

**SOAH DOCKET NO. 582-22-1016
TCEQ DOCKET NO. 2021-1214-MWD**

**APPLICATION BY AIRW 2017-7 L.P. § BEFORE THE STATE OFFICE
FOR § OF
TPDES PERMIT NO. WQ0015878001 § ADMINISTRATIVE HEARINGS**

**JONAH WATER SPECIAL UTILITY DISTRICT’S REPLY TO THE CITY OF
GEORGETOWN’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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

COMES NOW, Jonah Water Special Utility District, Protestant in the above-referenced proceeding (“Jonah”), and files this its Reply (“Reply”) to the City of Georgetown’s Exceptions to the Proposal for Decision (“Exceptions”).

I. REPLY

In its Exceptions, the City of Georgetown (the “City”) repeats many of the same arguments previously stated in its Closing and Reply Briefs,¹ but there is one key fact the City is silent on; the City cannot legally provide utility service to the Wastewater Treatment Plant (the “Facility”) at issue without Jonah’s consent.² The City’s silence on this fact is significant, because without legal authorization to provide wastewater service to the Facility, all of the City’s arguments are extraneous.

The City has only provided two new arguments regarding Jonah that have not previously been addressed by the Administrative Law Judges (“ALJs”). The City’s first new argument focuses on an ongoing petition filed by Jonah that was never referenced in the record and is irrelevant to this proceeding. In its second new argument, the City blatantly misstates facts in an attempt to avoid paying for its share of transcription costs. In reference to the City’s two new arguments, Jonah replies:

¹ See City of Georgetown’s Closing Brief (“City’s Closing Brief”) (June 14, 2022); see also City of Georgetown’s Reply Brief (June 24, 2022).

² *Rules and Guidance for Water and Sewer Utilities*, Public Utility Commission of Texas, available at <https://www.puc.texas.gov/industry/water/guidance/UtilRulesGuidance.aspx> (last visited Sept. 21, 2022) (“Similarly, a municipality may not provide retail water or sewer service within the CCN service area of a retail public utility unless the municipality has a CCN to provide retail water or sewer utility service to that area.”)

A. Jonah as Future Owner and Operator of the Facility Furthers the State of Texas’ Regionalization Policy.

In its Exceptions, the City restates its previous argument that using Jonah does not support regionalization. To attempt to bolster this argument, the City references a petition that Jonah and the City of Hutto jointly filed with the Public Utility Commission of Texas (“PUC”) on July 25, 2022. No evidence regarding the petition was ever presented in the record, so the City is asserting an argument for which there is no evidence in the record.

Even if the City had presented evidence in the record to support its new argument, that proceeding would be irrelevant to the draft permit at issue in this proceeding, TPDES Permit No. WQ0015878001 (the “Permit”), because the City recognizes that the proceeding is ongoing. In addition, Jonah presented evidence that it intends to provide wastewater service throughout the rest of its CCN service area.³

B. Jonah’s Participation In the Hearing Was Not Equal to The City’s and Applicant’s Participation.

In its Exceptions, the City raises a second new argument, that Jonah equally benefitted from the reporting and transcription services and therefore should pay for one-third of the transcription costs, alongside the City and Applicant.⁴ The City later claims that Jonah should pay transcription costs because it “participated roughly equally in the hearing” to the City and Applicant.⁵ Even a quick glance at the hearing transcript debunks the City’s argument; while the City’s presentation of its case and examination of witnesses accounts for **301 pages** of the 710-page transcript, and Applicant’s presentation and examination accounts for **231 pages**, Jonah’s participation extends to a mere **38 pages**. Due to Jonah’s minor participation in the hearing, Jonah even gave several hours of its allotted time to the City and Applicant.⁶ Not only is Jonah’s

³ See Hearing Tr. at 288:8-10; 12-13; 20-25; 289:1-16 (Brown Cross) (May 24, 2022) (“Q: Can you tell me generally whether Jonah has any plans to serve other nearby areas, communities, other than the Applicants . . . ? A: Yes, ma’am. We do have plans. We are currently going through a master – wastewater master plan development . . . we’re focusing on from Limmer Loop – or University Boulevard . . . Chandler Road to the north of our – the north end of our district from – from the western boundaries to the east, that entire area to be served. So there’s several developments out there. Q: Let me clarify what I was asking. I’m talking about sewer only. A: That’s sewer only that we’re looking at, yes, ma’am.”)

⁴ See City of Georgetown’s Exceptions to PFD (Sept. 12, 2022) at 48.

⁵ See *id.* at Proposed FOF 139 (“The City, Jonah, and AIRW participated roughly equally in the hearing”)

⁶ See Hearing Tr. at 265: 20-25; 266:1-5 (Judge Lutostanski) (May 24, 2022) (“The Applicant and the City have requested additional time to make their cases. We had a discussion, and ED and Jonah have graciously given back

participation in the hearing far from equal to the City's and Applicant's participation, examining the hearing transcript shows that the City actually benefitted from the reporting and transcription services the most of any party.⁷ The ALJs' determination that Jonah's participation in the hearing was minor and disproportionate to the City's and Applicant's participation, and that the City and Applicant participated roughly equally in the hearing, is correct.⁸

C. Jonah's Position on all Previously Stated Arguments Remains the Same.

The remainder of the City's arguments repeat those raised in the City's Closing Brief. The ALJs have appropriately addressed those issues in the Proposal for Decision, and Jonah's responses to the City's arguments remain the same:

a. Jonah as Future Owner and Operator of the Facility Furthers the State of Texas' Regionalization Policy.

As attested to by witnesses of the Executive Director, Applicant, and Jonah, Jonah as the future owner and operator of the Facility satisfies the state's regionalization policy.⁹ The full text of TWC § 26.003 provides:

It is the *policy of this state and the purpose of this subchapter to maintain the quality of water in the state* consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.¹⁰

By editing TWC § 26.003 in its closing brief to remove the purpose of this state's regionalization policy, *to maintain the quality of water in the state*, the City attempted to alter the

some of their time that they don't expect to use. So Jonah and the ED now are going to go down to two-hour time limits at this point . . . and we'll give the City an extra two hours and the Applicant an extra two hours.")

⁷ 301 pages is 70 pages greater than 231, and 263 pages greater than 38.

⁸ See Proposal for Decision at 75; FOF 77 and 78.

⁹ See Jonah Water Special Utility District's Closing Argument at 7 ("Jonah's Closing Argument") (June 14, 2022).

¹⁰ TWC § 26.003 (emphasis added).

meaning of the statute.¹¹ However, when given the opportunity to read the entire text of the statute, it is evident that Jonah meets the state’s regionalization policy. Jonah meets the policy because:

- Jonah’s certificated water service area encompasses the site of the Facility;
- Jonah is willing and able to own and operate the Facility; and
- Jonah’s cost-based fees for providing service to the development are not prohibitive.¹²

In the *Application by the Crystal Clear Special Utility District and MCLB Land, LLC for TPDES Permit No. WQ0015266002 in Hays County, Texas*, the Commission found that circumstances similar to those present here – Crystal Clear Special Utility District’s (“Crystal Clear”) provision of sewer service to the subdivision in question – furthered the state’s regionalization policy.¹³ Analogous to Jonah, the Commission also noted that Crystal Clear’s provision of service furthered regionalization because it was a large service provider in the region that held the water Certificate of Convenience and Necessity (“CCN”) for the area where the subdivision was located.¹⁴ Jonah has an even larger service area than Crystal Clear, and the location of the Facility is located wholly within Jonah’s certificated water service area.¹⁵

Jonah additionally satisfies the state’s regionalization policy because Jonah is invested in the quality of the water in the area, since Jonah’s water supply comes from both surface water and groundwater, including water from Lake Granger, into where the Facility will eventually discharge.¹⁶

In its Closing and Reply Briefs, the City tried to paint Jonah as a complete novice to the wastewater-service business, when in reality Jonah’s General Manager has been servicing

¹¹ See City of Georgetown’s Closing Brief at 53 (“It is the policy of this state . . . to encourage and promote the development and use of regional and areawide WASTE collection”)

¹² See Jonah’s Closing Argument at 5.

¹³ See *Appl. by the Crystal Clear Special Utility District and MCLB Land, LLC for TPDES Permit No. WQ0015266002 in Hays County, Texas*, TCEQ Docket No. 2020-0411-MWD, as corrected, 2021 TX SOAH LEXIS 26 (Apr. 12, 2021); AIRW-EXH 27 at 31 (Finding of Fact No. 50) (“The provision of sewer service from Crystal Clear to the Subdivision furthers the State’s policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located.”)

¹⁴ See *id.*

¹⁵ See Hearing Tr. at 579:8-11 (Tuckfield Cross) (May 25, 2022) (“You’ve got the same thing here That Jonah is similar – actually bigger than Crystal Clear”)

¹⁶ See AIRW-EXH 4 at 10 (Application for TPDES Permit) (“The discharge route is via a pipe to an unnamed tributary; thence to Mankins Branch; thence to San Gabriel/North Fork San Gabriel River, Segment 1248 of the Brazos River Basin.”)

wastewater treatment plants since the early 1990s and teaching TCEQ-approved water and wastewater classes to operators and operators-in-training since the early 2000s.¹⁷ Jonah’s General Manager also holds a Class A Wastewater Treatment Operator license.¹⁸ Jonah currently provides water and sewer service for approximately 9,000 customers and 30,000 people in its service area.¹⁹ Jonah has previously operated wastewater treatment plants, and is currently in negotiations to provide wastewater service to other nearby developments.²⁰ Also, Jonah already owns a wastewater collection system within its certificated water service area that has been approved by the TCEQ.²¹

Additionally, Jonah is currently developing a wastewater master plan to expand its wastewater services within its certificated water service area.²² For all of the reasons described above, Jonah as the future owner and operator of the Facility *encourages and promotes the development of regional and areawide waste collection, treatment, and disposal systems.*

By arguing that Jonah does not satisfy the state’s regionalization policy, the City ignores the deference due to the Executive Director.²³ Further, by claiming that it would be a better service provider than Jonah, the City overlooks the fact that it cannot provide utility service to the Facility without Jonah’s consent, since the Facility is located within Jonah’s water CCN service area and

¹⁷ See City of Georgetown’s Closing Brief at 54; See Hearing Tr. at 293:2-8 (Brown Cross) (May 24, 2022) (“I’ve been around wastewater treatment plants since the early ‘90s. I’ve operated small plants from lagoon systems, to oxidation ditches, to extended aeration plants . . . And all different – various sizes.); see *id.* at 294:10-15 (“I’ve been an approved instructor since the early 2000s. I’ve taught for – I’ve taught water and wastewater classes for Texas A&M extension services. I’ve taught classes for Texas Rural Water, but more specifically I’ve taught countless classes for Texas Water Utilities Association, both water and wastewater.”); see *id.* at 18-21 (“Q: And who do you teach when you teach those classes? A: Operators are [or] operators in training in the water and wastewater industry.”)

¹⁸ See Jonah Ex. BB-1 at 1 (William Brown’s TCEQ License Detail).

¹⁹ See Jonah Ex. JWSUD-5 at 4:11-12 (Revised Direct Testimony of William Brown).

²⁰ See Hearing Tr. at 253:15-17 (Brown Cross) (May 23, 2022) (“Q: Has Jonah Water ever operated any wastewater treatment plants? A: Yes.”); 288:5-16 (Brown Cross) (May 24, 2022) (“You asked me to be more specific. There are so many potential developments out there that it’s hard for me to recall them all. But Rancho San Gabriel, then there’s some to the south, the Patterson Ranch. There’s a mobile home park that is going – that is planned at 105 and 110 and 104 that may utilize a facility in that area. There’s just several out there . . . That’s sewer only that we’re looking at, yes, ma’am.”)

²¹ See *id.* at 255:14-17 (Brown Cross) (May 23, 2022) (“Q: So Jonah has a wastewater collection system that is permitted by the TCEQ? A: It was approved by TCEQ.”)

²² See *id.* at 288:12-14 (Brown Cross) (May 24, 2022) (“We do have plans. We are currently going through a master – wastewater master plan development.”)

²³ See *id.* at 576:21-24 (Tuckfield Cross) (May 25, 2022) (“Well, I think if you look at a common theme through Midtex, Crystal Clear, Regal, and all these cases, they talk about deference to the ED on this regionalization question.”)

partially within its district boundary.²⁴ The City has never requested consent from Jonah to provide wastewater service to the Facility, and Jonah does not consent to the City providing service to the Facility.²⁵ Consequently, the City has no legal authorization to provide wastewater service to the Facility.²⁶

Neither the Commission nor the legislature have established any preference for cities as regional providers over any other entity, such as a district.²⁷ Jonah and Applicant have entered into agreements for Jonah to be the future owner and operator of the Facility.²⁸ Jonah has sufficiently shown that its future ownership and operation of the Facility furthers the state’s regionalization policy.²⁹ Therefore, the City has failed to substantiate its regionalization concerns regarding the Permit, and Jonah respectfully requests that the Permit be issued to Applicant.

b. Jonah’s Support of the Permit Does Not Necessitate Applicant Re-Filing the Application, and the City’s Motion to Dismiss Was Correctly Denied.

Contrary to the City’s assertion, Jonah is not a “Co-Applicant” and the Applicant does not need to withdraw its permit application to file another application with Jonah. During the hearing, the City cited part of 30 Texas Administrative Code (“TAC”) § 305.43 and argued that it required that Applicant withdraw the application.³⁰ However, the City’s interpretation is incorrect, as reflected by the plain language of the rule. 30 TAC § 305.43 provides:

²⁴ *Rules and Guidance for Water and Sewer Utilities*, Public Utility Commission of Texas, available at <https://www.puc.texas.gov/industry/water/guidance/UtilRulesGuidance.aspx> (last visited Sept. 21, 2022) (“Similarly, a municipality may not provide retail water or sewer service within the CCN service area of a retail public utility unless the municipality has a CCN to provide retail water or sewer utility service to that area.”) ; *see also* 16 TAC § 24.229.

²⁵ *See* Hearing Tr. at 289:17-23 (Brown Cross) (May 24, 2022) (“Q: Has Jonah . . . ever received a request for consent from the City of Georgetown to serve anywhere within your district boundaries? A: Not that I’m aware of.”)

²⁶ TWC § 13.244(c); 16 TAC § 24.225(c).

²⁷ *See* Hearing Tr. at 620:10-15 (Tuckfield Redirect) (May 25, 2022) (“Q: This may be very obvious, but has the Commission or the legislature established any preference for cities as regional providers over any other entity? A: No. Q: Any other utility? A: No.”)

²⁸ *See* AIRW-EXH. 43 (NSSAs between Jonah Water Special Utility District and 800 Westinghouse Investments, LLC, and Jonah Water Special Utility District and 600 Westinghouse Investments, LLC).

²⁹ *See* Hearing Tr. at 685:14-19; 686:3-5 (Cooper Cross) (May 25, 2022) (“Q: Just one last question. Based on all the evidence that you’ve seen in the prefiled testimony and that you’ve witnessed in this hearing, what is your opinion about whether service by Jonah Water Special Utility District in the future would further regionalization? A: . . . I think it would definitely further it.”); *See id.* at 578:16-19 (Tuckfield Cross) (May 25, 2022) (“Q: So regarding that issue, does service by Jonah satisfy Texas’s regionalization policy? A: Absolutely. It’s – and Crystal Clear – the Crystal Clear case makes that clear.”)

³⁰ *See id.* at 240:10-15 (Counsel for Georgetown) (“[T]his is 305.43, Who Applies: It is the duty of the owners of the facility to submit an application for a permit; however, if the facility is owned by one person and operated by

It is the duty of the owner of a facility to submit an application for a permit or a post-closure order. However, if the facility is owned by one person and operated by another and the executive director determines that special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order, and for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit.³¹

Upon reading of this statute, it is clear that 30 TAC § 305.43 does not apply to this case. First, the Facility is not and has not been owned by one person and operated by another. Jonah does not either own or operate the Facility. Jonah has entered into an agreement with the Applicant to become the owner and operator of the Facility at a later date, if Applicant’s permit application is granted.³² Jonah’s Non-Standard Service Agreements (“NSSAs”) with the Applicant state that “. . . Developer and District have agreed that District will provide wastewater service to the Property through the construction of a wastewater treatment plant that has been permitted by Developer and transferred to District”³³ For the NSSAs to take effect, the Permit must first be granted to Applicant and then transferred to Jonah; these are both preconditions that have not yet been met. Jonah and Applicant’s agreement does not state that Applicant owns the Facility and Jonah operates it, so 30 TAC § 305.43 does not apply.

Second, the City once again glossed over—in stating, “blah blah blah” at the hearing—an essential portion of the statute: the Executive Director makes the determination of whether an application should be refiled.³⁴ The Executive Director has not determined that “special circumstances exist where the operator or the operator and the owner should both apply for a permit

another, **blah, blah, blah**, it’s the duty of the operator and the owner to submit an application for a permit.”) (emphasis added).

³¹ 30 TAC § 305.43(a).

³² See Hearing Tr. at 323:17-21 (Sims Cross) (May 24, 2022) (“Q: So it is your opinion that – or is it correct that Jonah will be the sole operator of the facility in question? A: After the permit is issued, and it is transferred to them, yes.”)

³³ See AIRW-EXH 43 (Wastewater Non-Standard Service Agreements between Jonah and 600 Westinghouse Investments, LLC and 800 Westinghouse Investments, LLC).

³⁴ See Hearing Tr. at 240:10-15 (Counsel for Georgetown) (“[T]his is 305.43, Who Applies: It is the duty of the owners of the facility to submit an application for a permit; however, if the facility is owned by one person and operated by another, **blah, blah, blah**, it’s the duty of the operator and the owner to submit an application for a permit.”) (emphasis added).

or a post-closure order.”³⁵ In fact, the Executive Director stated in response to the City’s motion that, “[W]e should move forward with the hearing as originally scheduled, and we shouldn’t have it sent back for a reapplication.”³⁶ As the Executive Director’s determination is required under the statute, the City is incorrect that 30 TAC § 305.43 has been implicated in this proceeding. For these reasons, the City’s objection was properly overruled and disregarded by the ALJs during the hearing and its Motion to Dismiss was properly denied.

c. Jonah, Like Any Other Party in This Proceeding, has the Right to Reassess its Position.

As explained in testimony by William “Bill” Brown and Miles Whitney, and in Jonah’s Closing and Reply Briefs, Jonah is a Protestant in this proceeding and initially opposed the issuance of the Permit to Applicant because it was concerned about another entity operating the Facility within Jonah’s CCN service area.³⁷ Jonah no longer has these concerns, since it has executed agreements with Applicant to be the future owner and operator of the Facility if the Permit is granted and then transferred to Jonah.³⁸

The City’s contention that it is wrong for Jonah to change its position or revise its testimony is a frivolous argument not supported by fact or law.³⁹ The City was unable to cite to any TCEQ rule or applicable state or federal law that prohibits Jonah from reassessing its position—because there are none. By insinuating that Jonah is not allowed to reassess its position on any issues, the City is merely attempting to draw attention away from the fact that it is legally barred from providing service to the Facility, since the site of the Facility is located within Jonah’s exclusive jurisdiction, and is trying to create unnecessary delay by forcing the application to be withdrawn and refiled.⁴⁰

Further, it should have come as no surprise to the City that Jonah reassessed its position after executing agreements with Applicant, since Applicant first tried to reach an agreement with

³⁵ 30 TAC § 305.43.

³⁶ Hearing Tr. at 243:7-10 (Executive Director Salehi) (May 23, 2022).

³⁷ See Jonah Ex. JWSUD-5 at 7:9-15 (Revised Direct Testimony of William Brown); JWSUD-5 and JWSUD-6 (Revised Direct Testimony of William Brown and Miles Whitney, respectively); Jonah Water Special Utility District’s Closing Argument.

³⁸ See Jonah Ex. JWSUD-5 at 7:19-20 (Revised Direct Testimony of William Brown).

³⁹ See City’s Closing Brief at 55.

⁴⁰ TWC § 13.244(c); 16 TAC § 13.225(c)

the City for wastewater service.⁴¹ It has always been clear that Applicant did not intend on owning and operating the Facility itself, and Jonah’s so-called “self-serving flip-flop”⁴² is actually a reflection of a change in circumstances that the City should and likely has predicted all along.⁴³

II. PRAYER

WHEREFORE, PREMISES CONSIDERED, Jonah Water Special Utility District, Protestant in this proceeding, hereby prays that the Commission grant the application, issue the Permit to Applicant, and award any such other and further relief to which Jonah may be entitled to in law or equity.

Respectfully submitted,

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⁴¹ See GT Ex. 10 at 1, 7 (Email correspondence from Sofia Nelson, Planning Director for the City of Georgetown to Matt Hiles, Developer, copying Wayne Reed, Assistant City Manager for the City of Georgetown, dated January 23, 2020, stating that annexation will be required if the developer wishes to connect to the City’s wastewater system).

⁴² See City of Georgetown’s Closing Brief at 55.

⁴³ See AIRW-EXH 8 at 5:3-6 (Direct Testimony of Janet Sims); see GT Ex. 10 at 2 (Email correspondence from Matt Hiles, Developer, to Wayne Reed, Assistant City Manager for the City of Georgetown, dated Feb. 6, 2020, stating that Mr. Hiles does not desire or require connection to Georgetown wastewater, but desires connection to a proposed public wastewater utility system and Jonah public water utility system).

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document on all parties of record on this 22nd day of September 2022, as follows:

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