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August 2, 2010

Via e-file

La Donna Castañuela
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
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Re: SOAH Docket Nos. 582-08-3825 and 582-09-3548; TCEQ Docket Nos. 2008-0955-UCR and 2009-0350-UCR; *Application of the City of Mission to Amend CCN No. 20768 in Hidalgo County and Application of the City of Alton to Amend CCN No. 20809 in Hidalgo County*

Dear Ms. Castañuela:

Enclosed for filing is the City of Alton's Exceptions to the Proposal for Decision and Motion to Reopen the Record in connection with the above-referenced matter. A copy is being served on each party of record.

Should you have questions, please do not hesitate to contact me at (512) 472-8021.

Sincerely,



Denise Fregeolle-Burk
Assistant to Emily W. Rogers

/dfb
Enclosures

cc: Judge Craig Bennett
All Parties of Record

SOAH DOCKET NOS 582-08-3825 and 582-09-3548
TCEQ DOCKET NOS. 2008-0955-UCR and 2009-0350-UCR

APPLICATION OF THE CITY	§	BEFORE THE STATE OFFICE
OF ALTON TO AMEND	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 20809	§	
IN HIDALGO COUNTY	§	
	§	OF
APPLICATION OF THE CITY	§	
OF MISSION TO AMEND	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 20768	§	
IN HIDALGO COUNTY	§	ADMINISTRATIVE HEARINGS

**CITY OF ALTON’S EXCEPTIONS TO THE PROPOSAL FOR DECISION
AND MOTION TO REOPEN THE RECORD**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Alton (“Alton”) and files this, its Exceptions to the Proposal for Decision (“PFD”) and Motion to Reopen the Record.

I. INTRODUCTION

Bringing centralized sanitary sewer service to the colonias within the area Alton has requested to be added to its sewer certificate of convenience and necessity (“CCN”) must be the priority in the Texas Commission on Environmental Quality’s (“TCEQ”) evaluation of the competing sewer CCN applications of Alton and the City of Mission (“Mission”). As noted throughout the contested case, Alton has been working since 2007 to bring sewer service to the requested area and has demonstrated a willingness and commitment to the project that is unmatched by Mission. This commitment is once again evidenced by the fact that Alton’s

project for the requested area¹ is ranked number one on the Texas Water Development Board's ("TWDB") SFY 2011 Clean Water State Revolving Fund Intended Use Plan ("2011 Intended Use Plan") and is eligible for 100% of principle forgiveness under the disadvantaged community funding criteria.² In other words, Alton's sewer project for the requested area and the area immediately adjacent to the requested area is eligible for a 100% grant funding. Mission has not shown such commitment to extend service to the requested area.

Despite Alton's demonstrated commitment to bring first-time sewer service to the requested area, the Administrative Law Judge ("ALJ") concludes that Mission should be granted an amendment to its sewer CCN to include the requested area. The ALJ's proposed decision, however, (1) does not make paramount the needs of the potential customers in the requested area, and (2) penalizes Alton for regionalizing with a neighboring utility and being smaller than its neighbor, Mission. Because of these errors, the ALJ's decision does not properly interpret or apply the TCEQ's rules to the facts of this case. Additionally, the ALJ's decision does not consider the fact that Alton's sewer project for the requested area is ranked and eligible to receive a 100% principle forgiveness "loan" from the TWDB. The fact that all of the facilities required to serve the requested area could be funded 100% with grant funds and the project could be started as soon as Alton closes on the "loan" and is awarded the CCN is important information that should be considered in comparing the two CCN applications. For these reasons, Alton files these exceptions to the ALJ's PFD and requests that the Commission reopen the record to include TWDB's SFY 2011 Clean Water State Revolving Fund Intended Use Plan attached hereto as Exhibit 1, and related evidence regarding Alton's funding from the TWDB

¹ Alton's sewer project includes facilities for both the requested area and the area adjacent to the requested area (as identified on Alton's Exhibit Nos. 20 and 21). Alton noted in its testimony that it had applied for funding from the TWDB (Alton Ex. 15 at 13:21 to 14:10; TR: 158:12 - 22) for this project.

² See www.twdb.state.tx.us/assistance/financial/fin_infrastructure/Draft_SF11_CWSRF_IUP.pdf.

and to change the ALJ's findings of fact and conclusions of law for failing to properly apply or interpret applicable law.

II. EXCEPTIONS

A. The ALJ failed to properly apply the law by not giving appropriate consideration to Alton's commitment to serve the requested area as demonstrated by its engineering and financial planning efforts.

The ALJ notes in his PFD that "Alton has shown greater efforts in planning to provide service to the requested area than Mission." Despite recognition of this fact, little weight is given for Alton's efforts in this regard, essentially placing the colonias within the requested area in a state of uncertainty about when and if sewer service will be extended to the area. When weighing the factors regarding CCNs and comparing retail utilities filing competing applications in this case, greatest consideration should be given to the residents in the requested area and potential customers, as they are the ones to which the retail public utility is accountable. In this case, when and how the city will bring first-time centralized sewer service to the requested area should be paramount in the Commission's decision on which city is more financially, managerially, and technically capable.

Alton has demonstrated its commitment to bring sewer service to the requested area and is poised to begin construction as soon as Alton's TWDB financing is finalized and the TCEQ issues the CCN to Alton. Alton's commitment is evidenced by the following:

1. Alton initiated a study in 2007 to evaluate bringing sewer service to the requested area. That study is a comprehensive evaluation of the required facilities, their costs, and the effect on Alton's rates. (Alton Exhibit No. 15 at 5:13 – 21; Alton Exhibit Nos. 22 and 30).

2. Alton has been working with members of La Union del Pueblo Entero to assess the need for service in the area and to engage the potential customers about obtaining sewer service. (Alton Ex. 31 at 3:10-18; TR – 121:24 – 123:10).

3. Alton has applied for and been ranked on the TWDB's intended use plans for its projects that include the requested area and areas immediately adjacent to the requested area. (Alton Ex. 15 at 13:21 to 14:10; TR: 158:12 - 22). In the 2011 Intended Use Plan, Alton's project was ranked number one on the fundable projects list, which includes projects from all over the state, and is eligible for 100% of principle forgiveness under the disadvantaged community funding criteria.

4. Alton was the first to apply for funding for facilities required to provide sewer service to the requested areas and the first to apply for an amendment to its CCN to include the requested area. (Alton Exhibit No. 1; Alton Exhibit No. 15 – 5:13-14, 7:8-9).

In contrast, Mission did not file its CCN application until well after Alton had already filed an application for the area. Mission has performed no study outlining when and how service to the requested area will be completed, and what effect on rates the extension will have. Mission has not engaged the help of any local community outreach groups about extending service to the colonias. Mission has not started the process of obtaining financing from the TWDB. (TR – 78:22-24). And because there is no analysis of the costs to extend service and its effect on the rates and debt service, there is no information that shows Mission will be able and, more importantly, willing, from a financial perspective, to extend service when the time comes to do so. All of these facts raise questions about Mission's commitment to extend service to the requested area.

Despite these obvious concerns regarding Mission, the ALJ, as did the Executive Director, brushes aside these concerns, and instead focuses on Alton's past financials and "flaws" in the rate consultant's analyses³ and bases his proposed decision in large part on the alleged deficiencies in Alton's finances. Alton takes exception to the ALJ's assessment of the City's financial status and, as fully and completely outlined in Alton's Closing Arguments and Replies to Closing Arguments, Alton has demonstrated that it has the financial capability, including sufficient revenues, credit worthiness, and fiscal management and controls to provide service to the requested area. The financial issues and information relied upon by the ALJ to support his contention that Alton should not be granted the CCN are addressed in Alton's Closing Arguments and Replies to Closing Argument and those arguments and information will not be repeated here, but are incorporated for all purposes.

Despite the alleged short-comings in Alton's financial data, these issues do not outweigh the fact that Alton is poised to extend service to the requested area and has demonstrated its commitment to bring service to the area repeatedly. The same cannot be said of Mission who only showed an interest in the area after Alton filed its CCN, and who has done little or no planning to date to determine who needs sewer service, how and when service will be extended, and what the cost of the service will be. This lack of planning and lack of proven commitment to serve the area leaves the potential customers at risk of not getting the much needed centralized sewer service. For this reason, the Commission should reject the ALJ's conclusion in the PFD that Alton's CCN application should be denied and Mission's issued, and find that Alton is more financially, managerial, and technically capable than Mission because it has developed a plan to extend service to the requested area, has worked with community outreach groups to obtain community support, and has taken affirmative steps to finance the project. Placing the needs of

³ See Paragraph II.C., Exception to FOF 41.

the existing residents first and favoring the applicant that has demonstrated its willingness and commitment to providing service to the requested area when considering the various CCN factors in 30 TEX. ADMIN. CODE § 291.102 is a proper application of the TCEQ rules to the facts in this case.

B. The ALJ failed to properly interpret TCEQ rules by concluding that Mission has more technical ability, ownership accountability, and a “more qualified” staff than Alton because Alton is part of a larger regional system.

Although recognizing the potential conflicts with regionalization, the ALJ essentially adopts the Executive Director’s comparative analyses regarding Mission’s and Alton’s technical ability, ownership accountability, and staffing and organization, which favors Mission over Alton because Alton has chosen to regionalize with a neighboring utility, the City of McAllen. The proposed decision improperly interprets TCEQ rules and is contrary to the clear public policy of this state to promote regionalization of sewer systems.

The Texas Legislature has made it clear in several statutory provisions that it is the public policy of this state to promote regionalization. Section 26.081 of the Texas Water Code states:

“The legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state:”

TEX. WATER CODE § 26.081(a); *see also* TEX. WATER CODE §§ 26.003 (stating “[i]t is the policy of this state and the purpose of this subchapter . . . to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems . . .”), and § 26.0282 (requiring TCEQ to examine the availability of regional systems before issuing new wastewater discharge permits). Moreover, to increase the efficiency and effectiveness of local

governments, the Legislature has specifically authorized and encouraged local governments to enter into interlocal agreements to obtain or provide wastewater treatment. TEX. GOV'T. CODE §§ 791.001, 791.011, and 791.026. Even the TWDB, through its financing of various projects, is required to promote regionalization. See TEX. WATER CODE §§ 15.002(a), 15.994(b), 17.275, 17.929(a)(5). Texas Water Code § 13.241(d) requires that “before the commission grants a new certificate of convenience and necessity for an area which requires the construction of a physically separate water or sewer system, the applicant must demonstrate that regionalization or consolidation with another retail public utility is not economically feasible.”

In fact, the issue of “ownership” and “control” was litigated at length *In re Applications of the City of Bulverde to Obtain and Bexar Metropolitan Water District to Amend Water Certificates of Convenience and Necessity In Comal County, Texas*; SOAH Docket Nos. 582-01-3633 and 582-02-0432; TNRCC Docket Nos. 2001-0697-UCR and 2001-0951-UCR. In that case, the Commission, and ultimately the Third Court of Appeals, concluded that ownership of facilities was not required to have a CCN, or to have “control” over the facilities, because requiring ownership is contrary to regionalization. *Bexar Metropolitan Water Dist. v. Texas Comm'n on Environmental Quality*, 185 S.W.3d 546, 551-52 (Tex. App. – Austin 2006, pet. denied) (“While § 13.241 of the Water Code requires the Commission to ensure that the certificate applicant possesses certain capabilities, it does not require the applicant to own the facilities.”); see also TEX. WATER CODE §§ 13.002(19) and 13.241.

While TCEQ’s rules require an examination of “ownership accountability,” “staffing and organization,” and “technical knowledge” of each applicant, these phrases must be interpreted in

a manner that is consistent with and a promotion of the state's policy regarding regionalization.⁴ Thus, these terms cannot mean that an applicant, who has chosen to regionalize, falls short of other entities in these categories simply because it does not own its own treatment facilities or "employ" certified operators. Such a position could lead to unintended consequences that would allow and promote the very thing the rule was trying to prohibit – the acquisition of service territory by utilities that are not providing continuous and adequate service to existing customers.

The facts, when evaluated in a manner that is consistent with and promotes regionalization, demonstrate that Alton is as technically capable, as adequately staffed, and as equally accountable in terms of ownership of its facilities as Mission. It is true that Alton does not have any certified operators, but it has entered an interlocal agreement with the City of McAllen for these services, and the City of McAllen is performing these services as required. (Alton Exhibit No. 2 – 8:10 to 10:4; Alton Exhibit No. 7). From Alton's perspective, it makes no sense for Alton to hire certified operators when it has a contract for those services – one that is encouraged by state law. While it is true that Alton does not own the wastewater treatment plant, it has purchased treatment capacity from the City of McAllen. (Alton Exhibit No. 2 – 8:10 to 10:4; Alton Exhibit No. 7). Alton also owns its own collection system and is responsible for its expansion and any major repairs, and the City of McAllen, by contract, is responsible for the daily operation of and minor repairs to Alton's collection system. (Alton Ex. 7). Alton's arrangement with the City of McAllen is exactly what the state's regionalization policy is intended to promote.

⁴ It should be noted that a review of the written legislative history of Texas Water Code § 13.241(d) makes no mention of requiring ownership of treatment facilities or employment of certified operators. Tex. S.B. 1421, 76th Leg., R.S. (1999). Moreover, there is nothing in TCEQ's rulemaking preambles proposing and adopting 30 TEX. ADMIN. CODE § 291.102(g) that provides any explanation about what is meant by these terms. See 25 TEX. REG. 6289 (proposal preamble); 25 TEX. REG. 10367 (adoption preamble).

Because the Commission has not previously been required to compare two retail public utilities using the criteria outlined in 30 TEX. ADMIN. CODE § 291.102(g), and because this case will likely be used by others as the standard for prosecuting these cases in the future, the Commission should not set a precedent that suggests that cities that have chosen to regionalize are less capable than other retail public utilities in these categories. For this reason, the Commission should change the ALJ's findings of fact in accordance with the proper interpretation of the TCEQ's rules and regionalization policy.

C. Specific Exceptions to Findings of Facts, Conclusions of Law, and Ordering Provisions.

Alton specifically takes exception to the findings of fact, conclusions of law, and ordering provisions as numbered as follows:

Finding of Fact 41. Alton disagrees with the characterization of Alton's rate study as "deficient." Mr. Jeff Snowden, Alton's rate consultant, based his analysis on certain assumptions, which were questioned by Mission and the Executive Director. However, neither Mission nor the Executive Director presented expert testimony showing that Mr. Snowden's assumptions were incorrect, outside industry standards, or too aggressive. In fact, the Executive Director's witness did not even review Alton's rate ordinance or rate study. (TR – 282:10 – 286:16). Based on the fact that Alton's project is eligible for 100% principle forgiveness loan, Mr. Snowden's assumptions appear conservative.

Moreover, Mr. Snowden repeatedly noted in cross-examination testimony that the forecasted free cash flow at the end of each fiscal year through 2021 exceeds any additional expenses that were not reflected in the total expenditures identified in the rate study. (Alton Exhibit No. 30 at 15). It should also be noted that no such rate analysis was done by Mission so

there is no way to know what effect the new area will have on rates. In fact, it has been over ten years since Mission has done a rate study at all. (TR – 10:1-7, 45:22 to 46-4).

Finding of Fact 69. Alton takes exception to the characterization that residents within Alton do not currently have “access” to sewer service, and that others are “not currently able to receive sewer service” from Alton. It is true that there are portions of Alton that currently do not have centralized sewer service and the reasons for that vary. However, there is no evidence that Alton has failed to provide sewer service to qualified service applicants in those areas. The finding of fact should be deleted in its entirety as it has no bearing on this case and is misleading.

Findings of Fact 72, 100, and 101. Alton takes exception to these findings of fact because, as argued in Paragraph II.B., they are contrary to regionalization and suggest that because Alton has chosen to be a part of a regional system it is less capable than Mission. Alton owns its own collection system, has purchased treatment capacity from the City of McAllen, and has contracted for treatment and operation and maintenance services from the City of McAllen, all of which are encouraged by the State of Texas under its clearly articulated regionalization policy. *See* Footnote 3. Moreover, as previously argued, “ownership” is not required to “control” facilities for providing sewer service.⁵ These findings of fact should be deleted or amended to be clear that Alton, through its regional provider, the City of McAllen, is equally as capable as Mission and is equally as accountable in terms of ownership of its facilities.

Findings of Fact 97, 103. Alton takes exception to these findings of fact to the extent that the purpose of these findings is to demonstrate that Alton, because it has chosen to be a part of a larger regional system, is less capable of providing service than Mission. Because Alton contracts for operation and maintenance services, it is unnecessary, and a waste of public funds, for Alton to employ certified operators or to employ a large staff.

⁵ *See* Tex. Water Code Ann. § 13.002(19).

Moreover, there is no evidence (expert or otherwise) supporting a finding that Mission’s “much larger staff and organization makes it better suited to properly operate and maintain effective sewer service operations.” The evidence shows that Mission’s staff is larger, but there is no evidence that demonstrates a larger staff is “better suited” to the job at hand. As explained in Alton’s Closing Arguments and Replies of Closing Arguments, Alton’s staff is sized accordingly for its population and its customer base. It has no need for a large staff, as that would be a waste of resources. The Commission should not conclude that “bigger is better” without evidence clearly supporting such a finding. This finding of fact is contrary to regionalization principles, unsupported by evidence, and is irrelevant and should be deleted.

Findings of Fact that Should be Included in Proposed Order. The following list of exceptions addresses findings of fact that were excluded from the PFD, but that should be included:

1. Alton takes exception to the lack of finding of fact that finds that Alton is financially capable of providing continuous and adequate service. There is no finding of fact addressing this issue and Alton has demonstrated, as fully described in its Closing Arguments and Replies to Closing Arguments, that it is financially capable of providing continuous and adequate service to the requested area.
2. Alton takes exception to the lack of finding of fact that finds Alton is more financially, managerially, and technically capable than Mission because it has developed plans for extending service to the requested area that identify who will be provided sewer service, when and how the service will be provided, what the facilities will cost, the how those costs will affect rates, and how the expansion will be financed. Alton is poised to begin its sewer project in the requested area.

Conclusions of Law 5, 6, 7, 8, and 9, and Ordering Provisions 1, 2, and 3. Alton takes exception to these conclusions of law and ordering provisions as they are unsupported by the facts in this case. The Commission should change the ALJ's findings of fact and conclusions of law to (1) correct the error in interpreting the TCEQ's rules in such a way that undermines the state's regionalization policy, and (2) to properly apply the TCEQ's rules as to the facts in this case and award the CCN to Alton who has demonstrated its commitment and willingness to extend service to the existing residents in the requested area, many of whom are living in substandard conditions.

D. If the Commission determines that Mission should be awarded the CCN, the Commission should require as a condition of the CCN that Mission extend service to the requested area within five (5) years of the granting of the CCN.

There are existing residents in the requested area that need centralized sewer service. These people should not be required to continue to live in substandard conditions. Alton believes that it is in a better position and more capable than Mission to provide service to the residents in the requested area. Alton has repeatedly demonstrated its commitment to providing sewer service to the requested area and should be granted its application.

In contrast, Mission has made no firm plans for providing service to the requested area, and only took an interest in the requested area after Alton filed its CCN application. The residents in the requested area do not benefit if the Commission grants Mission's CCN application without a commitment from Mission that it will extend sewer service to those existing residents. For these reasons, Alton respectfully requests that, if the Commission adopts the ALJ's PFD, the Commission add an ordering provision requiring Mission to provide service to the requested area within five (5) years of the effective date of the TCEQ's order. Such a provision should not be objectionable to Mission as its City Manager stated under oath that

Mission was willing to commit to TCEQ that it will have centralized sewer service to the requested area within two to five years after getting the CCN. (TR at 39:17 to 39:25).

V. MOTION TO REOPEN THE RECORD

Alton requests that the Commission order that the administrative record be reopened for the purpose of including TWDB's SFY 2011 Clean Water State Revolving Fund Intended Use Plan attached hereto as Exhibit 1, and related evidence regarding Alton's funding from the TWDB. Alton, in its testimony, explained that it had applied for funding from the TWDB for a sewer project in the area adjacent to the requested area and the requested area. (Alton Ex. 15 at 13:21 to 14:10; TR: 158:12 - 22). On July 15, 2010, the TWDB released its draft 2011 Intended Use Plan for comment, and Alton's proposed project is ranked number one on the priority funding list and is eligible for 100% of principle forgiveness under the disadvantaged community funding criteria. *See* 2011 Intended Use Plan at p. 12 and 47. The TWDB expects that the 2011 Intended Use Plan will be adopted at the TWDB's September 23, 2010 meeting. *See* 2011 Intended Use Plan ¶ I.C., and, www.twdb.state.tx.us/publications/agenda/2010_Board_Mtg_Dates_a.pdf (attached hereto as Exhibit 2).

Because of the TWDB's funding process, the 2011 Intended Use Plan was not available during the time of the hearing on the merits and thus could not have been included with the evidence. This new information, however, speaks directly to several points in the ALJ's PFD and suggested findings of fact regarding Alton's financial capabilities, and further illustrates Alton's commitment to provide service to the requested area. It is for this reason Alton requests that the Commission order that the record be reopened to include as evidence and for consideration the TWDB's 2011 Intended Use Plan and other related information.

WHEREFORE PREMISES CONSIDERED, Alton respectfully requests that the Commission grant Alton's Motion to Reopen the Record to include the TWDB's 2011 Intended Use Plan and other related information, and to issue an order granting Alton's CCN amendment application and denying Mission's CCN amendment application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that on this 2nd day of August, 2010, a true and complete copy of the foregoing was sent to the following by facsimile, hand-delivery, or by first class mail:

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