

**SOAH DOCKET NO. 582-12-5353
TCEQ DOCKET NO. 2011-1647-PWS-E**

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
V.	§	STATE OFFICE OF
	§	
SOUTH TEXAS WATER AUTHORITY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

**REPLY OF SOUTH TEXAS WATER AUTHORITY TO THE
EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW South Texas Water Authority (the “Authority”) and files this its Reply to the Executive Director’s Exceptions to the Proposal for Decision in the above cause.

I
THE AUTHORITY IS NOT A PUBLIC WATER SYSTEM

30 TEX. ADMIN. CODE § 290.38(66) reads as follows:

“Public water system - A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. This term includes; any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater at least 60 days out of the year. Without excluding other meanings of the terms “individual” or “served,” an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.” [emphasis added]

The Executive Director's ("ED") staff witnesses, and the EPA witness, all agreed that to be a public water system ("PWS"), the system has to "have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year."

Witnesses Blake Atkins, Alicia Diehl and James Weddell said that they were not contending that the Authority has 15 service connections. (Tx. Vol. 1, Pages 165 and 166, Vol. 1, Pages 141 and 142, and Vol. 2, Page 23, respectively). They are contending that the Authority is a PWS because it serves "at least 25 individuals at least 60 days out of the year." (Tx. Vol. 1, Pages 160 and 162, Vol. 1, Pages 143 and 144, and Vol. 2, Page 22, respectively). It is undisputed that the Authority does not directly serve any individual. Nevertheless, the Executive Director contends that the customers served by the City of Kingsville (and the other retail customers served by the Authority's wholesale customers) are imputed to the Authority, and that the Authority therefore serves those customers.

The witnesses offered no explanation to support their contention that the Authority "serves" customers of the City of Kingsville. In answer to the question "I am asking you to tell me, under the common ordinary meaning of the word serve, how the South Texas Water Authority serves residential customers in the City of Kingsville," ED witness James Weddell said, "I cannot answer that." (Tx. Vol. 2, Page 21).

The witnesses Atkins, Diehl and Weddell all testified that they do not impute the connections of the Authority's wholesale customers to the Authority, because that would be "double dipping" or "double counting." (Tx. Vol. 1, Pages 165 and 166, Vol. 1, Pages 141 and 142, and Vol. 2, Page 27, respectively). The Authority supports this interpretation.

Then, in contradiction to the foregoing interpretation, those same witnesses imputed the population served by the Authority's wholesale customers to the Authority, thereby "double dipping" and "double counting" persons being served, by contending that the population served by the Authority's wholesale customers are served by both the wholesale customers and the Authority. (Tx. Vol. 1, Pages 160 and 162, Vol. 1, Pages 143 and 144, and Vol. 2, Page 22, respectively).

The Proposal for Decision ("PFD") effectively disposed of the ED's contention by noting the contradictions, and the opposing explanations in the EPA guidance documents.

Interestingly, there are two other contradictions which are not mentioned in the PFD. The first is a document introduced as STWA Exhibit 10 which is a document taken from the TCEQ website, entitled "Am I a 'Public Water System'?" It states that:

"A system must be a certain size to be considered public:

- it must have at least 15 service connections
- OR
- serve at least 25 individuals for at least 60 days out of the year.

This includes folks that live in houses served by a system, but can also include people that don't live there. For instance, people served could include employees, customers, or students."

This language clearly contemplates individuals served directly by a system.

The survival of this guidance document is interesting. Recently almost all of the TCEQ guidance documents related to drinking water rules, and in fact it seems all of them except the one described above say, "This staff guidance has expired and is not longer in effect." (Tx. Vol. 3, Pages 43 and 44). If the ED had developed his theory that downstream consumers of water served by the wholesale purchasers of water from the Authority are imputed to the Authority before this case

started, it seems reasonable to expect that a guidance document would have been posted and maintained to advertise such a non-obvious interpretation.

The second contradiction is found in an earlier letter from the ED's staff.

A "community water system" is defined in 30 TEX. ADMIN. CODE § 290.38(14) as:

"Community water system - A public water system which has a potential to serve at least 15 residential service connections on a year-round basis or serves at least 25 residents on a year-round basis."

Community water systems have to issue Consumer Confidence Reports. (See 30 TEX. ADMIN. CODE § 290.271 et seq.). In his October 19, 2004 letter, Michael R. Lentz, CCR Coordinator, Public Drinking Water Section, Water Supply Division, to Carola Serrato, advised that "Wholesale systems which do not have any connections other than wholesale customers do not have to comply with the CCR rule." A copy of this letter is attached behind Tab 3 to STWA Exhibit 1.

This letter recognizes that the Authority is not a community water system, i.e., that residential connections served by the Authority's wholesale customers are not counted in determining whether the Authority is a community water system. By analogy, the residential connections served by the Authority's wholesale customers should have no bearing on whether the Authority is a public water system.

The foregoing October 19, 2004 letter from Michael R. Lentz establishes that the Authority does not have a "potential to serve at least 15 residential service connections on a year-round basis or serves at least 25 residents on a year-round basis." By analogy, the Authority's system does not have "at least 15 service connections or serve at least 25 individuals at least 60 days out of the year" as required to be a "public water system."

When the ED realized that he would probably not prevail by relying on the language in the definition of a PWS he developed a backup theory involving a circular argument based on the definitions of combined systems and consecutive systems. The PFD effectively disposed of this contention. Interestingly, Blake Atkins acknowledged that the TCEQ rules define combined and consecutive systems, but do not make any provision addressing disinfectant residual in combined systems or consecutive systems. (Tx. Vol. 1, Pages 191 and 192). This was confirmed by James Weddell. (Tx. Vol. 2, Page 15).

The ED then went to his third backup contention, involving the definition of a distribution system. The PFD effectively disposed of that contention.

When that didn't work, the ED contended that the distribution system is not just the part of a system under somebody's control; it extends all the way from the source of raw water to and through the treatment plant, and from thence through wholesale providers to retail providers to the ultimate consumers. This theory is addressed later under the discussion of the architecture of the EPA Rules.

Then, in his Exceptions, the ED promulgated yet another backup theory. At page 6 of his Exceptions, the ED contends that the last sentence of the definition of a PWS, reading:

“Without excluding other meanings of the terms ‘individual’ or ‘served,’ an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.”

This language clearly addresses how the persons being served are to be counted, saying that people working in retail establishments, living in apartment houses, etc., served by the system, are to be counted as being served by the system. This is explained in the Commission guidance document

mentioned earlier on page 3 of this Reply. The sentence in the definition of a PWS that is mentioned by the ED gives no hint that downstream retail customers of the Authority's wholesale customers are deemed to be served by the Authority.

For his fifth and final backup theory, the ED, develops another theory that was not mentioned at the hearing nor in the previous post-hearing briefs. In his Exceptions, at page 23, the ED develops the theory that, if the Authority is not a PWS then the distribution systems of the Authority's wholesale customers cannot be connected to the Authority. For additional support of that theory the ED alludes to TEX. HEALTH & SAFETY CODE § 341.0315(e), which prohibits the connection of the distribution system of a public drinking water supply to that of any other system unless the other water is of safe and sanitary condition.

The Authority does not agree with this analysis. However, if we accept the analysis as true, it only applies to the connection with Kingsville because that is the only location where the Authority has a continuing problem with the chloramine residual. This issue is addressed later in the section of this Reply addressing solutions to the dilemma.

II **THE ED'S EXCEPTIONS**

The twenty-nine (29) single-spaced pages of the ED's Exceptions appear to be an essay on the philosophy and science underlying the rules. The Exceptions make many allegations of fact without citations to where those facts can be found in the transcript, and many of the facts alleged by the ED cannot be found in the transcript. Nowhere in his Exceptions does the ED provide a coherent, logical explanation of his wishful interpretation of the definition of a PWS.

The theories developed in the Exceptions that were not previously raised in this case evidence that the ED's increasing acceptance of the fact that the contentions of the Authority are correct.

III
THE PARAMETERS CONCERNING THE COMMISSION'S
INTERPRETATION OF THE RULE

As a preliminary matter, it is interesting to note that the ED contends that "an agency's construction of its rule is controlling if it does not contradict the plain language of the rule and is reasonable." It is perhaps important to note that as yet, the Commission has not yet made an interpretation of the rule in question in this case. Historically, for the last decade or so, all interpretations of rules have been made by ED staff member James Weddell, working out of San Angelo. Mr. Weddell's interpretations are not binding on the Commission.

The Authority does except to two contentions in the PFD, as follows:

"As an initial matter, the ALJ stresses that the determination of whether STWA is a public water system is, in this case, solely a legal determination. As such, the Commission has the final authority to make such a determination, particularly because the determination hinges upon the Commission's interpretation of its own rules. Put bluntly, while the ALJ is presenting a recommendation, the Commission may decide this issue either way." (Proposal for Decision at page 10)

The Authority agrees with the above statement, except for the last sentence that said, "The Commission may decide this issue either way."

The other comment to which the Authority excepts is stated as follows:

"From a legal standpoint, there is enough ambiguity in the rules and statutes for the Commission to adopt the ED's proposed interpretation if it so chooses." (Proposal for Decision at page 16)

First, the cases cited by the ED establish the parameters governing the Commission's interpretation of the rules. (See *Texas Gen. Indem. Co. v. Texas Workers' Comp. Comm'n*, 36

S.W.3d 635, 641 (Tex. App.–Austin 2000, no pet.); *Phillips Petroleum Co. v. Texas Comm’n on Environmental Quality*, 121 S.W.3d 502, 507-507 (Tex. App.–Austin Nov 20, 2003); *Railroad Comm’n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 54 Tex. Sup. Ct. J. 642, 645 (Tex., Mar 11, 2011); *Southwestern Bell Telephone. Co. v. Public Util. Comm’n*, 888 S.W.2d 921, 927 (Tex. App.–Austin 1994, writ denied)).

These cases established the following:

1. The text of an administrative rule must be construed under the same principles as if it were a statute.
2. Interpretation of statutes is a question of law that is to be reviewed de novo.
3. Where language in a statute is unambiguous, the court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used.
4. An administrative agency has the power to interpret its own rules, and its interpretation is entitled great weight and efforts by the court called upon to interpret or imply such rules. The agency’s construction of its rule is controlling unless it is plainly erroneous or inconsistent.
5. The words should be interpreted according to their ordinary meaning; they are not to be interpreted in an exaggerated, forced or strained manner.

Miriam-Webster, Inc., *Webster’s Ninth New Collegiate Dictionary* (1988), at page 77, defines “ambiguous” as “capable of being understood in two or more possible senses or ways.” There is only one way that the definition of a public water system can be understood. To create an ambiguity, the ED must articulate a meaning other than that described by the Authority and the PFD. Saying it is so does not make it so. The ED’s alternate meaning must be subject to coherent

explanation based on reason and logic. The ED failed that test. He failed to “connect the dots” and has not been able to present a coherent, logical explanation of his wishful interpretation that the definition of PWS means something other than the plain wording of the definition in 30 TEX. ADMIN. CODE § 290.38(66).

The basic rule is that a rule or regulation of an administrative agency that provides financial penalties must give “fair warning of the nature of the proscribed conduct.” “When persons of common intelligence are compelled to guess at a law’s meaning and applicability, due process is violated and the law is invalid.” (*City of Webster v. Signad, Inc.*, 682 S.W. 2d 644, Tex. App. 1st Dist. 1984). No common person of ordinary intelligence could imagine that the Authority could be “serving” customers of the City of Kingsville (or any other retail customers served by the Authority’s wholesale customers).

IV ARCHITECTURE OF THE EPA AND TCEQ RULES

The difficulty began when the EPA adopted an architecture that conceptually defines a system as the entire facilities between the source (a reservoir or ground water) and the ultimate consumer, and then attempted to adopt rules applicable to each participant along the way. This is contrary to intuition. Intuitively, the rules should provide that anybody who deals with drinking water must do so in a certain way; i.e., if you treat drinking water, you must treat it in a certain way, if you transmit drinking water, you must do so in a certain way, if you store drinking water, you must do so in a certain way, and if you deliver water to the ultimate consumer, you must do so in a certain way. This is not what the EPA did, and that resulted in the confusion surrounding this case.

The EPA rules define “consecutive systems” and “combined systems” and require a disinfectant residual to be maintained throughout those systems. (Tx. Vol. 1, Page 149). The EPA does not have a definition of a “distribution system.” (Tx. Vol. 1, Page 185). It seems that the EPA has rules addressing disinfectant residuals through the combined and consecutive systems but the TCEQ rules do not.

Blake Atkins acknowledged that the TCEQ rules define combined and consecutive systems, but do not make any provision addressing disinfectant residual in combined systems or consecutive systems. (Tx. Vol. 1, Pages 191 and 192). This was confirmed by James Weddell. (Tx. Vol. 2, Page 15). Instead, unlike the EPA, the TCEQ defines a distribution system and requires maintenance of a disinfectant residual in the distribution system.

A “distribution system” is defined in 30 TEX. ADMIN. CODE § 290.38(21) as:

“Distribution system--A system of pipes that conveys potable water from a treatment plant to the consumers. The term includes pump stations, ground and elevated storage tanks, potable water mains, and potable water service lines and all associated valves, fittings, and meters, but excludes potable water customer service lines.”

The Authority does not have “a system of pipes that conveys potable water from a treatment plant to the consumers.” The Authority’s system does not comply with that definition. The adoption of a complicated system of rules by the EPA, and the TCEQ’s deviation from that system results in the conclusion that the Authority is not subject to the rules. The Authority cannot be required to comply with rules that do not apply to the Authority.

V THE COST CONSEQUENCES

The HDR Engineering study commissioned by the Authority shows that the cost of measures required to maintain the chloramine residual in the forty-two-inch (42") line in the vicinity of the

Kingsville range from \$8,500,000 to \$37,500,000. (Tab 25 in STWA Exhibit 1). James Weddell said that he does not know of any other way to address the issue besides what is in the HDR report. (Tx. Vol. 2, Page 7). These amounts are unrealistic. The Authority's annual budget, not including the amount paid to Corpus Christi for water, is approximately \$1.5 million. The debt service on the bonds required to produce the amounts set forth above would increase the rates charged to the Authority's customers by approximately 50% for the least expensive option and 230 % for the most expensive option, all this taking place in an economically distressed region of the State. (Tx. Vol. 2, Pages 38 through 87, and Tx. Vol. 2, Pages 212 and 213).

VI **PUBLIC HEALTH**

As explained at the hearing, and in the PFD, the problem exists because the Authority's 28 mile 42-inch diameter line was designed to supply all of Kingsville's needs, originally estimated to be 5 mgd. Kingsville quickly discovered that it could produce water from its wells at a cost much less than the price charged to the Authority by Corpus Christi, at the Corpus Christi treatment plant. Therefore, historically Kingsville has taken little water, causing the water to sit stagnant in the line near Kingsville, which causes loss of disinfectant residual. Nevertheless, the Authority maintains that the water in its forty-two-inch (42") pipeline in the vicinity of Kingsville is safe to drink because it meets the EPA's less-stringent chloramine residual requirements. There was some debate amongst the other parties as to whether this is true. Dr. Diehl believes that, because the chloramine residual has fallen below the TCEQ requirement, the water is "unknown," so she does not know whether re-disinfection before the water is delivered to Kingsville, and re-disinfection again by Kingsville

before it enters the Kingsville distribution system, is sufficient to resolve any problems. (Tx. Vol. 1, Pages 64-67).

There was no debate as to whether the water in the City of Kingsville is safe to drink. Blake Atkins of the EPA and the Authority's engineer, Aaron Archer, testified that, if the Consumer Confidence Reports for the Kingsville shows that the water meets federal and state drinking water standards, the water is safe to drink. (Tx. Vol. 1, Page 198, and Vol. 2, Pages 198 and 199). The Kingsville CCRs do indeed show this information. They are behind Tab 19 in STWA Exhibit 1. The Mayor of the City of Kingsville characterized the situation as a "non-problem." (STWA Exhibit 5).

VII **THE SOLUTION**

Where a problem exists, the task is to find a solution. The solution offered by the ED is to spend an enormous sum of money to solve what the Mayor of Kingsville describes as a non-problem.

The problem is not a real-life problem that poses a threat to human health. It is a problem created by an never-seen-before contrived explanation of what is a PWS. To solve this non-problem, the ED proposes draconian penalties. The better solution is to adjust the rules. In that regard the Authority emphatically states that it welcomes regulatory oversight because that will provide a second opinion on its performance.

The first solution offered by the Authority is that the Commission give the ED two (2) years in which to redefine the rules pursuant to which the Authority will be a PWS, and to allow the Authority to meet the EPA chloramine residual requirements in certain instances, which would include the location made the subject of this case. In his Exceptions, the ED stresses that the

Commission's rules must be at least as restrictive as the EPA rules. With respect to chloramine residual, the Commission's rules are more stringent. The Commission requires a residual of 0.5 mg/l. The EPA requires that the chloramine residual not drop below 0.2 mg/l for a period of more than four (4) hours, and that a trace residual be maintained at all times. (See STWA Exhibit 1, Tab 23). The Authority can comply with the EPA rule, but not with the Commission rule. Such a revision of the rules will not affect the public health, as noted previously.

The Authority's other solution is based on the ED's suggestion that if the Authority's customers are taking water from the Authority that does not meet the state and federal drinking water standards, they may be in violation of the drinking water rules. There is only a problem at one location, namely, at the City of Kingsville. In essence, the Authority is being asked to spend between \$8,500,000 and \$37,500,000 to address a problem for one customer. There is an alternative. The Commission can give the City of Kingsville the option of ceasing to take any water from the Authority, or taking enough water to pull water through the forty-two-inch (42") line and reduce the stagnation time in an amount sufficient to maintain the required chloramine residual.

The Authority's preference is for revision of the rules.

VIII **CONCLUSION**

The issue in this case is whether the Authority is a public water system. Both sides agree that whether the Authority is a public water system depends on whether the Authority serves "... at least 25 individuals at least 60 days out of the year." The Executive Director asserts that the Authority does serve at least 25 individuals, without giving an acceptable coherent explanation as to why it is

counting customers of the Authority' wholesale purchasers. The Authority gives a rational explanation as to why it does not serve at least 25 individuals.

WHEREFORE, PREMISES CONSIDERED, the Authority requests that the Proposal for Decision's conclusion that the Authority is not a public water system be adopted, and for such other orders and relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2013, the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, the foregoing document was served as indicated:

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