

SOAH DOCKET NO. 582-08-1318
TCEQ DOCKET NO. 2007-1956-UCR

APPLICATION OF MUSTANG SPECIAL	§	BEFORE THE
UTILITY DISTRICT (SUD) TO AMEND	§	
SEWER CERTIFICATE OF	§	TEXAS COMMISSION ON
CONVENIENCE AND NECESSITY (CCN)	§	
NO. 20930 IN DENTON COUNTY, TEXAS,	§	
APPLICATION NO. 35709-C	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), by and through a representative of the Commission’s Environmental Law Division, files the following exceptions to the Administrative Law Judge’s (ALJ’s) proposal for decision (PFD). In support of his exceptions, the ED shows the following:

I. OVERVIEW

According to the PFD, the Commission should grant Mustang SUD’s application to amend its sewer CCN in its entirety. While the ED agrees that Mustang SUD’s CCN should be amended to incorporate the Uncontested Service Area as agreed upon by the parties in this case, Mustang SUD has fallen short of meeting its burden of proof¹ with regard to the Contested Service Area, especially with regard to the need for additional service, the ability to provide service, and the feasibility of obtaining service from an adjacent retail public utility (RPU). The following exceptions, corrections, and other recommendations reflect this viewpoint and voice other concerns regarding the ALJ’s proposed order that would implement the PFD.

II. EXCEPTIONS

A. Finding of Fact Nos. 27-30

“Service” is defined in title 30, section 291.3(43) of the Texas Administrative Code as an act performed by an RPU in the performance of its duties under the Texas Water Code. As a

¹ 30 TEX. ADMIN. CODE § 291.12 (West 2009).

sewage collection system installed by a property owner for that property owner's use, an on-site sewage facility (OSSF) does not fall under this definition. Therefore, whatever role an OSSF serves is not defined as "service" in chapter 291, and that role is not relevant to the adequacy of service factor. Therefore, the ED recommends striking these findings of fact from the order.

If the Commission determines that these findings of fact are relevant, the ED still recommends that Finding of Fact No. 30 be struck from the order. "Commercial development" is a broad term that can encompass a business as small as a gas station or as large as a high-rise office building. While OSSFs could not support the latter, they could support the former. Therefore, the ED believes that an OSSF could support at least some commercial development, meaning this finding of fact is inaccurate.

B. Finding of Fact Nos. 35-38

These findings of fact assert that the Dallas North Tollway *will* be extended and that it *will* serve as a north-south transportation corridor for the Proposed Service Area. However, as the ED stated in his reply to closing argument,

The evidence in the record regarding the toll road is limited. According to Mustang SUD's wastewater master plan (WMP), the North Texas Tollway Authority (NTTA) has *proposed* a toll road that would run east of the requested area and that is not scheduled to be completed until after 2020.² According to a Mustang SUD witness, today there are tollway access roads in place east of the county line, the county line being the eastern border of the requested area, but [he] did not state how far east.³ Beyond that, there is no information in the record that shows that the toll road will in fact be constructed, such as whether the NTTA is

² Ex. Mustang-4 att. MM-6 at 1-2.

³ Transcript of Hearing 122:3- 8 (Aug. 5, 2009); Ex. Mustang-4 att. MM-6 at 1.

even still considering the project.⁴

While it is possible the toll road will be constructed, too much uncertainty exists today to conclude the proposed project demonstrates a need for additional service in the Contested Service Area. After all, building it does not always mean they will come. Therefore, the ED recommends striking these findings of fact from the order.

C. Finding of Fact Nos. 40-42 and 45

If the phrase “general area” refers to Mustang SUD’s current sewer CCN, then the general area has experienced growth. However, the growth discussed in Mustang SUD’s WMP is in the southern portion of the sewer CCN, not the entire CCN and not in the Proposed Service Area or the area immediately surrounding it.⁵

If the development in the southern portion of the CCN is the development discussed in Finding of Fact No. 45, then “near” means over two miles away.⁶

If the number of meters installed by Mustang signifies growth in the general area, then Mustang was installing 130 to 140 meters per month in the past, but that point was raised in the context of the purpose behind the WMP, not in the context of how many meters Mustang SUD has been installing recently.⁷ Furthermore, meters are usually for water service, not sewer service, so the installation of a water meter does not necessarily mean that customer is also receiving sewer service.

The ED does not believe these findings of fact provide evidence of a need for additional sewer service in the Contested Service Area and recommends striking them from the order.

⁴ ED’s Reply to Closing Argument 2 (Oct. 16, 2009).

⁵ Ex. Mustang-4 att. MM-6 at 1.

⁶ Ex. ATI-4 (drawn boxes with hash marks representing developments along the U.S. Highway 380 and FM 1385 corridors to which Mustang SUD provides retail or contract sewer service); *see also* Transcript of Hearing 41:13-45:4 (discussing the drawing of the boxes).

⁷ Transcript of Hearing 99:5-6, 100:4-8.

D. Finding of Fact Nos. 43, 47, and 55-57

While the Contested and Uncontested Service Areas are not separated by anything like a mountain range and do both contain agricultural property, the two areas are different in that portions of the Contested Service Area already have existing residences or other structures. As can be seen on Exhibit ED-6, Attachment B, Exhibit C, structures exist in the northwest, west, and southeast portions of the Proposed Service Area, which are all portions in the Contested Service Area.⁸ While it has been established that the structures in the northwest are part of a mobile home park,⁹ and the other structures in the area are likely farm homes and other farm structures, these are still people's homes. It seems the likelihood of those properties being developed is lower than in the Uncontested Service Area. Furthermore, development does end at some point. Otherwise, Texas would not have any countryside. Therefore, the ED recommends striking these findings of fact from the order.

As discussed in section II.O below, the ED does not believe Mustang SUD demonstrated a need for additional sewer service in the Contested Service Area. In support of this position, the ED recommends adding the following findings of fact at the end of the "Need for Additional Service" section of the order:

- Mustang SUD did not provide any evidence that showed there are other planned developments in the requested area.
- Mustang SUD did not provide any population projections for the requested area.

E. Finding of Fact No. 61

As evidenced by the ED's arguments above regarding the need for additional service issue, the ED does not believe the evidence sufficiently shows that a certain type of development

⁸ Exhibit ED-6 att. D; *see also* Ex. ED-7 (providing a closer view of the northwest portion of the Proposed Service Area).

⁹ Transcript of Hearing 61:10-14, 62:6-8.

is reasonably anticipated for the Contested Service Area.¹⁰ Therefore, it is unknown whether Aqua Texas' permit could sufficiently serve the Contested Service Area. The ED recommends striking this finding of fact from the order.

F. Finding of Fact No. 66

While Mustang SUD's transmission system may be a gravity system due to the drainage pattern of the Doe Creek Branch Drainage Basin, Mustang SUD has traditionally used a low pressure system for the collection portion of its system. According to Mustang SUD's tariff, "All applicants for sewer service shall grant an easement to the District which shall own, install and maintain the Grinder Pump Station . . . ," and "The District shall construct all sanitary sewer service facilities from the Grinder Pump Station of a residence or commercial building to the District's sewer service line, which installation shall include the Low Pressure Sewer System"¹¹ Therefore, the ED recommends striking the words "collection and" from this finding of fact.

G. Finding of Fact No. 71

According to one of Mustang SUD's witnesses, Mustang SUD does not have exclusive access to the unallocated treatment capacity at the Doe Branch plant.¹² Therefore, the ED recommends amending the first sentence of this finding of fact as follows: Mustang has subscription contracts with UTRWD [Upper Trinity Regional Water District] for treatment capacity at the Doe Branch WRP [Water Reclamation Plant] and may add treatment capacity, if available, to meet increased demand.

H. Finding of Fact Nos. 85 and 86

While the PFD states Mustang's ability to provide adequate service is not in dispute, this

¹⁰ See *supra* sections II.B-D.

¹¹ Ex. Mustang-1 att. CB-2 att. 5 § E 20.

¹² Transcript of Hearing 94:17-95:15.

is not the case.¹³ The ED stated in his closing argument he did not believe that Mustang SUD had met its burden of proof regarding the ability to serve factor.¹⁴ The following excerpt from the ED's closing argument expresses his reservations regarding Mustang SUD's ability to serve the Contested Service Area:

When considering an applicant's ability to provide adequate service to the requested area, the Commission must look at the applicant's ability to comply with TCEQ requirements and the current and projected density and land use of the area.¹⁵ Another way to look at this factor with regard to this particular case is assuming that the requested area is developed as Mustang SUD claims it will be, would Mustang SUD have the ability to provide adequate service to the requested area? The ED's ability to analyze this factor was limited by the fact that Mustang SUD did not provide a capital improvements plan for the requested area. Under title 30, section 291.105(a)(6), a CCN applicant must submit "a capital improvements plan, including a budget and estimated time line for construction of *all* facilities necessary to provide *full* service to the *entire* proposed service area, keyed to maps showing where such facilities will be located to provide service" as part of its application.¹⁶ The closest the ED received to a capital improvements plan was the WMP, but as already noted in section IV.A.2 above, the WMP did not include the requested area. Without a capital improvements plan or at least that information in some other form, the ED does not know the projected plant capacity or amount of infrastructure needed to serve the requested area or the cost

¹³ PFD 9 (Dec. 14, 2009).

¹⁴ ED's Closing Argument 18 (Sept. 25, 2009).

¹⁵ 30 TEX. ADMIN. CODE § 291.102(d)(4) (West 2009).

¹⁶ Emphasis added.

of installing and/or purchasing that capacity and infrastructure.

Mustang SUD did provide some capacity information but only for the developments with requests for service. Looking at the portions of the developments located in the requested area, the projected demand at full build-out will be 0.917 million gallons per day (mgd), or 917,000 gallons per day.¹⁷ Mustang SUD testified it could calculate the estimated demand for the remainder of the requested area but that it had not done so.¹⁸ Without this information, the ED does not know the full capacity Mustang SUD anticipates needing to serve the entire requested area.

The applicant also provided some information regarding infrastructure but not at the level of detail that would be found in a capital improvements plan. Mustang SUD obtains wholesale sewer service from [UTRWD].¹⁹ It currently has purchased capacity in three UTRWD wastewater treatment plants: Peninsula, Riverbend, and the as-yet-not built Doe Branch.²⁰ As of December 6, 2007, Mustang SUD had a reserved capacity of 0.28 mgd in the Riverbend plant and 0.2 mgd in the Doe Branch plant.²¹ It has requested additional capacity in the Riverbend plant following that plant's capacity rating increase from 1.5 mgd to 2 mgd, but there is nothing in the record that shows how much additional

¹⁷ The projected demand for the Land Advisors development is 0.86 mgd. Ex. Mustang-4 at 7:11. Of the 950.65 acres contained in the development, 900.22 acres are in the requested area. Ex. ED-6 at 6:16-20. $(900.22/950.65) * 0.86 = 0.814$ mgd. The projected demand for the Smiley Road development is 0.31 mgd. Ex. Mustang-4 at 7:10. Approximately one-third of the development is in the requested area. $0.31/3 = 0.103$ mgd. $0.814 + 0.103 = 0.917$ mgd.

¹⁸ Ex. Mustang-4 at 7:17-19, 8:11-21.

¹⁹ Ex. Mustang-1 at 7:18-19 (citing ex. Mustang-1 att. CB-2, at 10, 11, atts. 2-3).

²⁰ *Id.* atts. CB-2 atts. 2-3, CB-5, CB-6.

²¹ *Id.* att. CB-6, at 5.

capacity.²² Mustang SUD intends to serve the requested area via the Doe Branch plant.²³ Until UTRWD constructs that plant, a lift station at the future plant site will pump wastewater to the Riverbend plant.²⁴ Part of the Doe Branch interceptor, the main collection line that will run to the Doe Branch plant, has been installed and currently runs from the Doe Branch lift station to Parvin Road.²⁵ Mustang SUD's assigned share of the interceptor is 40%.²⁶ UTRWD has delayed construction of the Doe Branch plant for fifteen months, subject to quarterly review, due to the moderated pace of growth and development "throughout the region."²⁷

Essentially, Mustang SUD has presented evidence regarding how it will serve the requested area from Parvin Road to the treatment plant but has not presented any detailed facility plans north of the Doe Branch interceptor's current end point. This along with the lack of capacity information prevents the ED from knowing exactly what Mustang SUD will need to serve the entire requested area and, therefore, cannot say that Mustang SUD will have the ability to meet that need and provide adequate service. Looking at what the ED does know about Mustang SUD's ability to serve, Mustang SUD's current capacity situation is a cause of concern. As stated above, the Doe Branch plant has not been constructed, so the Riverbend plant would provide service to the requested area until UTRWD constructs the other plant. Mustang SUD currently has 0.14 mgd uncommitted at

²² Ex. Mustang-5 at 3:23-4:4; ex. Mustang-7, at 16:3-8 (citing att. JES-3, at 3-4); *see also* Transcript of Hearing at 114:21-24, 137:10-17 (Aug. 5, 2009) (the two Mustang SUD witnesses who discussed the requested additional capacity stating they do not the amount of the requested additional capacity).

²³ Ex. Mustang-1 att. CB-2, at 10.

²⁴ *Id.* at 10:5-8.

²⁵ *Id.* at 10:3-4, att. CB-4 at 2.

²⁶ *Id.* att. CB-6 at 5.

²⁷ Ex. Mustang-7 att. JES-3 at 16.

the Riverbend plant.²⁸ However, 0.134 mgd of Mustang SUD's reserved capacity at the Doe Branch plant has been allocated to the Glenbrook Estates subdivision.²⁹ Not only does that leave just 0.066 mgd at the Doe Branch plant to serve the requested area once the plant is constructed, but because Glenbrook Estates is set to be served by the Doe Branch plant, its wastewater will have to be diverted to the Riverbend plant for now, leaving only 0.006 mgd uncommitted at the Riverbend plant to serve the requested area.³⁰ This is especially concerning because the ED is aware of one additional subdivision outside the requested area, the Tomlin Investments development, that will also need to be served by the Riverbend plant until the Doe Branch plant comes online, thereby stretching that 0.006 mgd even thinner.³¹

Because Mustang SUD has not shown it has the technical capability to provide service to the Contested Service Area, the ED recommends striking Finding of Fact Nos. 85 and 86 from the order. The ED further recommends adding the following findings of fact to the order to reflect the ED's findings:

- Mustang SUD did not provide the projected plant capacity or amount of infrastructure needed to serve the entire requested area or the cost of installing and/or purchasing that capacity and infrastructure.
- Mustang SUD currently has 6,000 gallons per day of its reserved capacity at the Riverbend plant uncommitted, i.e. which it can use to serve the requested area.

²⁸ Ex. Mustang-4 at 13:6-9.

²⁹ *Id.* at 10:20.

³⁰ Ex. ED-6 at 11:3-7.

³¹ Ex. Mustang-1 att. CB-4 at 5; ED's Closing Argument 9-12 (Sept. 25, 2009).

I. Finding of Fact No. 96

As discussed in detail in section II.O below, the ED believes that it may be feasible for another RPU to provide service to the Contested Service Area. As discussed in that section, Aqua Texas does have a wholesale service contract with UTRWD, but the provision of service is not guaranteed. Therefore, the ED recommends that the following sentence be added at the end of this finding of fact: However, Aqua Texas does have a wholesale sewer service contract with UTRWD under which it may be able to obtain the necessary capacity to serve the Contested Service Area.

The ED further recommends adding the following findings of fact to the “Feasibility of Obtaining Service from an Adjacent Utility” section of the order in support of the ED’s position:

- The City of Celina’s sewer CCN No. 20764 borders the requested area to the east. In the future, the City of Celina’s CCN will also border the requested area along the eastern portion of its southern edge, as Mustang SUD is transferring a portion of its sewer CCN to the City of Celina in that area.
- The City of Celina has agreed for fifteen years to not seek to provide sewer service under sections 13.254 or 13.255 of the Texas Water Code to any portion of the requested area for which Mustang SUD obtains a sewer CCN. In other words, the City of Celina is prevented from providing service to the requested area under its contract with Mustang SUD only if Mustang SUD obtains a CCN for the area.
- The City of Celina’s sewer facilities come within a mile of the requested area.

J. Finding of Fact No. 99

The ED is unsure as to exactly what “more environmentally compatible” entails but suspects that Finding of Fact No. 100 may cover what this is intending to convey, as that finding

of fact discusses the compatibility of a centralized sewer system versus OSSFs with denser development. Also, this finding of fact assumes that development in the Contested Service Area will be the same as in the Uncontested Service Area, an assumption which the ED has already disputed.³² Therefore, the ED recommends striking this finding of fact from the order.

K. Finding of Fact Nos. 101, 106, and 111

These findings of fact contain information that would apply to the Proposed Service Area even if Mustang SUD's application were denied. As a district, Mustang SUD does not need a CCN to provide retail sewer service where another RPU is not already providing lawful service.³³ Therefore, it can engage in "proper planning" and require developers to enter into pro rata agreements even without the CCN. Therefore, the ED recommends striking these three findings of fact from the order.

L. Finding of Fact Nos. 102-104 and 108

These findings of fact assume "proper planning" will have the effects described therein. However, while proper planning could have these effects, there is no way to know today whether they definitely will have these results. Therefore, the ED recommends replacing the word "will" with the word "can" in Finding of Fact Nos. 102-104 and replace the word "avoids" with the phrase "can avoid" in Finding of Fact No. 108.

M. Finding of Fact No. 105

This finding of fact assumes Land Advisors' easement will be sufficient for installing lines wherever service is requested in the Proposed Service Area, including on property not owned by Land Advisors. While Land Advisors' easement may enable Mustang SUD to extend

³² See *supra* section II.D.

³³ 30 TEX. ADMIN. CODE § 291.101(a) (West 2009).

only one interceptor into the Proposed Service Area,³⁴ the ED has not seen any planning for the area that shows Land Advisors' easement will accommodate all trunk lines and facilities in the entire area. Therefore, the ED recommends striking this finding of fact from the order.

N. Finding of Fact Nos. 112 and 113

The ED is unsure as to why the fact that Aqua Texas has not filed a CCN application for the Contested Service Area means it is not possible to compare Aqua Texas' and Mustang SUD's rates. Aqua Texas has an established rate for this region,³⁵ so if it obtained a CCN for the Contested Service Area, that rate would apply to that area. The rate that is uncertain in this case is what Mustang SUD will charge the contested area. As a district, the TCEQ does not have original rate jurisdiction over Mustang SUD,³⁶ so the district can charge its customers whatever it wishes without going through the rate application process. Also, as pointed out in the ED's prefiled testimony, Mustang SUD charges different subdivisions it serves different rates, so it is unknown what Mustang SUD will charge in the Proposed Service Area.³⁷ Furthermore, the probable improvement in service or lowering of cost to consumers as a result of granting the application factor only looks at the costs associated with the applicant, not a comparison between the applicant and any other RPU that may seek to provide service in the contested area. Therefore, what Aqua Texas may charge in the Contested Service Area is irrelevant with regard to this factor, and the ED recommends striking these findings of fact from the order.

O. Conclusion of Law Nos. 11-15

As the ED stated in his closing argument, he does not believe Mustang SUD has met its

³⁴ See Transcript of Hearing 72:12-23 (Aug. 5, 2009) (describing the easement Land Advisors was about to obtain to enable the extension of the interceptor).

³⁵ *Id.* 146:18-24 (Aug. 5, 2009).

³⁶ See 30 TEX. ADMIN. CODE § 291.21(a) (only requiring utilities to charge rates in accordance with their approved tariffs).

³⁷ Ex. ED-5 at 4:18-23.

burden of proof in this case with regard to the need for additional service and the ability to provide service and believes that it may be feasible for an adjacent RPU to provide service to the Contested Service Area.³⁸ The following excerpt from the ED's closing argument presents his concerns regarding the need for additional service issue:

This factor is often the crux of a CCN case. After all, if no one needs additional service from the applicant, why does the applicant need a CCN to provide service? An applicant can demonstrate need through various means, such as a written request for service, a growth study, or evidence of a planned development.³⁹ Whatever evidence the applicant does provide, it needs to demonstrate a need for additional service *in* the requested area. The additional service should also be needed in the near future. As circumstances change over the years, the RPU who may be the best service provider today may not be the best service provider tomorrow. Granting a CCN where there may be no need for several decades is potentially forcing people who will need service at some point in the future to obtain it from an RPU that is not best suited to provide them with service.

The applicant presented two requests for service in the requested area, which cover approximately 1,018.79 acres in that area.⁴⁰ These two requests leave 1,404.29 acres, or 2.19 square miles, still not covered by requests for service, and Mustang SUD did not provide any evidence that shows there are other planned developments in the requested area. Mustang SUD did provide its [WMP], but it also does not provide sufficient support for demonstrating a need for additional

³⁸ ED's Closing Argument 8, 12, 14, 17-18 (Sept. 25, 2009).

³⁹ 30 TEX. ADMIN. CODE § 291.102(d)(2)(D)-(E).

⁴⁰ Ex. ED-6 at 6:21-23; Ex. Mustang-1 att. CB-4 at 1-4.

service in the requested area. While it does contain population projection information for Mustang SUD's current sewer CCN, the requested area is absent from the WMP's purview.⁴¹ Therefore, the WMP does not demonstrate how growth may occur within the requested area itself, merely how growth may occur in the surrounding area. Mustang SUD provided no evidence to show that the projections surrounding the requested area would also apply to the requested area. Mustang SUD could have included this area in its original WMP or provided that information as part of its application but did not do so.

The fact that the requested area was not included in the WMP may further demonstrate the lack of need in the requested area. After all, two areas were included in the WMP that were not in Mustang SUD's CCN, which were referred to as the Northern Addition and the Eastern Addition.⁴² According to the WMP, the land uses and population forecasts were estimated for these areas because they were "two areas adjacent to [Mustang SUD's] CCN that could possibly contribute wastewater to collection and treatment systems in [Mustang SUD's] area because they are within the same drainage basin,"⁴³ i.e. there may possibly be a need for service provided by Mustang SUD in those areas. Evidence in this case suggests that a majority of the requested area is within either the Riverbend drainage basin or the Doe Branch drainage basin.⁴⁴ It is also well established that Mustang SUD intends to serve the requested area via the Doe Branch wastewater treatment

⁴¹ Compare ex. Mustang-1 att. CB-2 att. 12 fig. 5 with ex. Mustang-4 att. MM-2 (showing the requested area is not covered by the master plan).

⁴² Ex. Mustang-1 att. CB-2 att. 12, at 6. The Northern Addition is depicted on figure 5 of the WMP. Mr. Mark Mihm provided a description of the Eastern Addition at the hearing, which is found on page 106, lines 13-25 of the hearing transcript.

⁴³ Ex. Mustang-1 att. CB-2 att. 12, at 6.

⁴⁴ *Id.* att. CB-2 att. 12 Mustang Wastewater Masterplan Map; see also ex. Mustang-4 at 16:6-11 (describing how gravity lines must be installed in the Doe Branch Basin to serve the requested area).

plant.⁴⁵ Therefore, the requested area appears to be within “the same drainage basin” as Mustang SUD’s current CCN. Furthermore, the requested area is adjacent to Mustang SUD’s current CCN.⁴⁶ The question remains then that if the requested area is in the same drainage basin and located next to Mustang SUD’s CCN, was the requested area not included in the WMP because Mustang SUD did not think it “could possibly contribute wastewater to collection and treatment systems in [Mustang SUD’s] area”?⁴⁷

Based on these concerns, the ED could not find a need for additional service in the Contested Service Area. Section II.H above already detailed the ED’s position on the ability to provide service, and the following expresses his position on the feasibility of obtaining service from an adjacent RPU factor:

Two RPUs currently have service areas that border the requested area: Aqua Texas and the City of Celina. A portion of Aqua Texas’ sewer CCN No. 20867 sits adjacent to the southwest corner of the requested area.⁴⁸ The utility obtained this portion of its CCN to serve the Prosper Point subdivision.⁴⁹ Aqua Texas’ discharge permit for this area has a maximum allowed capacity of 0.225 mgd.⁵⁰ The utility intends to build a wastewater treatment plant to serve Prosper Point for ten years but so far has not installed the plant.⁵¹ Assuming the plant is eventually built, Aqua Texas’ intention after operating the plant for ten years is to switch to

⁴⁵ Ex. Mustang-1att. CB-2, at 10.

⁴⁶ Ex. Mustang-4 att. MM-2.

⁴⁷ ED’s Closing Argument 5-7 (Sept. 25, 2009).

⁴⁸ Ex. Mustang-4 att. MM-2.

⁴⁹ Ex. ATI-2 at 6.

⁵⁰ *Id.* at 36.

⁵¹ Ex. ATI-1 at 11; ex. ATI-2 at 7.

wholesale sewer service provided by UTRWD.⁵²

While Aqua Texas has a CCN adjacent to the requested area and has a plan at least to serve its current CCN, Aqua Texas could be hindered from providing service to the requested area. As a utility, Aqua Texas would have to obtain a CCN for any area to which it wishes to provide retail sewer service, including the requested area.⁵³ . . . If [the capacity allowed in its Prosper Point permit] is insufficient [to serve the requested area], Aqua Texas would have to apply to the TCEQ to have its discharge permit amended.⁵⁴ Aqua Texas does have an agreement with UTRWD to obtain wholesale sewer service, but it appears that UTRWD can decline to provide such service to Aqua Texas under their contract.⁵⁵

The City of Celina's sewer CCN No. 20764 borders the requested area to the east.⁵⁶ In the future, Celina's CCN will also border the requested area along the eastern portion of its southern edge, as Mustang SUD is transferring a portion of its sewer CCN to Celina in that area.⁵⁷ Celina has agreed for fifteen years to not seek to provide sewer service under sections 13.254 or 13.255 of the Texas Water Code to any portion of the requested area for which Mustang SUD obtains a sewer CCN.⁵⁸ The city also agreed to support the application at issue in this case and did so by submitting a letter to the TCEQ dated February 5, 2009.⁵⁹

Beyond Celina's letter, Mustang SUD provided little information regarding

⁵² Ex. ATI-1 at 11.

⁵³ 30 TEX. ADMIN. CODE § 291.101(a) (West 2009).

⁵⁴ *Id.* § 305.62.

⁵⁵ Ex. ATI-2 at 63.

⁵⁶ Ex. Mustang-4 att. MM-2.

⁵⁷ Ex. ED-6 att. B 2, ex. C.

⁵⁸ *Id.* att. B 2.

⁵⁹ *Id.*; ex. Mustang-2 att. CB-1.

the feasibility of Celina providing service to the requested area. One witness did state he believed Celina's sewer lines come within a mile of the requested area.⁶⁰ Based on its proximity to the requested area and the fact that it obtains service from UTRWD,⁶¹ it is possible that Celina could serve the requested area. In fact, it appears that Celina already intends to receive service from UTRWD via the Doe Branch plant.⁶² Celina is prevented from providing service to the requested area under its contract with Mustang SUD *only* if Mustang SUD obtains a CCN for the area.⁶³

Based on his analysis, the ED determined that it may be feasible for another RPU to provide service to the Contested Service Area. This determination along with the questions surrounding the need for additional service and Mustang SUD's ability to provide service were the main considerations that led to the conclusion that the CCN amendment is not necessary for the service, accommodation, convenience, or safety of the public. Therefore, the ED recommends amending these conclusions of law as follows:

11. Mustang has not met its burden of proof regarding the applicable requirements for the Contested Service Area.
12. The CCN amendment is not necessary for the service, accommodation, convenience, or safety of the public in the Contested Service Area.
13. Delete – covered by Conclusion of Law No. 15
14. Certifying Mustang to serve the Uncontested Service Area is consistent with the

⁶⁰ Transcript of Hearing 45:22-46:15 (Aug. 5, 2009).

⁶¹ Ex. Mustang-1 att. CB-6.

⁶² *See id.* atts. CB-4 att. 2 ex. A (showing a future pipeline coming from the Celina area that eventually runs to the Doe Branch plant), att. CB-6 at 5 (stating "pending completion of the Doe Branch Plant, while Celina's Wastewater flows are being treated at the Riverbend Plant the Minimum Flow for Financial Purposes will be 0.04 MGD").

⁶³ Ex. ED-6 att. B 2; ED's Closing Argument 12-14 (Sept. 25, 2009).

objectives of regionalization.

15. Based on the above Findings of Fact and Conclusions of Law, Mustang's amended Application for a sewer CCN to serve the Proposed Service Area should be approved only for the Uncontested Service Area.

P. Order Provision No. 1

Based on the ED's recommendation that the application be granted only in part, the ED recommends amending this provision as follows: The Application of Mustang SUD to amend sewer CCN No. 20930 in Denton County, Texas, to provide sewer service within its Proposed Service Area is GRANTED in part and DENIED in part as set forth in Conclusion of Law No. 15.

III. CORRECTIONS

The following discussions address various parts of the proposed order which need to be corrected due to factual errors and omissions.

A. Finding of Fact No. 1

The rule reference should be to section 291.3(40) instead of section 291.3(4).

B. Finding of Fact No. 13

The Proposed Service Area is also bounded on its southwest corner by Aqua Texas' sewer CCN No. 20867.

C. Finding of Fact No. 19

The meeting on March 10, 2009, was a prehearing conference, not an additional preliminary hearing.

D. Finding of Fact No. 76

The Doe Branch Interceptor runs to Parvin Road, not to the edge of the Proposed Service

Area.⁶⁴

E. Finding of Fact No. 78

Because the Doe Branch Interceptor runs to Parvin Road, the nearest take point is just over a mile from the Proposed Service Area,⁶⁵ not within a half-mile as a Mustang SUD witness approximated at the hearing.⁶⁶

F. Finding of Fact No. 79

The take point is located on the north side of U.S. 380, just east of FM 1385.⁶⁷

IV. ADDITIONAL RECOMMENDATIONS

Title 30, section 291.102(d) of the Texas Administrative Code lists nine factors that the Commission shall consider when determining whether to grant a CCN amendment. However, neither the PFD nor the ALJ's proposed order discusses the ninth factor listed in section 291.102(d)(9), the effect on the land to be included in the certificated area. The following excerpt from the ED's closing argument explains his view on this factor:

Any land for which Mustang SUD obtains a CCN will be encumbered with the CCN. Anyone who currently owns or purchases property in the CCN will have to obtain centralized sewer service from Mustang SUD unless their property is removed from the CCN or another RPU obtains dual certification for the area.⁶⁸

Furthermore, the land could be encumbered by a different RPU's CCN if Mustang SUD transfers the CCN for that land to another RPU via an agreement between

⁶⁴ Ex. Mustang-1 at 10:3-4, att. CB-4 at 2.

⁶⁵ Ex. ATI-4.

⁶⁶ Transcript of Hearing 36:1-4 (Aug. 5, 2009).

⁶⁷ Ex. Mustang-1 att. CB-4 at 2.

⁶⁸ 30 TEX. ADMIN. CODE § 291.101(a) (West 2009); *see, e.g., id.* §§ 291.113 (revocation and expedited release), 291.120 (single certification by a municipality).

the two RPUs.⁶⁹

In light of this position, the ED proposes inserting a section titled “Effect on the Land” prior to the “Regionalization” section and adopting the following findings of fact in that section:

1. The land in the requested area would be encumbered with the CCN if Mustang SUD’s application is granted.
2. A landowner in the requested area would have to obtain his or her centralized sewer service from Mustang SUD unless his or her property is removed from Mustang SUD’s CCN and/or certificated to another RPU.

While the ED has recommended changes to the ALJ’s proposed order in these exceptions, the ED believes the attached proposed order is more reflective of the ED’s position in this case and presents it for the Commission’s consideration.

V. CONCLUSION

The Commission can only grant a CCN amendment application if it finds that doing so is necessary for the service, accommodation, convenience, or safety of the public.⁷⁰ Based on his analysis of the application, the ED concludes that granting Mustang SUD’s application for the Contested Service Area does not meet this requirement. As the ED has already discussed throughout these exceptions, Mustang SUD has not sufficiently demonstrated a need for additional service, its ability to provide adequate service, or that it is not feasible to obtain service from an adjacent RPU. While Mustang SUD is financially capable of providing service, this alone does not provide a sufficient basis for granting an application in light of the other factors. The ED’s analysis shows that Mustang SUD has not met its burden of proof by satisfying the section 291.102 requirements. This combined with the fact that Mustang SUD

⁶⁹ 30 TEX. ADMIN. CODE § 291.117(a). This type of agreement is popularly known (at least in the Texas water and sewer utilities world) as a 13.248 agreement, as section 13.248 of the Texas Water Code is the controlling statute.

⁷⁰ *Id.* § 291.102(c).

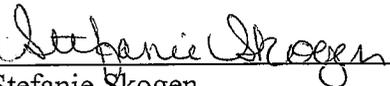
legally does not need a CCN to provide service to the Contested Service Area shows that granting the application in full is not necessary.⁷¹ Therefore, the ED recommends adoption of his proposed order.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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⁷¹ *Id.* § 291.101.

AN ORDER granting in part and denying in part the application of Mustang Special Utility District (SUD) to amend sewer Certificate of Convenience and Necessity (CCN) No. 20930 in Denton County, Texas; TCEQ Docket No. 2007-1956-UCR.

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered Mustang SUD's application to amend sewer CCN No. 20930 in Denton County, Texas, Application No. 35709-C.

Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a preliminary hearing on May 20, 2008, and a hearing on the merits of the application on August 5, 2009. Stefanie Skogen appeared for the Executive Director (ED) of the TCEQ, Skip Newsom appeared for Mustang SUD, and Mark Zeppa appeared for Aqua Development, Inc., dba Aqua Texas, Inc. (Aqua Texas). All of the foregoing, together with the Office of Public Interest Counsel (OPIC), are parties to this docket.

After considering the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mustang SUD is a retail public utility (RPU). 30 TEX. ADMIN. CODE § 291.3(40).
2. Mustang SUD applied to the TCEQ to decertify a portion of Aqua Texas' sewer CCN No. 20867 and to amend sewer CCN No. 20930 in Denton County, Texas.

3. Mustang SUD's application was filed in June 2007.
4. Mustang SUD mailed notice of the application on August 30, 2007, to landowners, neighboring utilities, and affected parties.
5. Mustang SUD published notice of the application in the *Denton Record Chronicle* on September 4 and 11, 2007.
6. The TCEQ received two opt out requests for the requested area from Affordable Housing Communities and Celina West 637, Ltd.
7. The TCEQ also received two protests to the application from the City of Celina (Celina) and Aqua Texas.
8. The Chief Clerk of the TCEQ mailed notice of the preliminary hearing on April 8, 2008.
9. Mustang SUD amended its application on May 16, 2008, by removing Affordable Housing Communities' property from the requested area, which also removed Aqua Texas' CCN No. 20867 from the area.
10. A preliminary hearing was held on May 20, 2008, at which time Mustang SUD, the ED, OPIC, and Aqua Texas were named as parties.
11. On July 2, 2008, Mustang SUD entered into a settlement agreement with Celina West 637, Ltd. and Celina, resulting in Celina West 637, Ltd. withdrawing its opt out request and Celina withdrawing its protest.
12. An evidentiary hearing was held on August 5, 2009.

Stipulations of Fact

13. Following the August 5, 2009, evidentiary hearing, the ED, Mustang SUD, and Aqua Texas agreed on the following stipulations of fact:

- a. Mustang SUD's sewer CCN application, as amended, requests retail sewer certification to approximately 2,423.08 acres of land in this docket.
- b. Mustang SUD has received requests for retail sewer service from Land Advisors, Ltd. (Land Advisors) and Smiley Road Ltd. (Smiley Road) for the development of their properties within and adjacent to the requested area.
- c. The Smiley Road and Land Advisors properties within the requested area comprise approximately 1,018.79 acres of land, or approximately forty-two percent (42.05%) of the land area requested for certification by Mustang SUD's application.
- d. There is no service currently provided to the proposed Smiley Road and Land Advisors developments within the requested area.
- e. The proposed density of the Land Advisors and Smiley Road developments is such that individual on-site sewage facilities (OSSFs) cannot be utilized for wastewater treatment and disposal, resulting in the need for the requested service to the area represented by these developments.
- f. Mustang SUD has the fiscal, technical, and managerial ability to serve the areas requested by the Land Advisors and Smiley Road developers.
- g. The CCN amendment requested by Mustang SUD for the area represented by the Land Advisors and Smiley Road developments, if granted, will increase the defined area which Mustang SUD is obligated to serve with continuous and adequate service and reduce the capability of other retail

sewer service providers extending service to such area.

- h. The environmental integrity of the area represented by the Land Advisors and Smiley Road developments will be temporarily disturbed during the construction of the sewer facilities to serve such developments, but such temporary disturbance will occur with any similar developments.
- i. The granting of the CCN amendment requested by Mustang SUD for the area represented by the Land Advisors and Smiley Road developments will result in an improvement in sewer service to the area, as there is presently no retail sewer service available to such area and service has been requested for those two developments.
- j. The parties have agreed that Mustang SUD's application should be granted for the area for which it has received requests for service from Land Advisors and Smiley Road.

14. Because the parties made these stipulations of fact, the only portions of the requested area still in dispute in this matter is the area not covered by the Land Advisors and Smiley Road requests for service (disputed area).

Description of the Applicant

- 15. Mustang SUD is a special utility district located in Denton County, Texas.
- 16. Mustang SUD currently holds sewer CCN No. 20930.

Compliance with the Legal Standards

The Adequacy of Service Currently Provided to the Requested Area

- 17. There is no sewer service currently provided to the requested area.

The Need for Additional Service in the Requested Area

18. Mustang SUD presented two requests for service within the requested area which cover approximately 1,018.79 acres in that area. The two requests leave approximately 1,404.29 acres, or 2.19 square miles, still not covered by requests for service
19. Mustang SUD did not provide any evidence that showed there are other planned developments in the requested area.
20. Mustang SUD did not provide any population projections for the requested area.

The Effect of the Granting of a CCN Amendment

21. If the Commission grants the application, Mustang SUD must provide continuous and adequate service to all qualified service applicants in the requested area and respond to service applications as soon as is practical.
22. Another RPU will not be permitted to provide service in the requested area unless the RPU obtains a CCN for the area and/or Mustang SUD's CCN for the area is revoked.
23. Any landowner in the requested area wishing to obtain centralized sewer service from an RPU would have to obtain that service from Mustang SUD unless the landowner has his or her property removed from the CCN and/or certificated to another RPU.

The Ability of the Applicant to Provide Adequate Service

24. Mustang SUD did not provide the projected plant capacity or amount of infrastructure needed to serve the entire requested area or the cost of installing and/or purchasing that capacity and infrastructure.

25. Mustang SUD intends to serve the requested area via wholesale sewer service from the Upper Trinity Regional Water District (UTRWD) at its Doe Branch plant.
26. UTRWD has not yet constructed the Doe Branch plant and has no date certain for doing so. Until it is constructed, Mustang SUD would have to serve the requested area via UTRWD's Riverbend plant. The Doe Branch interceptor has been installed from the future location of the Doe Branch plant to the southern edge of the Smiley Road development.
27. Mustang SUD currently has 6,000 gallons per day of its reserved capacity at the Riverbend plant uncommitted, i.e. which it can use to serve the requested area.

The Feasibility of Obtaining Service from an Adjacent Retail Public Utility

28. Two RPU's currently have service areas that border the requested area: Aqua Texas and Celina.
29. A portion of Aqua Texas' sewer CCN No. 20867 sits adjacent to the southwest corner of the requested area.
30. To serve the requested area, Aqua Texas would have to obtain a sewer CCN for the area and may need to increase its permitted wastewater treatment plant capacity. Aqua Texas may be able to obtain wholesale sewer service from UTRWD rather than using its own wastewater treatment plant.
31. Celina's sewer CCN No. 20764 borders the requested area to the east. In the future, Celina's CCN will also border the requested area along the eastern portion of its southern edge, as Mustang SUD is transferring a portion of its sewer CCN to Celina in that area.

32. Celina has agreed for fifteen years to not seek to provide sewer service under sections 13.254 or 13.255 of the Texas Water Code to any portion of the requested area for which Mustang SUD obtains a sewer CCN. In other words, Celina is prevented from providing service to the requested area under its contract with Mustang SUD only if Mustang SUD obtains a CCN for the area.
33. Celina also agreed to support Mustang SUD's application and did so by submitting a letter to the TCEQ dated February 5, 2009.
34. Celina's sewer facilities come within a mile of the requested area.

The Financial Ability and Stability of the Applicant

35. ED staff examined Mustang SUD's unqualified opinion audit for the fiscal year ending September 30, 2007.
36. At the time of the audit, Mustang SUD had total net assets, or equity, in the amount of \$23.2 million, \$5.4 million of which was cash or cash equivalents and \$2.6 million was restricted assets.
37. Term debt in the amount of \$8.1 million resulted in a debt-to-equity ratio of 0.34:1.

Environmental Integrity

38. If any RPU installs sewer facilities to serve the requested area, such as collection lines or lift stations, the environmental integrity of the area will be at least temporarily disturbed due to the installation of those facilities.
39. Both OSSFs and centralized sewer systems can fail and release untreated effluent into the environment.

The Probable Improvement in Service or Lowering of Cost to Consumers

40. To the extent that one day there may be people in the disputed area who may wish to receive service, the availability of service would be an improvement over no available service.
41. The only current consumers in the requested area are OSSF owners.
42. Mustang SUD did not show which types of OSSFs exist in the requested area and the physical state of those OSSFs.
43. The cost of obtaining service from Mustang SUD could exceed the cost of replacing an OSSF.

The Effect on the Land

44. The land in the requested area would be encumbered with the CCN if Mustang SUD's application is granted.
45. A landowner in the requested area would have to obtain his or her centralized sewer service from Mustang SUD unless his or her property is removed from Mustang SUD's CCN and/or certificated to another RPU.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case under chapter 13 of the Texas Water Code.
2. 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 chapter 2003 of the Texas Government Code.
3. In determining whether to amend a CCN, the Commission shall ensure that the applicant possesses the financial, managerial, and technical capability to provide

continuous and adequate service. 30 TEX. ADMIN. CODE § 291.102(a). For sewer utility service, the Commission shall ensure that the applicant is capable of meeting the TCEQ rules and the Texas Water Code. *Id.* § 291.102(a)(2).

4. The Commission shall consider the factors listed in section 291.102(d) when considering whether to amend a CCN.
5. The Commission can only grant a CCN amendment application if it finds that doing so is necessary for the service, accommodation, convenience, or safety of the public. 30 TEX. ADMIN. CODE § 291.102(c).
6. For the disputed area, Mustang SUD has not sufficiently demonstrated a need for additional service, its technical ability to provide adequate service, or that it is not feasible to obtain service from an adjacent RPU.
7. While Mustang SUD is financially capable of providing service, this alone does not provide a sufficient basis for granting its application for the disputed area in light of the other section 291.102 requirements.
8. Mustang SUD has not met its burden of proof by satisfying the section 291.102 requirements for the disputed area. Therefore, the Commission concludes that the CCN amendment is not necessary for the service, accommodation, convenience, or safety of the public in the disputed area.
9. The Commission adopts the parties' stipulations of fact.
10. Mustang SUD's application should be granted for the portions of the requested area covered by the two requests for service and denied for the remaining portions of the requested area.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY:

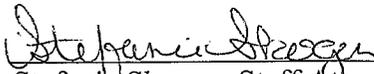
1. The application of Mustang SUD to amend sewer CCN No. 20930 in Denton County, Texas, is GRANTED in part and DENIED in part as set forth in Conclusion of Law No. 10.
2. CCN No. 20930 is hereby amended as set forth in Conclusion of Law No. 10.
3. Mustang SUD shall provide the ED with the CCN boundary mapping information as required by title 30, section 291.105(a)(2) for the CCN area granted in this order.
4. The ED is directed to redraw CCN No. 20930 as set forth in Conclusion of Law No. 10 and to amend the Commission's official sewer service area map for Denton County, Texas
5. The Chief Clerk of the TCEQ shall forward a copy of this order to the parties.
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.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

For the Commission

CERTIFICATE OF SERVICE

I certify that on January 4, 2010, a copy of the foregoing document was sent by first class, agency mail, electronic mail, and/or facsimile to the persons on the attached Mailing List.


Stefanie Skogen, Staff Attorney
Environmental Law Division

Mailing List
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SOAH Docket No. 582-08-1318
TCEQ Docket No. 2007-1956-UCR

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