

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

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

**CITY OF MISSION’S RESPONSE TO CITY OF ALTON’S
EXCEPTIONS TO THE PROPOSAL FOR DECISION AND
MOTION TO REOPEN THE RECORD, OBJECTIONS AND MOTION TO STRIKE**

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

COMES NOW, the City of Mission (“Mission”) and files this Response to the City of Alton’s (“Alton”) Exceptions to the Proposal for Decision and Motion to Reopen the Record, Objections and Motion to Strike and would show in support thereof the following:

I.

OBJECTION TO EXHIBIT 1 AND MOTION TO STRIKE

Alton has filed Exceptions to the Proposal for Decision (PFD) that violate the rules of evidence and procedure in an improper effort to overturn the PFD recommendation made in this contested case, that the Commission approve the application of Mission and deny the application of Alton. The record closed in this contested case on May 14, 2010. Mission Objects and Moves to Strike Exhibit 1 and any reference to or argument made based on Exhibit 1 attached to Alton’s Exceptions to the Proposal for Decision as no ruling granting Alton’s Motion to Reopen the Record and admit Exhibit 1 into evidence in this contested case has been made. Until such a

Motion is granted by this Commission and Exhibit 1 ordered admitted into evidence and made part of the record, Exhibit 1 and any reference to said Exhibit 1 in Alton's Exceptions are improper and should be stricken. Since Alton continuously refers to Exhibit 1 throughout its Exceptions, the Exceptions in its entirety should be stricken.

A decision whether to reopen the evidence is within agency discretion and is reserved for a variety of extraordinary circumstances. *Lake Medina Conservation Soc'y v. Texas Natural Res. Conservation Comm'n*, 980 S.W. 2d 511, 518-19 (Tex. App.—Austin 1998, pet denied). Mission objects to the reopening of the evidence to consider the admission of Exhibit 1 because it is not only a Draft Intended Use Plan (IUP) which is subject to public comment and major revisions/change before finalization and formal issuance. The evidence contained in Exhibit 1 is controversial and to reopen the evidence in this contested matter to consider it would necessarily involve evidentiary hearings to determine the reliability and foundation for the assumptions made in said Exhibit 1. This would expand the scope of this contested hearing far beyond the statutory criteria used to reach the conclusions of fact and law made in this Proposal for Decision.

It is within the court's discretion to refuse to reopen if the evidence addresses a collateral matter or is cumulative of other evidence already presented. *Smart v. Missouri-Kansas-Texas*, 560 S.W.2d 216, 218 (Civ. App.—Tyler 1977, ref. n.r.e.) If the court grants a motion to reopen and allows one party to present additional evidence, the opposing party must be given the opportunity to offer rebuttal testimony. *Papco, Inc. v. Eaton*, 522 S.W. 2d 538, 543-4 (Civ. App.-Texarkana 1975, dis. agr.). Mission maintains that Exhibit 1 addresses a collateral matter in that Alton cannot be awarded funds for an area they do not hold a CCN to serve. Mission requests an opportunity to present rebuttal testimony in the event the motion to reopen is granted.

II.

RESPONSE TO CITY OF ALTON'S EXCEPTIONS

None of Alton's Exceptions disprove the ALJ's findings that (1) Mission is more financially stable; (2) Mission has its own wastewater treatment facilities; and (3) the requested area is in the ETJ of Mission. In weighing the comparative assessment of the applicants' financial, managerial, and technical capabilities pursuant to 30 TAC Sec. 291.102 (a) (g), Mission has demonstrated that it is better able to provide continuous and adequate sewer service to area in contention.

A. Mission has received requests for service within the contested area; Alton has not. Alton doesn't serve all the area within its current CCN.

Mission has actually received requests for service from landowners within the contested area. Transcript (Tr.) at 8:15-24. But Alton has received no formal requests from residents or landowners in this proposed service area. Alton's only claimed informal request came from La Union del Pueblo Entero (LUPE) through a contact, Marta Sanchez, who is not even known to live in the requested area. Tr. at 121:16 - 123:17.

Alton is seeking to amend their CCN to serve this proposed area where they have had no formal requests yet Alton is currently failing to adequately and continuously serve many residents within their current CCN. Jorge Arcaute, Alton's City Manager, admitted that the Alton residents within the areas between Moorfield Road west towards La Homa Road are not currently receiving sewer service despite being in Alton's CCN for years. Additionally there are approximately nine different pockets within Alton's CCN boundaries that are not currently receiving sewer service. Tr. at 120:20- 121:11.

B. Mission's System has demonstrated superior financial planning and management efforts in providing wastewater service to two of their neighboring communities already, in addition to serving its own residents.

Mission is already a regionalized wastewater system serving its neighboring communities of Pamhurst and Granjeno. Mission's System currently has an existing capacity of 9.0 MGD with 2.8 MGD available for expansion to serve its neighboring communities in the requested area. Mission's audited financials are clearly better and Mission holds a bond credit rating of A3, as contrasted to Alton which has no bond credit rating. Mission has shown deliberate and consistent planning through continued increases in rates so that new areas can receive service. Mission's System is sufficiently financially stable to fund expansion into the requested area. Mission's 80 year history of providing sanitary sewer service to its customers and expanding when needed to meet its customers' and surrounding communities' new demands, show Mission is best qualified to bring first time sewer service to this requested area.

By contrast Alton has had a recent financial history of shortfalls in revenues (2007-8) due to poor collection practices involving at least 300 accounts, or over 10% of their connections, not being billed for service. Alton's financial stability has been dependant on obtaining/maintaining TWDB loans. The City of Alton has no bond credit rating according to Alton's City Manager, Jorge Arcaute. Tr. at 126:20-24. Alton's City Council has repeatedly failed to implement the rate hikes its consultants have advised are necessary to maintain service. Thus Alton's repeated assertion that it has planned better is defeated by their own City Council's inaction.

According to their city manager, Alton's customers are not metered for sewer service. Tr. at 144:16-18. Alton's sewer system runs at a deficit. Tr. at 142:10-11. Alton is charging its customers the same amount that McAllen is charging Alton, with no markup. This means that Alton is not maintaining or repairing its wastewater collection system, thus increasing a public

health risk, and doesn't satisfy the requirements for debt service coverage in order to sell revenue bonds to improve or extend its wastewater collection system. If repairs and maintenance is performed, Alton's taxpayer are subsidizing this cost, since Sharyland provides retail water service. So Alton is not recovering its cost of service from its wastewater customers. Alton bills its customers based on the Sharyland reports on water consumption. If historically Alton has had management problems collecting payments from 300 consumer accounts familiar with sewer service and bills, how can they or their billing subcontractor be projected to do servicing a more disadvantaged population unfamiliar with sewer service and bills.

Additionally Alton has had line separation problems between the water and sewer lines within Alton's CCN boundaries. This sewer line problem led to litigation between Alton and Sharyland Water Supply Corporation (Tr. at 134:15-136: 1) which Alton lost and is subject to a judgment in the amount exceeding \$1,000,000. Alton's appeal of this adverse judgment is currently pending before the Texas Supreme Court which means that the Court of Appeals affirmed the judgment. Until this litigation is resolved, Alton's liability exposure is still a financial issue.

Alton's planning to extend wastewater service is ill advised when they make such studies before obtaining CCN amendments to serve said areas. Likewise Alton's efforts to apply for federal stimulus funds for this requested area is premature as they do not qualify to apply for said loans until they have received the CCN amendment covering this requested area.

Jorge Arcaute also admitted that Alton has made no formal presentation to McAllen's City Council, city manager, nor the McAllen Public Utility Board regarding Alton's application for additional CCN rights. Tr. at 124:5-17. Good planning would reasonably dictate that

McAllen's wastewater professionals be consulted before Alton seeks to amend a sewer CCN that they expect McAllen to provide critical service to.

C. The ALJ has properly interpreted TCEQ rules in concluding Mission has more technical ability, ownership accountability and a "more qualified" staff than Alton.

First Mission, itself, is a regionalized wastewater system already providing wastewater service to its neighboring communities of Pamhurst and Granjeno. Expanding Mission's CCN to this requested area within Mission's extraterritorial jurisdiction is totally consistent with the State's regionalization policy.

Second, Alton's cited authority regarding how the state policy of regionalization should be applied in this contested CCN case supports the ALJ's determination that the factors set out in statute and commission rules favor granting the CCN amendment application of Mission.

The Third Court of Appeals in *Bexar Metropolitan Water Dist. v. Texas Comm.'n on Environmental Quality*, 185 S.W.3d 546, 552 (Tex. App. – Austin 2006, pet denied) stated:

"A certificate of convenience and necessity issued by an administrative agency grants operating authority to a utility company. See Black's Law Dictionary 239-40 (8th ed. 2004). Before granting a certificate, the statute requires the Commission to ensure that the proposed system possesses "the financial, managerial, and technical capability to provide continuous and adequate service" to its customers. Therefore, the requirement of "continuous and adequate" in section 13.241(a) is the standard to which Bulverde's capabilities must rise before the Commission may grant it a certificate."

While the Third Court did state in this opinion that "{o}wnership is not something legally required, which may be the only thing absent in Bulverde's application on the first criteria", it went on to elaborate:

"There is substantial evidence in the record to support the conclusion that Bulverde possesses the capabilities that would allow it to provide continuous and adequate service to its customers The ALJ and the Commission found that Bulverde had over \$1,000,000 in liquid assets for the fiscal year ending December 31, 2000, and that it had sufficient funds budgeted for its annual water supply contract obligations to GBRA.

There is also substantial evidence that Bulverde is capable of providing safe drinking water and that it has access to an adequate supply of water. *See* Tex. Water Code Ann. § 13.241(a)-(b).”

In other words Bulverde’s ability to deliver “continuous and adequate” service to its customers was superior to BexarMet’s because it possessed “the financial, managerial, and technical capability” to do so. Likewise Mission’s ability to deliver “continuous and adequate” service to this requested area is superior to Alton’s because it has demonstrated to ALJ Craig R. Bennett that it possesses the superior “financial, managerial, and technical capability” to do so compared to Alton. In any event, Mission is also a regionalized wastewater system providing wastewater service to the Cities of Granjeno and Palmhurst, so this is a moot argument. Tr. at 196:12-15.

In bringing first time centralized sewer service to underserved areas like the colonias, serious new management problems are likely to be confronted in dealing with first time sewer customers/users. The City of Mission’s experienced management staff and public work crews will be better equipped and resourced to resolve said problems quickly and successfully. Mission has 128 employees in their public works department, eight in their finance department, and one Financial Director. Mission employs ten licensed wastewater operators. Between them these operators hold important Class A, B, C and D licenses. Mission is more qualified when it comes to staffing and organization to bring first time sewer service to the requested area.

By contrast the City of Alton has only planned for a wastewater collection system and limited public work crews that provide only basic inspection and repair services for their system. Alton’s regular city staff conducts the overall management of its sewer operations in addition to their other city duties. If Alton’s past history of sewer revenues not covering expenses, of accounting errors and deficient practices, and of poor collection practices are the criteria for

judging their ability to work with a disadvantaged population new to paying for sewer service or using it, then Alton is not the right choice.

Most significantly, Alton lacks the certified wastewater operators required under Texas law to operate the CCN they currently have. Under 30 TAC 30.331(b) and 350(n) Alton is required to have certified operators because as their Exceptions state “Alton ... owns its own collection system and is responsible for its expansion and any major repairs...”

Section 30 TAC 30.331(b) provides: “Persons that operate, assist in the operation, or contract to operate domestic wastewater treatment facilities or supervise wastewater collection activities...must be licensed or registered and meet the qualifications of this subchapter...and must comply with the requirements in Chapter 317...and all other applicable rules under the jurisdiction of this commission.”

Section 30 TAC 30.350(n) states: “Each classified wastewater collection system must employ at least one licensed operator who holds a license class equal to or higher than the category of system. Wastewater collection system operation and maintenance activities shall be supervised and inspected daily by an on-site licensed wastewater operator.”

Thus Alton is wrong in claiming “it makes no sense for Alton to hire certified operators” as the law requires they must.

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

Finding of Fact 41.

The numerous deficiencies in Mr. Snowden’s rate analysis are obvious and glaring. No expert testimony is required to establish that: (a.) omitting to include Alton’s required annual payments to McAllen leaves annual expenses understated and cash flow projections overstated by \$75,000; (b) 100% collection rate should not be used in an analysis where the actual collection rate is 95%; (c) low interest loans or grant cannot be presumed as occurring in the future as a given.

Finding of Fact 69.

It is relevant that Alton is not currently serving all of its certificated area while seeking to enlarge its CCN by amendment to cover this requested area because Alton's resources and capacity to serve new customers is finite and limited. Two square miles within Alton's CCN remain without wastewater service between Inspiration Road and La Homa Road from Mile 6 to the southern boundary. Tr. at 173:15-175:5.

Findings of Fact 72, 100, 101, 97 and 103; Conclusions of Law 5,6,7,8, and 9, Ordering Provisions 1, 2, and 3.

Mission is also a regional wastewater system serving its neighboring communities of Palmhurst and Granjeno. Thus regionalization is a neutral concept when judging Mission and Alton's competing CCN amendment applications. Alton's regionalization argument does not negate the fact that owning its own complete treatment system, Mission has greater control over the provisions of service than Alton; or that Mission has full ownership and control over its entire wastewater system, including treatment facilities; or that Mission has ten licensed wastewater operators.

While Alton has a contractual right to treatment capacity in McAllen's wastewater treatment plant, Alton's Public Works Director holds no wastewater operator license, nor collection operator license and Alton employs no licensed wastewater operators in violation of 30 TAC 3.331(b) and 350 (n). These facts are relevant to understanding whether a system possesses "the financial, managerial, and technical capability to provide continuous and adequate service" to the new customers of the requested area. Regionalization as a policy does not restrict the ALJ from factually investigating and weighing the abilities, competence, accountability and resources of competing applicants to deliver service to a requested area.

D. There is no Evidence in the Pre-Filed Testimony regarding conditions being placed on Mission if awarded the CCN amendment thus there is no support in the record for such conditions to be imposed in this order.

III.

IF ALTON'S MOTION TO REOPEN THE RECORD IS GRANTED

Alternatively, if Alton's Motion to Reopen the Record is granted over Mission's objections and Motion to Strike, and Exhibit 1 is admitted into evidence and considered without an evidentiary hearing being granted to Mission, Mission, without waiving said Objections and Motion to Strike Exhibit 1, would show the following:

Alton's financial plan for expanding sewer service to this new service area is predicated on being awarded Federal Stimulus Funds in grants and/or low interest loans. Alton has represented to this Commission that "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" (Alton's Exceptions: 2). Mission reserves the right to offer proof that this representation is based on false assumptions. Alton cannot be awarded federal grants/loans for an area they are not authorized by a CCN amendment to serve.

At a minimum Alton must disclose this contested administrative CCN proceeding when applying for federal grants/loans to provide service to this requested area. The CWSRF IUP application process for this contested service area can only be completed after this CCN amendment contest is won.

Alton is engaged in a simultaneous triple gamble: first, Alton's future application for a federal grant/loan for this requested service area bets on Alton being granted a CCN to fulfill the grant/loans purpose; second, Alton's CCN application bets on Alton obtaining federal

grants/loans not yet awarded for this new service area; and third, the federal government has the funds and chooses to appropriate money for the grant/loan program.

Alton is asking this Commission to deny awarding this CCN Amendment to Mission so that Alton can leverage their simultaneous bets into a CCN Amendment. Mission should not be penalized for having proceeded in a straightforward manner to qualify on the merits for this CCN Amendment. This underserved area deserves a utility, like Mission, that has the financial, managerial and technical capability to provide continuous and adequate wastewater service to its customers.

IV.

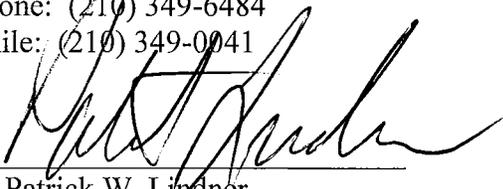
Conclusion

For the reasons set out above, Alton's Exceptions should be stricken, or if not stricken, then denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing City of Mission's Response to City of Alton's Exceptions to the Proposal for Decision and Motion to Reopen the Record, Objections, and Motion to Strike was served upon the following parties by facsimile and/or first class mail on this 19th day of August 2010:

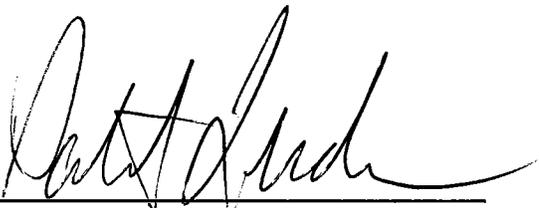
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