

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

November 30, 2010

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

Re: SOAH Docket No. 582-10-1868; TCEQ Docket No. 2009-1865-UCR; In Re: Application Of East Cedar Creek Fresh Water Supply District, Certificate of Convenience And Necessity (CCN) No. 11682, To Acquire Facilities And Transfer A Portion Of CNN No. 11206 From the City Of Mabank And To Amend Its CCN No. 11682, Located In Henderson County

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 20, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than December 30, 2010.

This matter has been designated **TCEQ Docket No. 2009-1865-UCR; SOAH Docket No. 582-10-1868**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Katherine L. Smith".

Katherine L. Smith
Administrative Law Judge

KLS/Ls
Enclosures
cc: Mailing List

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STYLE/CASE: EAST CEDAR CREEK FRESH WATER SUPPLY DISTRICT
SOAH DOCKET NUMBER: 582-10-1868
REFERRING AGENCY CASE: 2009-1865-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ KATHERINE L. SMITH**

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CITY OF MABANK

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-10-1868
TCEQ DOCKET NO. 2009-1865-UCR

APPLICATION OF EAST CEDAR CREEK	§	BEFORE THE STATE OFFICE
FRESH WATER SUPPLY DISTRICT,	§	
CERTIFICATE OF CONVENIENCE AND	§	
NECESSITY (CCN) NO. 11682, TO	§	
ACQUIRE FACILITIES AND TRANSFER	§	OF
A PORTION OF CCN NO. 11206 FROM	§	
THE CITY OF MABANK AND TO	§	
AMEND ITS CCN NO. 11682, LOCATED	§	
IN HENDERSON COUNTY	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

East Cedar Creek Freshwater Supply District (East Cedar Creek) and the City of Mabank (Mabank) filed an application with the Texas Commission on Environmental Quality (TCEQ or Commission) for approval of a proposed sale of assets and transfer of service area under section 13.301 of the Texas Water Code from Mabank to East Cedar Creek. The service area that the parties seek to transfer is located within the city limits of Gun Barrel City (Gun Barrel). Gun Barrel opposes the sale and transfer. The Commission's Executive Director (ED) supports the application. The Administrative Law Judge (ALJ) finds that the application satisfies the statutory and regulatory criteria and recommends that the requested transfer be approved.

I. PROCEDURAL HISTORY, OVERVIEW, AND LEGAL STANDARDS

A. Procedural History

East Cedar Creek and Mabank filed their application with the Commission on July 3, 2009. After protests were filed, the Commission's Chief Clerk referred the application to the State Office of Administrative Hearings (SOAH) on November 20, 2009, for a contested-case hearing. ALJ Katherine L. Smith held a preliminary hearing on February 8, 2010. No contested issues of notice or jurisdiction were raised. Jurisdiction was established, and the following parties were designated: East Cedar Creek (represented by Mark Zeppa); Mabank (represented by Bill Dugat); Gun Barrel

(represented by Skip Newsome); and the ED (represented by Brian MacLeod). The hearing on the merits was held on July 13-14, 2010. After the briefs were filed, the record closed on September 24, 2010.¹

B. Overview

East Cedar Creek is a statutory municipal utility district, which holds water convenience and necessity (CCN) No. 11682. Mabank is a general law municipality operating under CCN No. 11206. This case involves a contract entered into between them for the sale of a portion of Mabank's water utility distribution system and the transfer of that portion of Mabank's CCN located in Gun Barrel to East Cedar Creek. The transfer is documented by a "Contract of Sale of Public Water Utility System and Transfer of Service Areas," which was approved by the governing bodies of Mabank and East Cedar Creek. East Cedar Creek will pay Mabank \$1.1 million for the purchase.

Mabank and Gun Barrel are located in Henderson County. East Cedar Creek currently provides water utility service to more than 50% of the residential connections in Gun Barrel. Mabank currently provides water utility service to approximately 900 customers in Gun Barrel. Tr. at 29-30, 220-21. East Cedar Creek also provides all of Gun Barrel's sewer utility service. The application seeks to transfer approximately 380 acres served by Mabank under its CCN and the 900 customers. Some infrastructure will also be transferred.

East Cedar Creek notes that because it and Mabank are political subdivisions, which do not have to serve under a CCN, they do not need the Commission's approval prior to the sale. TEX. WATER CODE ANN. §§ 13.242(a) and 13.301(a). But because Mabank holds a CCN for the area in

¹ At that time Gun Barrel City sent an errata sheet correcting the cites to volume two of the transcript, because the copy it received was misnumbered. The ALJ's copy was also misnumbered. A corrected copy was delivered to the ALJ on October 27. The ALJ has also discovered that when the ED and East Cedar Creek cite to the transcript, the page number is different by one page from the copy in the ALJ's possession. The ALJ will cite to the corrected copy.

question and because East Cedar Creek wants to operate under that CCN after the sale, the two parties filed the application to transfer that portion of the Mabank CCN pursuant to section 13.301.

Mabank wishes to sell the portion of its certificated service area in Gun Barrel because Mabank is developing water capacity shortages in its water system under the requirements of 30 TEX. ADMIN. CODE (TAC), Chapter 290, Subchapter D. With the transfer of its Gun Barrel customers to East Cedar Creek, it will achieve long-term compliance. Mabank Ex. 1 at 4; ECC Ex. 1 at 13.

The applicants assert that East Cedar Creek was the logical buyer because it is the only other retail public utility serving water customers and already has a franchise to provide service within Gun Barrel's city limits. East Cedar Creek contends that it has the service capacity to serve additional customers. All that will be required is a phased-in program of interconnections between existing East Cedar Creek water lines and the adjacent Mabank water lines. ECC Ex. 2 at 5-7; ECC Ex. 1 at 15; tr. at 14. According to East Cedar Creek, half of the affected customers can be transferred within 90 days, with the remainder being transferred within 12 months. Tr. at 14-15. Mabank will provide a transitional water supply so that the affected customers will not be disrupted. ECC Ex. 1 at 18.

Gun Barrel describes itself as a home rule city with most of the growth occurring within Henderson County taking place within Gun Barrel's governmental and extraterritorial boundaries. GBC Ex. 5; tr. at 118. Gun Barrel contends that the transfer should not be approved because it is not in the public interest and is not necessary for the service, accommodation, convenience, or safety of the public. Gun Barrel City also contends that the transfer will reduce the level of service from what Gun Barrel's customers currently receive, retard the growth in the service area, and foreclose Gun Barrel from exercising its own home rule, municipal prerogative of furnishing its own water service. Gun Barrel has made an offer to purchase the system and customers from Mabank and has conducted cost and other studies to acquire surface water from the Tarrant County Regional Water Authority and to fund the installation of water intake and treatment facilities. Tr. at 162, 217; GBC Ex. 7.

C. The Legal Standards for Certification

The Texas Water Code and the Commission's rules set forth the standards for transferring a portion of a CCN between retail utilities. East Cedar Creek and Mabank filed the transfer application under section 13.301 of the Texas Water Code, although technically section 13.301 does not apply because Mabank and East Cedar Creek are not utilities or water supply or sewer service corporations to which the section applies, but are retail public utilities. Nevertheless, the requirements of Section 13.301 are pertinent and state:

- (b) The commission may require that the person purchasing or acquiring the water or sewer system demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.

* * *

- (d) The commission shall, with or without a public hearing, investigate the sale, acquisition, lease, or rental to determine whether the transaction will serve the public interest.

Texas Water Code section 13.301(e) also requires that the factors set forth in Texas Water Code section 13.246(c), which apply to an amendment to a CCN, as well as an application for a CCN, be considered in determining whether the purchaser has the financial, managerial, and technical ability to provide continuous and adequate service and whether the transfer will serve the public interest.²

The Commission has adopted rules in sections 291.109 and 291.112 of Title 30 of TAC to implement section 13.301 of the Texas Water Code. Section 291.109 addresses the sale of a water system and essentially replicates the criteria of Texas Water Code section 13.246(c). The criteria at section 291.109(e)(5) are as follows:

² As the ED noted, the financial, managerial, and technical ability to provide continuous and adequate service is the overarching concern when determining whether a transfer should be approved. Texas Water Code § 13.301(b), 30 TAC § 291.109(b) and § 291.112(b) and (c)(5)(B).

- (A) whether the seller has failed to comply with a commission order;³
- (B) the adequacy of service currently provided to the area;⁴
- (C) the need for additional service in the requested area;⁵
- (D) the effect of approving the transaction on the utility or water supply or sewer service corporation, the person purchasing or acquiring the water or sewer system, and on any retail public utility of the same kind already serving the proximate area;⁶
- (E) the ability of the person purchasing or acquiring the water or sewer system to provide adequate service;⁷
- (F) the feasibility of obtaining service from an adjacent retail public utility;⁸
- (G) the financial stability of the person purchasing or acquiring the water or sewer system, including, if applicable, the adequacy of the debt-equity ratio of the person purchasing or acquiring the water or sewer system if the transaction is approved;⁹
- (H) environmental integrity;¹⁰ and
- (I) the probable improvement of service or lowering of cost to consumers in that area resulting from approving the transaction.¹¹

³ This criterion is not listed as a factor under Texas Water Code § 13.246(c) and is not an issue in this proceeding.

⁴ See also § 13.246(c)(1).

⁵ The criterion under § 13.246(c)(2) includes whether any landowners, prospective landowners, tenants, or residents have requested service.

⁶ The criterion under § 13.246(c)(3) includes the effect on landowners in the area.

⁷ The criterion under § 13.246(c)(4) includes the ability to meet the standards of the commission, taking into consideration the current and projected density and land use of the area.

⁸ See also § 13.246(c)(5).

⁹ See also § 13.246(c)(6).

¹⁰ See also § 13.246(c)(7).

¹¹ See also § 13.246(c)(8).

Section 13.246(c)(9) contains an additional criterion--the effect on the land to be included in the certificated area.

Pursuant to 30 TAC § 291.112(c)(5), when reviewing a CCN transfer, the Commission must also consider:

- (A) if notice has been properly given;
- (B) if the retail public utility which will acquire the facilities or certificate is capable of rendering adequate and continuous service to every consumer within the certificated area, after considering the factors set forth in the Texas Water Code, § 13.246(c). The commission may refuse to approve a sale, acquisition, lease, merger, or consolidation and/or transfer where conditions of a judicial decree, compliance agreement or other enforcement order have not been substantially met;
- (C) the experience of the person purchasing or acquiring the water or sewer system as a utility service provider;
- (D) the history of the person or an affiliated interest of the person in complying with the requirements of the commission or the Texas Department of Health or of properly managing or using revenues as a utility service provider; or
- (E) the ability of the person purchasing or acquiring the water or sewer system to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water or sewer system.

II. DISCUSSION

Of all of the factors listed above, adequacy of notice, as well as whether the seller has failed to comply with a Commission order are not in dispute. Therefore, they will only be addressed in the findings of fact and conclusions of law. Because of the redundancy of the issues set forth in the Texas Water Code and 30 TAC sections 291.109(e)(5) and 291.112(c)(5), they have been combined in the discussion below and roughly follow those of Texas Water Code section 13.246(c). Gun Barrel also includes four criteria set forth in a sentence in Texas Water Code section 13.246(b) in its closing

brief.¹² Because those requirements are covered in the more specific provisions of section 13.246(c), they will not be addressed separately.

A. Adequacy of Service Currently Provided, Need for Additional Service, Including Requests for Service, Water Code § 13.246(c)(1) & (2) and 30 TAC § 291.109(e)(5)(B) & (C).

Mabank serves the area in question. All parties agree that the service it provides meets the needs of its current customers. It is the potential for growth in the area, including commercial and residential growth, that will require the need for additional service. Tr. at 32, 118-19.

Mabank's required capacity is currently over 85% of its provided capacity. Tr. at 152-53. Because it has reached 85% of its capacity, it is required to submit to the ED a report detailing how it will provide for the expected service.¹³ Mabank's solution is this sale, which will free up capacity in its water treatment plant and allow for future growth in other areas of Mabank. According to Mabank's City Administrator, if the application is denied Mabank will have to expand its capacity at the cost of \$8 million, which would create a hardship for Mabank. Tr. at 154. Mabank operates under a waiver from 30 TAC § 290.45 to provide a supply capacity of 0.53 gallons per minute (gpm) per connection. It had tried to obtain a lower alternative capacity requirement from the Commission, but its request was denied. Tr. at 160.

Gun Barrel makes the point that its residents and businesses have not requested that their service and accounts be transferred from Mabank to East Cedar Creek and states that its citizens oppose such transfer through their municipal elected officials who have protested the Application. In response, Mabank notes that only two protests were received after notice of this action was sent to

¹² The commission may grant applications and issue certificates and amendments to certificates only if the commission finds that a certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public.

¹³ 30 TAC § 291.93(3) requires a retail public utility that possesses a CCN that has reached 85% of its capacity to submit a planning report to the ED explaining how the retail public utility will meet expected service demands.

current customers. Mabank Ex. 1 at 6. East Cedar Creek charges that the only reason for the objection is because Gun Barrel's officials want to get into the water business.

B. The Impact on the Applicant and its Ability to Provide Adequate Service, Water Code §§ 13.246(c)(3) & (4), 13.301(e)(2) & (3) and 30 TAC § 291.109(e)(5)(D) & (E) and 291.112(c)(5)(B), (C) & (D)

The capability of East Cedar Creek to provide adequate service is the most relevant issue in this proceeding. Three matters were raised by Gun Barrel: inadequate production capacity, water treatment plant maintenance, and water quality.

1. Production Capacity and Water Treatment Plant Maintenance

East Cedar Creek is a statutorily created municipal utility district governed by a Board of Directors elected by the residents of the district. It has provided service to thousands for more than 30 years. It has the largest CCN in Henderson County. ED Ex. 7 at 12, ECC Ex. 1 at 5, 10, 15, 124. It is governed by a seven member, elected board. It has 13 trained employees, including the appropriate number of licensed operators. ECC Ex. 1 at Schedules 2 and 3. Bill Goheen, its General Manager, has more than 25 years experience in the water utility business. ECC Ex. 1 at 4. It has long-term water supply contracts with the Tarrant County Regional Water Authority and the City of Trinidad. The infrastructure needed to transport water from its Brookshire water treatment plant to the Gun Barrel service area is in place and only needs to be interconnected to Mabank's distribution lines after closing. The crews and equipment needed to serve the Gun Barrel service area are already in place because they operate the parallel East Cedar Creek water system. East Cedar Creek contends that it will provide treated water to its new customers from its Brookshire treatment plant in the amount of 4.0 million gallons per day (mgd), which is sufficient under Commission rules to serve its current customers and those transferred from Mabank.

Gun Barrel contends that the effect of transferring the CCN to East Cedar Creek will exacerbate its current supply capacity deficiencies and the need to make immediate improvements to

its water treatment plant and raw water intake structure and to require the installation of additional elevated storage capacity and service pump upgrades. Gun Barrel charges that the Brookshire plant has continuously received notices of violation from the Commission since 2001, requiring East Cedar Creek to dismantle half of its plant since 2008 to commence the refurbishing of its filters and the replacement of its clarifier. Tr. at 89. Gun Barrel complains that even though the filter refurbishing is ongoing, the clarifier replacement has not begun nor been budgeted. Tr. at 90. Gun Barrel contends that without a rehabilitated or replaced primary clarifier, the two refurbished filters are useless. Even though the Brookshire plant is rated at 3.0 mgd based upon the supply capacity of its raw water intake pumps, its actual capacity is and will be 2.0 mgd because half of the Brookshire plant has been and will out of service for at least four years. Tr. at 89.

According to Gun Barrel, water utilities are generally required to provide a capacity of at least 0.6 gpm per connection under 30 TAC § 290.45. Gun Barrel notes that East Cedar Creek's water system has been operating under a waiver from 30 TAC § 290.45 since 1993 when it was allowed to maintain a supply capacity of 0.45 gpm per connection. Gun Barrel notes that East Cedar Creek currently serves approximately 3,706 connections from its Brookshire water treatment plant, which means that under the 0.45 gpm per connection requirement, East Cedar Creek is required to continuously maintain at least 2.4 mgd of treatment capacity at its Brookshire plant ($0.45 \text{ gpm} \times 3706 \text{ connections} = 1,668 \text{ gpm} \times 24 \text{ hrs} \times 60 = 2.4 \text{ mgd}$). Tr. at 244. Therefore, with only 2.0 mgd of treatment supply capacity, the Brookshire plant currently maintains a supply capacity of only 0.37 gpm per connection ($1388 \text{ gpm} / 3706 \text{ connections}$). Tr. at 246. Gun Barrel also notes that East Cedar Creek also reports that 24% of its pumped, treated water is lost and unaccounted for, which means that Brookshire's effective supply to its customer connections is only 1.52 gpm (2.0 less than 24%). GBC Ex. 7; ECC Ex. 1. Therefore, water usage from the Brookshire plant currently exceeds its actual supply capacity under the Commission's 85% rule by nearly 30%, according to Gun Barrel.

Gun Barrel charges that transferring 900 Gun Barrel customers to East Cedar Creek (and disregarding potential growth) will reduce the actual supply availability of the Brookshire plant to a low of 0.229 gpm per connection, which is approximately half of the minimum allowed under East

Cedar Creek's 0.45 gpm per connection variance and about one-third of the Commission's minimum capacity requirement of 0.6 gpm connection applicable to water supplies under 30 TAC § 290.45. Gun Barrel charges that 900 additional customers will put East Cedar Creek in violation of the Commission's 85% rule because its raw water intake structure will be at nearly 100% of its rate capacity, its elevated storage facilities will be at 92% of their capacity and its service pumps will exceed the 85% rule.¹⁴ Gun Barrel complains that East Cedar Creek has provided no plans for how it will address those deficiencies.

In response to Gun Barrel's suggestion that East Cedar Creek's 0.45 gpm variance is somehow a failing, East Cedar Creek charges that that is not so.¹⁵ According to East Cedar Creek, the area it serves consists of scattered lakeside communities, whose water demand is lower than normal. Therefore, East Cedar Creek applied for and on December 23, 1993, was granted an alternative to the Commission's 0.6 gpm water production capacity rule, pursuant to 30 TAC § 290.45(g). ED Ex. 7 at 5. According to East Cedar Creek, the 0.45 gpm per connection is still in place because actual customer demand has not exceeded the demand level set by the Commission, despite Gun Barrel's unsupported contention that there is need for a water production capacity of 0.6. gpm. East Cedar Creek notes that despite Gun Barrel's claims, East Cedar Creek is not deficient in the Commission's judgment and is already undergoing a water treatment plant refurbishment and upgrade program. Moreover the ED is satisfied that East Cedar Creek has the capacity to serve the additional connections. ED Ex. 7 at 5-6; tr. at 285-286.

The ED also responds by stating that Gun Barrel's suggestion that there is something wrong with East Cedar Creek's alternative capacity requirement of 0.45 gpm per connection is not a valid criticism, because the alternative capacity requirement is a Commission approved rule and because the waiver that East Cedar Creek received became its new benchmark upon which it was entitled to rely.

¹⁴ Gun Barrel erroneously cites to ED Ex. 1.

¹⁵ 30 TAC § 290.45(b)(2).

The ED points out that Gun Barrel's expert witness admitted that when the Commission granted an exemption, the exemption became the benchmark for measuring compliance with the standards of the Commission. Tr. at 187-88.

The ED is also highly critical of Gun Barrel's use of the testimony in this case, pointing out that no where did a witness testify that "half of the Brookshire Plant [has been] out of service for at least four years." CBC Initial Brief at 3. Instead, East Cedar Creek's witness Christopher Weeks testified that "a couple of years ago we completed the construction of a secondary primary clarifier and a second set of new filters which allowed the . . . operators, and the management, to take off one half the plant to do the refurbishing that is underway right now." Tr. at 89. The ED contends that there is no testimony stating that plant capacity decreased to 2.0 mgd while the filter was refurbished and that there is testimony that the plant will provide 3.0 mgd by the end of this year and 4.0 mgd by 2012. Tr. at 17-18. The ED notes further that the Commission does not subtract line loss when calculating the gpm requirements. In addition, when the alternative capacity requirement is approved, the Commission makes conservative assumptions that include line loss considerations.

In response to Gun Barrel, Mabank notes that taking the 3,706 East Cedar Creek customers and adding the 900 Mabank customers produces a total of 4,606 customers to be served by the Brookshire treatment plant. When one multiplies that number by East Cedar Creek's approved capacity of 0.45 gpm per connection, that equals 2,072.7 gpm to serve 4,606 customers. 2,072.7 gpm is equal to 2.98 mgd, which is well under the 4.0 mgd that will be available to East Cedar Creek in 2012. Mabank notes that the 4.0 mgd is also enough water to meet even the 0.6 gpm per connection requirement.

The ED, East Cedar Creek, and Mabank also criticize Gun Barrel's complaint that East Cedar Creek has not submitted a plan for what it will do when it exceeds the 85% rule. ED Ex. 7 at 5-6. They note that the rule at Texas Water Code section 13.139(d) is only a reporting rule, not a minimum capacity rule, and East Cedar Creek does not have to provide a plan until it reaches the 85% level. Noting that East Cedar Creek has a contract with Trinidad to supply it with 288 million gallons of raw

water per year, which East Cedar Creek has the facilities to treat, particularly with its plans to increase its production capacity to 4.0 mgd by 2012, the ED contends that East Cedar Creek already has plans that should keep it out of the 85% rule. Tr. at 29-30. Mabank also notes that any alleged deficiencies are being addressed. And even though the addition of the Gun Barrel customers could trigger the Commission's 85% rule, ED witness John Locke determined that East Cedar Creek's proposed 4.0 mgd plant will likely satisfy the 85% rule so that one can conclude that East Cedar Creek can provide continuous and adequate service. ED Ex. 7 at 10.

Gun Barrel also argues that East Cedar Creek may have to file an 85% rule report because adding the new connections would put them within 85% of their required capacity for elevated storage and for the service pumps. East Cedar Creek responds that should it reach 85% capacity in its elevated storage, it will submit plans to the Commission to address the need for more storage.

As noted, Christopher Weeks testified that the raw water pump station can pump up to 3 mgd. Although a portion of the Brookshire plant is currently off-line while one clarifier and two filters are being refurbished, when the filter refurbishment is completed by the end of this year, the full 3 mgd will be restored. ECC Ex. 1 at 16; tr. at 18, 89. Subsequent work on the clarifier refurbishment and the addition of a new raw water intake pump will increase the treatment plant capacity to 4.0 mgd. Tr. at 90, 104-05. The work needed to achieve the 4.0 mgd should be completed by 2012. Tr. at 18. According to the sales contract, Mabank will fill any "gaps" by providing water for the transfer area after East Cedar Creek takes ownership and control of the Mabank facilities up to one year after East Cedar Creek takes control of the Mabank facilities. Mabank Ex. 3 at Ex. G. Therefore, the ALJ finds that East Cedar Creek will have the capacity to extend its service capacities to the affected Gun Barrel customers.

2. Water Quality

Gun Barrel asserts that examination of the Commission's investigation reports reflects a longstanding indifference on the part of East Cedar Creek to noticed violations, including disinfectant

by-product contamination. GBC Ex. 7. Gun Barrel contends that the transfer will subject Gun Barrel customers, who have been provided service by Mabank, which has been compliant with State and Federal drinking water standards, to a system that has been plagued with carcinogenic disinfectant by-product contamination violations for years, and which still have not been resolved.

In 2006, the Commission issued an Enforcement Order after determining that East Cedar Creek's treatment and disinfection process resulted in too many disinfection by-products so that it was non-compliant with the Commission rule for Haloacetic Acid (HAA5's). Since then, East Cedar Creek's operators and management teams have entered into an 18-month Commission and Environmental Protection Agency (EPA) performance based training program to address disinfection by-product reduction. It has been collaborating with the EPA and the Commission to resolve the problem, including the use of new coagulants. ECC Ex. 1 at 10-11; tr. at 20-21, 31, 78 79. East Cedar Creek notes it has adequately addressed its purported deficiencies in the opinion of the ED. ED Ex. 7 at 4.

ED witness John Lock testified that East Cedar Creek was addressing the disinfection by-product violation by changing its coagulant. ED Ex. 7 at 4. According to the ED, the problem is common with other water suppliers in the area who use Cedar Creek Lake as their water source. More than 100 water systems had the same problem because of drought followed by flooding. Tr. at 79. And 10-12 water systems are attending the same EPA/Commission training to address disinfectant by-products that East Cedar Creek is attending. Tr. at 22-23, 32, 91-92.

The other issue raised by Gun Barrel concerns violations noted by the Commission's regional staff at East Cedar Creek's Brookshire and McCay water treatment plants, resulting in a number of Commission inspection reports since 2001. ED Ex. 3. Most recently, the staff visited the Brookshire system on November 30, 2009, noting several alleged violations. According to ED witness John Lock the violations mainly concerned maintenance and housekeeping issues. On January 21, 2010, staff sent a letter to East Cedar Creek requesting a compliance plan by February 22, 2010. On January 25, 2010, East Cedar Creek submitted its compliance plan. In Mr. Lock's opinion, the alleged violations

do not cause concern about East Cedar Creek's ability to provide adequate water service. He was of the opinion that East Cedar Creek could address those issues. ED Ex. 3; ED Ex. 7 at 4.

East Cedar Creek's consulting engineer Daniel Weeks has 19 years of experience and has seen hundreds of Commission inspection reports. He testified that he has never seen an investigation inspection report without a reported violation. He also testified that after reviewing East Cedar Creek's violations over the past ten years he considered them to be minimal and found that East Cedar Creek has made good faith efforts to comply with the laws and the requirements of the Commission and the Department of Health. Tr. at 96-97.

Based upon the testimony of John Lock and Daniel weeks, the ALJ finds that East Cedar Creek has adequately addressed its noticed violations, including the disinfectant by-product contamination.

C. The Impact on Landowners, Water Code § 13.246(c)(3)

Gun Barrel contends that the immediate impact upon landowners in the affected area would be the reduction in their supplier's minimum service capacity from a standard of 0.53 gpm per connection, which applies to Mabank's current customers, to a standard of 0.45 gpm per connection, which applies to East Cedar Creek's current customers. Gun Barrel also charges that the affected landowners will also be subject to great uncertainty as to when any plant, intake, storage and pump facilities will actually be built and how they will be funded, thus tying up potential development plans indefinitely. Gun Barrel charges further that East Cedar Creek presented no growth projections for the area to be transferred or any other area that it presently serves, making it impossible to make a finding as to the projected costs of providing for such future service. Gun Barrel complains that East Cedar Creek has made no provision for such growth by way of updating its 13 year old Capital Improvement Plan and has ignored its own Capital Improvement Plan recommendation to bring its facilities up to the 0.6 gpm per connection standard. GBC Ex. 3. Gun Barrel charges that East Cedar Creek's engineer admitted that East Cedar Creek is still playing "catch up" for what it already has in the way

of undersized and improperly installed facilities and has not directed any attention to its future service capabilities. Tr. at 112-13.

East Cedar Creek responds that there is no evidence in the record that transferring the Gun Barrel customers to East Cedar Creek's system will reduce service to end-use customers and contends that no evidence was presented that the landowners will be adversely affected. Tr. at 285-86. In response to Gun Barrel's complaint that East Cedar Creek did not present any growth projections for the area to be transferred, East Cedar Creek noted that no such studies are required, noting that Texas Water Code section 13.241(b) only requires that a CCN holder have access to an adequate supply of water for current needs, and not for all the water it will ever need. East Cedar Creek notes further that 30 TAC § 290.41(b) and 290.45(b) only require a water supplier to add new plant as customer demand/numbers grow. As it has in the past, it will expand its service capacity as demand grows.

According to Mabank, the customers will benefit from service improvements. Looped water mains resulting from the transfer will enhance water pressure and reduce water quality risks associated with dead-end water mains. ECC Ex. 1 at 18. Moreover, part of the agreement with Mabank includes an interconnection of systems that will provide East Cedar Creek and its customers with a temporary supply of water from Mabank in the event of an emergency. ECC Ex. 1 at 18; Mabank Ex. 3 at Ex. H

In response to Gun Barrel's contention that the transfer will result in great uncertainty, the ED states that relying on Gun Barrel to become its own water supplier for the area would result in greater uncertainty. The ED notes that East Cedar Creek has plans in place that will increase production capacity to 4.0 mgd by 2012. In contrast, Gun Barrel has no wholesale water contract, no pending deal to purchase Mabank's system, only a preliminary cost estimate, no plans and specifications for building the infrastructure, and only an intended use plan filed with the Texas Water Development Board (TWDB). In the meantime, Mabank will have to spend an additional \$8 million to continue to supply water to the area. The ED notes that East Cedar Creek is the only retail public utility that has a

concrete, predictable plan to serve the area, which should decrease the amount of uncertainty for developers.

As previously discussed, Gun Barrel suggests that there is something wrong with East Cedar operating at the reduced standard of 0.45 gpm and complains more specifically that that standard, which is applicable in a low density, low demand, rural area, is no longer acceptable to meet the needs of urban customers in a high growth area. Although Gun Barrel makes the point that it is the fastest growing municipality in the county, no data was presented establishing that its growth is unusual and cannot be kept up with increased capacity as it occurs. Gun Barrel also provided no information about prospective large projects that could be affected adversely. Although it included complaint letters written by the Gun Barrel City Economic Development Corporation in 2006, one of the problems seemed to be which water district supplied the area in question, Mabank or East Cedar Creek. GBC Ex. 6. Amalgamation under one system would solve that problem. And although Gun Barrel in its reply brief stated that its engineers calculated that 0.6 gpm capacity was needed, it provided no support for the allegation. Gun Barrel also complains that if a 0.45 gpm supply capacity flow standard was determined to be inadequate by the Commission when it denied Mabank's request for waiver, how can it now be determined that East Cedar Creek's 0.45 gpm standard will be appropriate for the same customers. Yet the reason for the Mabank denial was not sufficiently presented in this case, and even Mabank's City administrator, LouAnn, Confer did not know why. Tr. 160.

Although Texas Water Code section 13.246(c)(4) requires the consideration of projected density and land use in the area, East Cedar Creek was not required to present growth projections for the area to be transferred. Nor does section 13.246(c)(4) require a finding as to the projected costs of providing for the future needs of the area. Furthermore, although East Cedar Creek may be playing "catch-up" to continue to correct the failings of the many substandard systems that were conglomerated into the district, East Cedar Creek's engineer did not state that East Cedar Creek has not directed any attention to its future service capabilities, as Gun Barrel charges. Tr. at 111-12. That East Cedar Creek is having to correct the many failings of small, substandard systems that were conglomerated into its district underscores the need for regionalized water systems. Tex. Water Code

§ 13.241(d). Therefore, the ALJ finds that landowners will benefit from the experience that East Cedar Creek has gained from providing long time service in the area and that it will provide increased capacity as it is needed.

Gun Barrel also charges that East Cedar Creek acknowledged that its connection fees currently include an illegal impact fee component because the fee charged exceeds the cost of the connection by more than three times. Yet what Gun Barrel fails to address is that when East Cedar Creek discovered that it had misinterpreted Texas Water Code section 49.212(d), it took corrective action and agreed that over-collections will be refunded. Tr. at 53-55

D. The Impact on Other Utilities, Water Code § 13.246(c)(3) and 30 TAC § 291.109(e)(5)(D)

There is no dispute that Mabank will be positively affected by the transfer because the transfer will obviate the need for Mabank to spend \$8 million to expand its capacity. Tr. at 153-54.

E. The Feasibility of Obtaining Service from an Adjacent Retail Public Utility, Water Code § 13.246(c)(5); 30 TAC § 291.109(e)(5)(F)

There is no disagreement that East Cedar Creek and Mabank are the only existing retail public utilities in the area that provide water service and that East Cedar Creek provides sewer service to the transfer area. Gun Barrel contends, however, that it is in the public interest to allow it to run its own water system. To that end it has filed an intended use plan with TWDB.

In response, the other parties note that Gun Barrel has never owned or operated a public water system. Although it has recently expressed an interest in buying Mabank's system, it has not made a written offer to purchase the assets and CCN. It has filed no CCN application with the Commission. Tr. at 222-23, 227-28. And it has made no contract for obtaining a long-term supply of Commission-approved water. Tr. at 225-26.

Mabank responds that even if Mabank wanted to transfer the system to Gun Barrel, it is unrealistic to believe that Gun Barrel could obtain the financing, add staff, bid for and construct a water treatment plant, and contract for sufficient water supplies before 2012 when East Cedar Creek should be able to provide 4.0 mgd of service. Mabank suggests further that Gun Barrel's aspirations fail to acknowledge that the additional customer base for East Cedar Creek will provide economies of scale, will not require the construction of or proliferation of new treatment plants in contravention of the Commission's regionalization objectives, and will allow Mabank to avoid a costly plant expansion.

East Cedar Creek also notes that the transfer of the service territory to East Cedar Creek promotes the state policy of regionalizing water. East Cedar Creek asserts further that Gun Barrel would not be permitted to build its own stand-alone system as long as consolidation with an economically viable alternative, such as East Cedar Creek, is available. Tex. Water Code § 13.241(d).

The ED complains that the plan for Gun Barrel to have its own water system is so undeveloped that it merits no consideration. It would still require Mabank to spend \$8 million to meet its capacity problem while Gun Barrel City developed its own system. Tr. at 216. And even if Gun Barrel could buy the system from Mabank and find a source for water to put into that system, it would still only serve less than half of its residents, because East Cedar Creek already provides service to more than half of Gun Barrel's residents. The ED also notes that if Gun Barrel thinks that it could convince Mabank to sell its system to Gun Barrel, the same could be said for buying it from East Cedar Creek.

In response Gun Barrel asserts that it would never be able to get East Cedar Creek out of its city limits because East Cedar Creek could protect itself under section 1926(b) of the United States Code, which protects the service area of entities that have loans from the federal government to provide water service.¹⁶ According to the ED, the provision has been subject to different

¹⁶ (b) **Curtailed or limitation of service prohibited** The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the

interpretations by a Texas Court of Appeals and the Federal 5th Circuit. Moreover, as the ED suggests, Gun Barrel's reliance on the code provision is stretched and too tangential to be considered in this proceeding. No evidence was presented showing that East Cedar Creek has federal debt and the suggestion that East Cedar Creek might procure some just to hinder Gun Barrel in the future is nonsensical. Additionally, if federal debt were to block any attempt by Gun Barrel to take the service area in this case from East Cedar Creek, denying the transfer in this proceeding would not affect the half that East Cedar Creek already serves.

Section 13.255 of the Texas Water Code allows a city to take the territory of Special Utility Districts and Water Supply or Service Corporations that operate within its limits. Because East Cedar Creek is neither one, Gun Barrel argues that if the transfer is approved, it could not oust East Cedar Creek in the future. The ED responds that the argument is irrelevant, because East Cedar Creek, which serves half of the city, cannot now be ousted, nor can Mabank. The ED also points out that section 13.254 of the Texas Water Code allows decertification without consent of the CCN holder if certain conditions are met.

The ALJ finds that Mabank is the most feasible utility to provide service because it is economically viable and promotes the state policy of regionalizing water.

G. Applicant's Financial Capability, Water Code § 13.246(c)(6) and 30 TAC § 291.109(e)(5)(G) and 291.112(c)(5)(E)

This issue concerns whether East Cedar Creek has the financial stability to pay for the facilities that are needed to ensure continuous and adequate service to the area in question, which includes the adequacy of its debt-equity ratio. Gun Barrel asserts that East Cedar Creek presented no evidence in support of its ability to pay for the facilities necessary to serve the area other than for the acquisition cost from Mabank and the cost of interconnecting Mabank's distribution system in Gun Barrel to East Cedar Creek's. Gun Barrel complains that the costs of increasing raw water intake

time of the occurrence of such event.

capacity to 4.0 mgd, upgrading the treatment plant to 4.0 mgd, and providing additional elevated storage and service pumps were not addressed.

As noted, East Cedar Creek has been in continuous operation for more than 30 years. It obtained approval for a \$1.475 million loan from the TWDB, the purpose of which is to finance the purchase and the anticipated improvements necessary to serve the transferred area. ECC Exs. 1 at 17 and Ex. 3 at Schedule D. It has the capability to access capital markets at competitive interest rates and has a million dollar-plus reserve fund and 139 days of cash on hand. ECC Ex. 1 at 13; tr. at 145. It has an investment grade rating of A minus. ECC Ex. 1 at 4; ECC Ex. 3 at 3; tr. at 122. When purchasing bond insurance, it can acquire debt at the interest rates associated with an AAA rating. Tr. at 25. Given its bond rating and bond insurance, East Cedar Creek can access capital at low costs. ECC Ex. 3 at 3; tr. at 122-23.

The ED notes that East Cedar Creek has been able to get funding through the TWDB since 1978. Tr. at 26. According to the ED, TWDB has a stringent process for checking the creditworthiness of applicants. Tr. at 124-25. East Cedar Creek currently has two other loans with TWDB. Tr. at 28. And although both the ED and Mabank note that the concept of debt to equity ratio is not relevant to East Cedar Creek because it is not an investor owned utility, East Cedar Creek's debt service coverage, which is the proper measure of financial stability for governmental entities, is more than required to pay its debt service and is one of the strengths of its investment grade rating. Tr. at 128-29. According to the ED's financial expert, Stacy Foster, East Cedar Creek has demonstrated adequate financial and managerial capacity and has the sustainable financial health to provide for the service requested in the application. ED Ex. 9; tr. at 279-80.

Furthermore, although East Cedar Creek may have not provided dollar for dollar evidence of how it was going to pay the subsequent costs of upgrading its treatment plant and for future capital needs, the ALJ finds that East Cedar Creek witness James Sabonis demonstrated that East Cedar Creek has a strong financial history and can obtain the financing to serve increasing needs. ECC Ex. 3.

H. Environmental Integrity and Effect on the Land, Water Code 13.246(c)(7) & (9) and 30 TAC § 291.109(e)(5)(H)

According to Christopher Weeks' undisputed testimony, a minimal amount of ground surface will be disturbed to install infrastructure. ECC Ex. 2 at 7. Because the transaction is the transfer of an existing system, no extensive construction will trigger the issue of environmental integrity and adversely affect the land. The land should, therefore, be able to maintain its current long term value or be rezoned as developers request to change from agriculture to multi-purpose, commercial and light industry. ECC Ex. 1 at 20 and Ex. 2 at 8.

I. The Probable Improvement of Service or Lowering of Cost to Consumers, Water Code § 13.246(c)(8) and 30 TAC § 291.109(e)(5)(I)

Gun Barrel claims that dramatic rate increases are inevitable because of the facility improvements that will ultimately be mandated by the proposed transfer, which East Cedar Creek did not take into account in any of its analyses.

In response, East Cedar Creek points to Mr. Goheen's testimony wherein he noted that Mabank's Gun Barrel City rates are higher than East Cedar Creek's rates. Although the rates of the transferred customers will remain the same initially, after the transition is accomplished East Cedar Creek intends to lower their rates to the same level as East Cedar Creek's current customers. ECC Ex. 1 at 19-20. Moreover, East Cedar Creek will benefit by increasing its customer base, which will lower costs on a per customer basis. It has acquired additional water supplies from the City of Trinidad, and it has applied for and obtained approval for funding to serve the service area so that it will not suffer a negative financial impact from the proposed transfer. ECC Ex. 1 at 16-17.

Mabank is currently charging a \$29 base rate for a standard residential connection with a gallonage charge of \$3.70 per 1000 gallons for the first 10,000 gallons, \$4.25 for the next 10,000 gallons, and \$4.50 for more than 20,000 gallons. Initially, East Cedar Creek intends to charge the \$29 base rate with a gallonage charge of \$3.25 per 1,000 gallons for all levels of consumption. ECC Ex. 1

at 19. After the first year, East Cedar intends to reduce the transferred customers' water rates to the lower rates that it charges its current customers, that is, a base rate of \$17.26 with a gallonage charge of \$3.25-\$3.50 per 1000 gallons for the first 10,000 gallons and \$3.75 for more than 10,000 gallons. ECC Ex. 1 at 19-20, ED Ex. 6.

Gun Barrel countered that East Cedar Creek will charge higher initial connection or tap fees, that is, \$2,027 for a standard residential 5/8 inch meter, rather than the \$1,702 that Mabank charges. GBC Ex. 1 at 3 and Ex. 2 at 1; tr. at 47-50, 163. The ED counters that the increased charge will not apply to existing customers, but new ones. The ED reiterates that if the transfer is not approved existing customer costs will undoubtedly rise when Mabank spends \$8 million to maintain adequate capacity. In addition, the transfer of the area to East Cedar Creek will add to its customer base, providing economies of scale. ECC Ex. 1 at 15, 20-21.

The evidence presented shows that Gun Barrel's residents will see lower rates soon after the sale and will benefit from the increase in East Cedar Creek's customer base.

H. Fire Flow

Gun Barrel contends that the transfer would not be in the public interest because East Cedar Creek would not provide fire protection capability. Although Gun Barrel admits that no statute mandates that a retail water utility provide fire protection capability, it contends that such consideration should be given due weight when the utility service is to be provided in an increasingly urbanized area that has expressed the desire for fire protection capability. Gun Barrel's position is that the application should be denied because other options are available that will better ensure the safety of the proposed area. Gun Barrel also asserts, without reference to the record, that Gun Barrel has expressly spoken through its ordinances as to hydrant placement and fire flows and that East Cedar Creek is refusing to provide fire fighting capabilities through adequately sized pipes and flow capability.

Cedar Creek, Mabank, and ED note that fire flow and fire protection are not a requirement for granting a CCN. The ED specifically cites to *Application of Creedmoor Maha Water Supply Corporation to Amend Certificate of Convenience and Necessity No. 11029 for Water Service in Travis County*, SOAH Dkt No. 582-00-0546 at 40-41, TCEQ Dkt. No. 2000-0018-UCR, which stated that there are no cases in which the Commission required a water utility to provide fire fighting capability as a condition for granting a new or amended CCN or where the Commission found that fire protection was required for public safety under statutory considerations.

The ED further notes that, since that proposal for decision was written and approved by the Commission, the legislature has passed a law requiring certain utilities to provide fire flow. Texas Health and Safety Code section 341.0358(b), states, "The regulatory authority for a public utility shall by rule or ordinance adopt standards for installing fire hydrants and maintaining sufficient water pressure for service to fire hydrants adequate to protect public safety in residential areas in a municipality with a population of 1,000,000 or more." The new law obviously applies only to large cities. The ED also notes that Gun Barrel's expert witness, Sam Jones, admitted that he has never seen a CCN application for transfer turned down because the applicant could not provide fire flow. Tr. at 186.

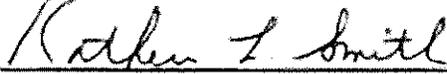
The ED also notes that there is no evidence in the record that East Cedar Creek could not provide fire flow. The issue is who would pay for it. Tr. at 36, 69-70, 81-82. Although Gun Barrel has the authority to pass such an ordinance, East Cedar Creek has the right to require payment or reasonable costs for the service. East Cedar Creek points to Texas Water Code section 49.212(a), which would require Gun Barrel to bear the cost of East Cedar Creek providing fire-fighting services inside the city.

Because a CCN is not required to provide fire flow, the ALJ concludes that it is not a factor in determining whether to grant or amend a CCN.

III. RECOMMENDATION

The ALJ recommends that the Commission approve the joint application of East Cedar Creek and Mabank because it meets all the requirements for an amendment to a water CCN. East Cedar Creek has experience in providing water service and has an adequate supply of water. After the completion of improvements, it will have additional capacity in its water treatment plant. It is the only retail public utility that can effectively serve the transferred area. It is financially strong and has a loan approved to finance the transfer. Customers will gain from decreased rates and the benefits of an integrated water infrastructure. East Cedar Creek has the financial, managerial, and technical ability to provide continuous and adequate service and granting the application will serve the public interest.

SIGNED November 30, 2010.



KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



AN ORDER Approving the Amended Application of the City of Crandall to Amend its CCN No. 11295 in Kaufman County; TNRCC Docket No. 2000-0393-UCR; SOAH Docket No. 582-00-1479

The Texas Commission on (Commission) considered the application of the City of Crandall to amend its certificate of convenience and necessity (CCN) no. 11295 in Kaufman County to add to the area in which the CCN authorizes Crandall to provide water utility service. The application was presented to the Commission with a Proposal for Decision by Katherine L. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a contested case hearing concerning the application. After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

PROCEDURAL HISTORY

1. On July 3, 2009, East Cedar Creek Fresh Water Supply District (East Cedar Creek) and the City of Mabank (Mabank) filed an application at the Texas Commission on Environmental Quality (TCEQ or Commission) for approval of the sale of a portion of Mabank's water distribution system and the transfer of that portion of Mabank's certificate of convenience and necessity (CCN) located in Gun Barrel City (Gun Barrel), Henderson County.
2. Notice of the application was mailed on September 15, 2009, to persons within the additional CCN area and to cities and neighboring retail public utilities providing the same utility service whose corporate limits or CCN boundaries are within two miles of the additional CCN area that East Cedar Creek wishes to acquire.
3. Additionally, that same notice was published in THE MONITOR, a newspaper regularly published and generally circulated in Henderson County, on September 6 and 10, 2009.
4. After requests for hearing were filed, the Chief Clerk referred this case to State Office of Administrative Hearings (SOAH) for hearing on November 20, 2009.

5. ALJ Katherine L. Smith held a preliminary hearing on the application on February 8, 2010. Notice of that preliminary hearing was mailed, on January 4, 2010, to all parties who had requested a hearing on the application.
6. At the preliminary hearing, the following were admitted as parties: East Cedar Creek (represented by Mark Zeppa); Mabank (represented by Bill Dugat); Gun Barrel (represented by Skip Newsome); and the Executive Director (ED) of the Commission (represented by Brian MacLeod, staff attorney). The Commission's Public Interest Counsel did not participate.
7. The hearing on the merits was held on January 13 and 14, 2010. The record on September 24, 2010, with the filing of written closing arguments and responses thereto, and a clarification of the cited record.

BACKGROUND FACTS

8. East Cedar Creek is a statutory municipal utility district and Mabank is a general law municipality.
9. Mabank currently provides water utility service to approximately 900 customers in Gun Barrel. East Cedar Creek currently provides water utility service to more than 50% of the residential connections in Gun Barrel. East Cedar Creek also provides all of Gun Barrel's sewer utility service.

NEED FOR SERVICE IN THE PROPOSED AREA

10. Mabank provides adequate service to its current customers
11. Mabank is developing water capacity shortages in its water system. Mabank's required capacity is currently over 85% of its provided capacity. Because it has reached 85% of its capacity, it has to submit to the ED a report detailing how it will provide for more service.
12. Mabank has not failed to comply with a Commission order.
13. Mabank wishes to sell the portion of its service area in Gun Barrel to East Cedar Creek free up capacity and to provide for future needs. Otherwise Mabank will have to expand its capacity at the cost of \$8,000,000.
14. Gun Barrel opposes the sale alleging that the transfer will reduce the level of service to Gun Barrel's customers, retard growth in the service area, and foreclose Gun Barrel from establishing its own water service.

IMPACT ON EAST CEDAR CREEK AND ITS ABILITY TO PROVIDE ADEQUATE SERVICE

15. East Cedar Creek has provided service to thousands of customers for more than 30 years. It has the largest CCN in Henderson County. It has long-term water supply contracts with the Tarrant County Regional Water Authority and the City of Trinidad.
16. East Cedar Creek has 13 trained employees, including the appropriate number of licensed operators. Bill Goheen, its General Manager, has more than 25 years experience in the water utility business.
17. The infrastructure needed to transport water from its Brookshire water treatment plant to the Gun Barrel service area is in place and only needs to be interconnected to Mabank's distribution lines.
18. East Cedar Creek's water system received a waiver in December 23, 1993, to maintain a supply capacity of 0.45 gallons per minute (gpm) per connection rather the 6.0 gpm per connection because the communities it serves are lakeside communities. The 0.45 gpm per connection is still in place because customer demand has not exceeded the demand level set by the Commission.
19. Gun Barrel provided no support for its allegation that there was a need for water production capacity of 6.0 gpm.
20. East Cedar Creek's raw water pump station can pump up to 3 million gallons per day (mgd). Although a portion of the Brookshire plant is currently off-line while one clarifier and two filters are being refurbished, when the filter refurbishment is completed by the end of this year, the full 3 mgd will be restored. Subsequent work on the clarifier refurbishment and the addition of a new raw water intake pump will increase the treatment capacity to 4.0 mgd.
21. The addition of 900 Gun Barrel customers to East Cedar Creek's current customers totals 4,606 customers to be served by the Brookshire plant. When one multiplies that number of by East Cedar Creek's approved capacity of 0.45 gpm per connection that equals 2,072.7 gpm to serve 4,606 customers. 2,072.7 gpm is equal to 2.98 mgd, which is less than the 4.0 mgd that will be available in 2012. 4.0 mgd is also enough to meet the 0.6 gpm per connection requirement.
22. East Cedar Creek will have sufficient capacity to provide serve the 900 Gun Barrel customers currently being served by Mabank.
23. In 2006, the Commission issued an Enforcement Order after determining that East Cedar Creek's treatment and disinfection process resulted in too many disinfection by-products so that it was non-compliant with the Commission rule for Haloacetic Acid (HAA5's).
24. Since then, East Cedar Creek's operators and management teams have entered into an 18-month, Commission and Environmental Protection Agency (EPA) performance based

training program to address disinfection by-product reduction. It has been collaborating with the EPA and the Commission to resolve the problem, including the use of new coagulants, which have been working. East Cedar Creek has adequately addressed its purported deficiencies.

25. East Cedar Creek has had violations noted by the Commission's regional staff at East Cedar Creek's Brookshire and McCay water treatment plants, resulting in a number of Commission inspection reports since 2001.
26. Commission regional staff visited the Brookshire system on November 30, 2009, noting several alleged violations. The violations mainly concerned maintenance and housekeeping issues. On January 25, 2010, East Cedar Creek submitted a compliance plan, which meets the Commission's requirements.

IMPACT ON LANDOWNERS

27. No evidence was presented establishing that landowners will be adversely affected by the transfer of water service from Mabank to East Cedar Creek.
28. The customers will benefit from service improvements. Looped water mains resulting from the transfer will enhance water pressure and reduce water quality risks associated with dead-end water mains. Interconnection of the East Cedar Creek and Mabank systems will provide East Cedar Creek with a temporary supply of water from Mabank in the event of an emergency.

IMPACT ON OTHER UTILITIES

29. Mabank will be positively affected by the transfer to East Cedar Creek because Mabank will not need to spend \$8,000,000 to expand its capacity.

FEASIBILITY OF OBTAINING SERVICE FROM AN ADJACENT RETAIL PUBLIC UTILITY

30. Besides Mabank, East Cedar Creek is the only existing retail public utility in the area that provides water service.
31. Gun Barrel has never owned or operated a public water system. Although it has recently expressed an interest in buying Mabank's system, it has not made a written offer to purchase the assets and CCN. It has filed no CCN application with the Commission. And it has made no contract for obtaining a long-term supply of Commission-approved water.
32. The transfer of the service territory to East Cedar Creek promotes the state policy of regionalizing water.

FINANCIAL CAPABILITY

33. East Cedar Creek obtained approval from the Texas Water Development Board (TWBD) for a \$1.475 million loan to finance the transfer and to make anticipated improvements to serve the transferred area.
34. It has a million-plus reserve fund and 130 days of cash on hand.
35. It has a bond rating of A-, which is a good rating for a municipal utility district. With the purchase of bond insurance, it can acquire debt at the interest rates associated with an AAA rating. Given its bond rating and bond insurance, it can access capital at low costs.
36. East Cedar Creek's debt service coverage is more than required to pay its debt service.
37. East Cedar Creek has the sustainable financial health to provide for the service requested in its application.

ENVIRONMENTAL INTEGRITY AND THE EFFECT ON THE LAND

38. Because the transaction involves the transfer of an existing system, no extensive construction will adversely affect the environmental integrity of the land.

LOWERING CONSUMER COSTS

39. Mabank's rates are higher than East Cedar Creek's.
40. Mabank is currently charging a \$29 base rate for a standard residential connection with a gallonage charge of \$3.70 per 1000 gallons for the first 10,000 gallons, \$4.25 for the next 10,000 gallons, and \$4.50 for more than 20,000 gallons. Initially, East Cedar Creek intends to charge the \$29 base rate with a gallonage charge of \$3.25 per 1,000 gallons for all levels of consumption. After the first year, East Cedar intends to reduce the transferred customers' water rates to the lower rates that it charges its current customers, that is, a base rate of \$17.26 with a gallonage charge of \$3.25-\$3.50 per 1000 gallons for the first 10,000 gallons and \$3.50 for more than 10,000 gallons.
40. East Cedar Creek will benefit by the increase in its customer base, providing economies of scale, which will lower costs on a per customer basis.

FIRE FLOW

41. Because a CCN is not required to provide fire flow, it is not a factor in determining whether to grant or amend a CCN.

CONCLUSIONS OF LAW

1. Based on the above Findings of Fact, notice of the application was sent to affected persons as required by Water Code § 13.246 and 30 Texas Administrative Code (TAC) § 291.112(c).
2. Based on the above Findings of Fact, notice of the hearing was provided as required by TEXAS GOVERNMENT CODE (Gov't Code) § 2001.051 and 2001.052.
3. Texas Water Code and the Commission's rules set forth the standards for transferring a portion of a CCN between retail utilities.
4. East Cedar Creek and Mabank filed the transfer application under section 13.301 of the Texas Water Code.
5. Under section 13.301(b), the Commission may require that an applicant purchasing or acquiring the water system to demonstrate that it has adequate financial, managerial and technical capability to provide continuous and adequate service.
6. Under section 13.301(d), the Commission shall determine whether the sale of the water system is in the public interest.
7. In determining whether the sale serves the public interest, the Commission may hold a hearing pursuant to section 13.301(e)(5) to consider the factors in Water Code § 13.246 (c), which are:
 1. the adequacy of service currently provided to the requested area;
 2. the need for additional service in the requested area, including whether any landowners, prospective landowners, tenants, or residents have requested service;
 3. the effect of the granting of a certificate or of an amendment on the recipient of the certificate, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area;
 4. the ability of the applicant to provide adequate service, including meeting the standards of the commission, taking into consideration the current and projected density and land use of the area;
 5. the feasibility of obtaining service from an adjacent retail public utility,
 6. the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
 7. environmental integrity;
 8. the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and
 9. the effect on the land to be included in the certificated area.

8. The Commission has restated these requirements and considerations in its rules. 30 TAC § 291.109(e)(5) and 291.112(c)(5)
9. Based on the above Findings of Fact, the transfer of service from Mabank to East Cedar Creek will provide for the need for additional service. Water Code § 13.246(c)(1) & (2) and 30 TAC § 291.109(e)(5)(B) & (C).
10. Based on the above Findings of Fact, East Cedar Creek will not adversely affect either East Cedar Creek or the Gun Barrel customers to be transferred because East Cedar Creek has the ability to provide adequate service to the service area being transferred. Water Code §§ 13.246(c)(3) & (4), 13.301(e)(2) & (3) and 30 TAC § 291.109(3)(5)(D) & (E) and 291.112(c)(5)(B), (C) & (D).
11. Based on the above Findings of Fact, the affected landowners will benefit from the experience that East Cedar Creek has gained from providing long time service in the area from increased capacity as it is needed. Water Code § 13.246(c)(3).
12. Based upon the above Findings of Fact Mabank will benefit from the sale. Water Code § 13.246(c)(3) and 30 TAC § 291.109(e)(5)(D).
13. Based upon the above Findings of Fact, other than East Cedar Creek, no opportunity exists to obtaining service from an other retail public utility Water Code § 13.246(c)(5); 30 TAC § 291.109(e)(5)(F).
14. Based upon the above Findings of Fact, East Cedar Creek has the financial capability to serve the transferred area. Water Code § 13.246(c)(6) and 30 TAC § 291.109(e)(5)(G) and 291.112(c)(5)(E).
15. Based on the above Findings of Fact, the environmental integrity of the land will not be affected. Water Code 13.246(c)(7) & (9) and 30 TAC § 291.109(e)(5)(H)
16. Based on the above Findings of Fact, the sale will not generally raise and may lower costs to customers in Gun Barrel. Water Code 13.246(c)(8) and 30 TAC § 291.109(e)(5)(I)
17. Based on the above Findings of Fact and Conclusions of Law, Crandall's application should be approved.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION THAT:

1. Application No. 32905-C by the City of Crandall to amend it CCN No. 11295 in Kaufman County, as amended by Crandall, is approved.
2. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
3. The Chief Clerk of the Texas Natural Resource Conservation Commission shall forward a copy of this Order to all parties and, subject to the filing of motions for rehearing, issue an amended CCN No. 11295 to Crandall that conforms to this Order.
4. 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.
5. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code Section 80.273 and Section 2001.144 of the Administrative Procedure Act, Tex. Gov't Code Ann. (West 2000).

Issue Date: _____

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Robert J. Huston, Chairman