

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 24, 2010

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 MAY 24 PM 4:09
CHIEF CLERKS OFFICE

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

Re: SOAH Docket No. 582-09-2557; TCEQ Docket No. 2009-0048-UCR; In Re: Appeal of Multi-County Water Supply Corporation to Review the Wholesale Water Rate Increase Imposed by the City of Hamilton, Certificate of Convenience and Necessity No. 11525, and Request for Interim Rates in Hamilton County; Application No. 36280-M

Dear Mr. Trobman:

On April 13, 2010, the undersigned Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) in this matter. The ALJ has reviewed the parties' exceptions and replies to exceptions, which are addressed below.

The Executive Director (ED) of Texas Commission on Environmental Quality filed no exceptions to the PFD. Multi-County Water Supply Corporation (MCW) filed exceptions which largely tracks the arguments presented in MCW's post-hearing briefing in this matter. The ALJ recommends no changes as a result of MCW's exception, because MCW's evidence and argument were addressed in the PFD.

The City of Hamilton (City) proposed non-substantive and substantive changes to the PFD and the Proposed Order (Order). The City's non-substantive changes deal with simple scrivener's errors in the PFD and Order. However, the ALJ does not believe these matters warrant corrections to the PFD itself. Rather, the ALJ recommends that page one of the Order be corrected to remove the reference to "Cook County" and replace it with "Hamilton County."¹

As for substantive exceptions, the City disagrees with the ALJ's analysis that "the only factors relevant to this proceeding are those raised by MCW." As noted by the City, the ALJ allowed both MCW and the City to develop a complete evidentiary record. This was done, in part, because under 30 TAC § 291.133(a)(3), in determining whether the protested rate evidences the seller's abuse of monopoly power in its provision of water or sewer service to the purchaser, the Commission shall weigh all

¹ The mistaken reference to Cook County is an error that has existed in the style of this case for some time.

relevant factors, which *may* (but not necessarily) include factors (A) through (H).² In its appeal, MCW only raised factors (A), (B), (C) and (D).³ As explained below, the ALJ's finding that factors (E) through (H) are irrelevant is a comment on the evidence and is not intended as guidance for future proceedings.

The petitioner bears the burden of proof in these proceedings and usually only offers evidence on those factors which form the basis of its appeal. As a result, if the respondent wants the Commission to consider other factors, it has to offer supporting evidence. Although the petitioner retains the ultimate burden of proof on its appeal, the respondent's duty to prove-up any other factors is similar to establishing an affirmative defense.

In this instance, the ALJ determined that MCW, the petitioner, failed to establish any of the alleged grounds for its appeal. There was no need to reach the City's affirmative defenses. The ALJ outlined this in the PFD:

The ALJ finds that the only factors relevant to this proceeding are those raised by MCW. To be clear, however, had this case been more complex, the ALJ might have found other factors relevant.⁴

Had this case been closer, the City's evidence on the remaining factors would certainly have been considered relevant by the ALJ and discussed in the PFD.⁵

The ALJ did, however, review the City's evidence, which clearly supports Finding of Fact Nos. 56 and 57 proposed by the City in its exceptions to the PFD.⁶ In the event the Commission wishes to consider factors other than those in MCW's appeal, the ALJ agrees that it is appropriate to include these findings in the Final Order.

² Note that the Commission's mandate that all relevant factors be considered appears only in 30 TAC § 291.133(a)(3). Although the mandate does not expressly extend to 30 TAC § 291.133(a)(1), (2) or (4), it could be read as inclusive of those factors, so long as they pertain to an abuse of monopoly power.

³ In its Exceptions to the PFD at 2, the City indicated that MCW based its appeal on factors (A) through (H). The ALJ believes the City intended to state factors (A) through (D), which are the only factors MCW raised in its appeal.

⁴ PFD at 10.

⁵ Due to the expansive language of 30 TAC § 291.133(a), the ALJ continues to believe that a robust evidentiary record should be developed at hearing.

⁶ City's Exceptions to the PFD at 2.

May 24, 2010

Page 3

With the exception of the amendments set forth above, it is the recommendation of the undersigned ALJ that the Commission deny all exceptions and adopt the Proposal for Decision and the Proposed Order as submitted.

Sincerely,

A handwritten signature in black ink, appearing to read "Travis Vickery". The signature is written in a cursive style with a large initial "T" and a long horizontal stroke.

Travis Vickery

Administrative Law Judge

TV:ls

cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

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

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: MULTI-COUNTY WATER SUPPLY CORP
SOAH DOCKET NUMBER: 582-09-2557
REFERRING AGENCY CASE: 2009-0048-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ TRAVIS VICKERY**

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bcoy@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

RON OLSON
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION
P.O. BOX 13087, MC-173
AUSTIN, TX 78711-3087
(512) 239-0608 (PH)
(512) 239-0606 (FAX)
rolson@tceq.state.tx.us

TCEQ EXECUTIVE DIRECTOR

KATHLEEN F. DOW
ATTORNEY
3203 ROBINSON DRIVE
WACO, TX 76706
(254) 662-5888 (PH)
(254) 662-6652 (FAX)
buengeroc@grandecom.net

MULTI-COUNTY WATER SUPPLY CORPORATION

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2010 MAY 24 PM 4:09
CHIEF CLERKS OFFICE

WESLEY LLOYD
ATTORNEY
NAMAN HOWELL SMITH & LEE
400 AUSTIN AVENUE, SUITE 800
WACO, TX 76701
(254) 755-4100 (PH)
(254) 754-6331 (FAX)
lloyd@namanhowell.com

CITY OF HAMILTON

xc: Docket Clerk, State Office of Administrative Hearings