate System

127. McKinney provided its 2004 update to its Wastewater Master Plan in its application. This plan included a capital improvement plan and a comprehensive plan for the development of McKinney's sewer system to serve at build-out conditions. The plan projected the location and land use for future development. It provided cost estimates of needed facilities from 2004 through 2014 and at build-out.

Allocation of Transcript Costs

128. All of the parties have benefitted from the transcript because it has made it easier to assess the evidence.

129. McKinney has a demonstrated financial ability to pay for the transcript and benefitted most directly from it because it allowed the City to cite to the record in establishing its entitlement to the requested CCN areas.

130. Participation in the City's CCN application, which arose from the Comprehensive Plan, is a continuation of Landowners' input into the City's planning process.

131. Landowners were required to travel to Austin for the hearing and preliminary hearing, over objection, incurring personal expense.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case under TEX. WATER CODE ANN. Ch. 13.

2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003.

3. McKinney published notice and provided notice to neighboring utilities and affected parties, as well as all landowners in the requested area as required by TEX. WATER CODE ANN. § 13.246 and 30 TEX. ADMIN. CODE §291.106.

4. Parties received proper and timely notice of the hearing. TEX. GOV'T CODE ANN. § 2001.051 and 2001.052.

5. McKinney has met the substantive criteria for granting a sewer CCN amendment in Collin County, Texas, as set forth in TEX. WATER CODE ANN. §§ 13.241, 13.244, and 13.246 and 30 TEX. ADMIN. CODE § 291.102(d).

6. Issuing the amended CCN for sewer service to McKinney is necessary for the service, accommodation, convenience, or safety of the public.

7. McKinney has met its burden of proof regarding the entire area set out in its published notice, as amended by McKinney on February 5, 2007, and May 14 and June 3, 2008.

8. McKinney's sewer CCN amendment should be granted for the entire area set out in the published notice, as amended by McKinney on February 5, 2007, and May 14 and June 3, 2008.

9. The Commission's rules provide that the Commission will not assess transcription costs against the ED or the OPIC. 30 TEX. ADMIN. CODE § 80.23(d)(2).

10. The transcription costs in this matter should be assessed against McKinney, taking into consideration the factors set out in 30 TEX. ADMIN. CODE § 80.23(d).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The application of the City of McKinney to amend its Certificate of Convenience and Necessity No. 20071 in Collin County, Texas is GRANTED.

2. The CCN shall include the area described in the published notice, as amended by McKinney on February 5, 2007, and May 14 and June 3, 2008, and set forth in Finding of Fact No.5.

3. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.

4. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

5. The Executive Director of the Texas Commission on Environmental Quality shall amend the official maps to reflect this decision.

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

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Buddy Garcia, Chairman for the Commission