

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
ALTON TO AMEND CERTIFICATE
OF CONVENIENCE AND
NECESSITY NO. 20809 IN HIDALGO
COUNTY

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BEFORE THE STATE OFFICE

APPLICATION OF THE CITY OF
MISSION TO AMEND
CERTIFICATE OF CONVENIENCE
AND NECESSITY NO. 20768 IN
HIDALGO COUNTY

OF

ADMINISTRATIVE HEARINGS

THE EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files the following Executive Director's **Reply** to the City of Alton's Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) in the above captioned matter. The ED agrees with the PFD and believes it was correctly decided.

I. INTRODUCTION

This Reply is in response to Part II.B., page 6, of the City of Alton's Exceptions to the ALJ's PFD, which states that the ALJ "favors Mission over Alton because Alton has chosen to regionalize with a neighboring utility, the City of McAllen."¹ This mischaracterizes the ALJ's decision. The ALJ compared Mission and Alton across thirteen criteria and found Mission superior in five of them, Alton superior in one, and equality between the two applicants in the remaining seven. The ALJ ultimately found in favor of Mission. Alton argues that valuing an applicant that owns its facilities over one which has contracted with another utility to provide some of its services is inconsistent with case law and the state's policy of promoting regionalization. The ED believes that Alton has

mischaracterized the case law and misunderstood the state's policy of regionalization, the goals of which the ED believes will be achieved regardless of which applicant in this case is certificated to the requested area.

II. DISCUSSION

A. Legal framework

When granting or amending a certificate of convenience and necessity (CCN), the legislature requires that the TCEQ "ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service."² The financial, managerial, and technical capabilities are commonly referred to as "FMT." The legislature also requires that the Commission determine the more capable applicant when two or more parties apply for a CCN to serve an economically distressed area.³ This necessarily requires a comparison of the parties' capabilities. The Commission's rules reflect the legislature's directives:

For two or more retail public utilities that apply for a certificate of convenience and necessity to provide water or sewer utility service to an uncertificated area located in an economically distressed area as defined in Texas Water Code, §15.001, the executive director shall conduct an assessment of the applicants to determine which applicant is more capable financially, managerially and technically of providing continuous and adequate service.⁴

In this case, two applicants have applied for a CCN to provide service to an economically distressed area. The Commission's rule at 30 Texas Administrative Code (TAC) §291.102(g) lists 10 criteria to evaluate in assessing which applicant is more capable of providing continuous and adequate service. The criteria include ownership accountability.⁵

B. Ownership accountability

The ALJ found in favor of Mission in the ownership accountability criterion, relying on a

¹ Exceptions, p. 6

² Texas Water Code §13.241(a)

³ Texas Water Code §13.241(e)

⁴ 30 TAC §291.102(g)

⁵ 30 TAC §291.102(g)(4)-(6)

plain reading of the term “ownership accountability” and the fact that Mission has full ownership and control over the entire wastewater process whereas Alton only has control over its collection system.

Alton cites *Bexar Metropolitan Water District v. TCEQ* to argue that the ownership accountability criterion conflicts with the policy of promoting regionalization. The controversy in that case arose because the City of Bulverde (which was granted certification), like Alton, did not own its facilities. The district (which was denied certification) believed that Texas Water Code (TWC) §13.241(a) required “possession” of a water system to meet the FMT requirements. Because Bulverde planned to contract with another regional provider for some of its services, Bexar Met thought that Bulverde did not satisfy the “possession” requirement of TWC §13.241(a).⁶ Thus, *BexarMet* dealt with whether the term “possess” in TWC §13.241(a) requires a CCN applicant to own its facilities. The court found that simple control of facilities, by contract or otherwise, was enough to satisfy the “possession” requirement for the purposes of TWC §13.241(a). The court also found this to be consistent with the policy of regionalization, because if actual ownership were required, applicants that had chosen to regionalize and relied on facilities owned by other utilities would be unable to amend their CCNs to acquire new territory. This would conflict with the state’s policy of promoting regionalization.

Alton reads this case to invalidate the criterion of ownership accountability in evaluating competing CCN applications under 30 TAC §293.102(g). However, *BexarMet* did not say the Commission cannot *consider* ownership, it said only that the Commission cannot *require* ownership when accessing FMT. Moreover, the controlling provision of the water code in this case is §13.241(e). That law requires the Commission to determine which of competing applicants to an economically distressed area is more capable. To that end, the ED believes that 30 TAC §291.102(g), which considers along with nine other criteria ownership accountability, is entirely warranted. The ED did consider this factor, but it was not determinative.⁷

C. Regionalization

Furthermore, the Commission’s rules and the ALJ’s interpretation of them are consistent with the state’s regionalization policy. In its Exceptions, Alton properly cites to various statutes in both

⁶ 185 S.W.3d 546 (550)

⁷ Tr. 318:3-9 (K. Adhikari).

the water and government code that establish a state policy of regionalization.⁸ What Alton does not do, though, is elaborate on just what that policy is.

The Austin Court of Appeals noted that regionalization “prevents redundancy and ensures low rates for water service”⁹ The water code §13.241(d) requires “the applicant [to] demonstrate that regionalization or consolidation with another retail public utility is not economically feasible,” before obtaining a CCN. The regionalization policy is simply this: do not build a new system if you can connect to an existing one. Using existing systems means fewer point sources and fewer discharges; it means more experienced staff; and it ensures customers do not have to pay high rates to cover the costs of unnecessary new systems.

In this case, the state’s regionalization policy will be satisfied regardless of which applicant is certificated. Alton suggests that the state’s regionalization policy somehow trumps the standard FMT requirements. At the end of the day, Mission had superior financial capability. This alone would have carried the ED’s recommendation to find in favor of Mission.

The fact that Alton receives sewer service from a regional provider does not make it a regional provider. Alton’s own expert stated that by extending service to the requested area, Mission would be a regional provider (though the same could not be said for Alton).¹⁰ Denying Alton’s application does not run afoul of the state’s regionalization policy, nor does it discourage regionalization. The state’s regionalization policy has nothing to do with expanding already regionalized utilities – rather, the policy is focused on discouraging new systems. The uncertificated area in this case will receive service from an existing system rather than building its own system regardless of which applicant is certificated, therefore the state’s regionalization policy is being furthered.

III. CONCLUSION

It is appropriate to consider ownership accountability, even in light of *Bexar Metropolitan Water District v. TCEQ*. Doing so does in no way contravene the state’s regionalization policy. Moreover, the regionalization policy will be furthered by granting Mission’s application. The

⁸ Exceptions, p.6-7

⁹ 185 S.W.3d 546, 554

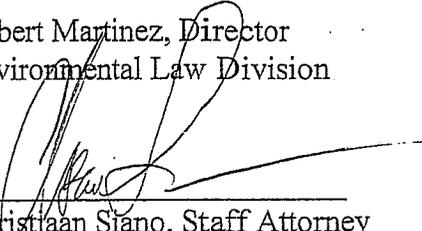
¹⁰ Tr. 196:7-15 (direct examination of R. LeFevre)

believes the deciding factor in this case was Mission's financial superiority. Accordingly, the ED requests that the ALJ's finding of facts and conclusions of law be adopted, with the minor corrections noted in the Executive Director's Exceptions to the Proposal for Decision.

Respectfully submitted,

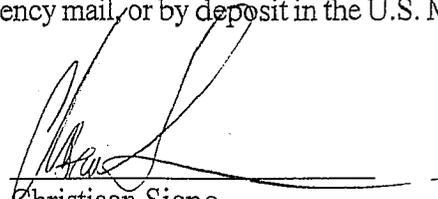
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2010 a true and correct copy of the foregoing document was delivered via facsimile, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.

A handwritten signature in black ink, appearing to read 'Christiaan Siano', written over a horizontal line.

Christiaan Siano
Environmental Law Division

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TCEQ Docket No. 2008-0955-UCR & 2009-0350-UCR
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