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SOAH DOCKET NO. 582-23-10368
TCEQ DOCKET NO. 2022-1731-MWD

APPLICATION BY R040062, LP § BEFORE THE STATE OFFICE
FOR § OF
TPDES PERMIT NO. WQ0016008001 § ADMINISTRATIVE HEARINGS

JONAH WATER SPECIAL UTILITY DISTRICT'S CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Jonah Water Special Utility District, Protestant in the above-referenced proceeding ("Jonah"), and files this its Closing Arguments pursuant to the Order Granting Motion to Extend Deadlines ¹ and, in support thereof, would show the following:

I. HEARING ON THE MERITS

In a two-day hearing on the merits, conducted as a hybrid hearing, with parties appearing both in person and via Zoom remote videoconference from August 15, 2023 to August 16, 2023 (the "Hearing"), R040062, LP ("Applicant"), Jonah, TCEQ Executive Director ("Executive Director" or "ED"), and the Office of the Public Interest Counsel ("OPIC") (collectively, the "Parties"), presented evidence and arguments in support of and in opposition to the draft permit at issue in this proceeding, TPDES Permit No. WQ0016008001 (the "Permit"). The Hearing was conducted by the Honorable Administrative Law Judge ("ALJ") Holly Vandrovec. Jonah presented two witnesses, William "Bill" Brown, General Manager of Jonah, and Miles Whitney, the professional civil engineer for Jonah, who testified regarding Jonah's opposition of the Permit's issuance. Mr. Brown and Mr. Whitney testified regarding their direct testimony, admitted at the Hearing as exhibits JWSUD-1 and JWSUD-2, respectively. Mr. Brown and Mr. Whitney's testimony during the Hearing supported denial of the Permit to Applicant.

At the close of the Hearing, the ALJ requested the Parties file closing briefs on September 7, 2023, with responsive closing briefs to be filed by not later than September 14, 2023. Pursuant to the Order Granting Motion to Extend Deadlines, those deadlines were extended to September 18, 2023, and September 25, 2023, respectively.²

¹ See SOAH Order Granting Motion to Extend Deadlines (Sept. 15, 2023).

² *Id.*

II. CLOSING ARGUMENTS

A. Legal Standard

Pursuant to Texas Water Code (“TWC”) § 5.557, the purpose of the contested case hearing is to determine whether the application complies with all applicable statutory and regulatory requirements.³ Texas Government Code § 2003.047 guides how SOAH’s review of these requirements is conducted.⁴ More specifically, subsections (i-1) through (i-3) of Section 2003.047 describe the procedural process in a contested case hearing at SOAH and the rights of the parties as follows:

(i-1) In a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

- (1) the draft permit meets all state and federal legal and technical requirements; and
- (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

- (1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
- (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

(i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.⁵

³ The Applicant requested a direct referral of the application to the State Office of Administrative Hearings (“SOAH”) pursuant to 30 TAC § 55.210 on November 17, 2022, and the matter was transferred to SOAH on January 19, 2023. *See* TCEQ Request to Docket Case (Jan. 19, 2023). TWC § 5.557 allows applicants to request direct referral of the subject application to expedite the process. This obviates the need for a Commission order regarding specific issues to be considered and broadens the scope of the hearing to encompass consideration of whether the application meets all applicable statutory and regulatory requirements.

⁴ Tex. Govt. Code § 2003.047.

⁵ *Id.*

B. The Application Fails to Address All Statutory and Regulatory Requirements.

Jonah identified two deficiencies with R040062, LP's application ("Application"), which neither the Applicant nor Executive Director provided sufficient evidence to controvert or otherwise overcome to support issuance of the Permit. These deficiencies leave the Application shy of meeting all applicable statutory and regulatory requirements and thus necessitate denial.

i. The Applicant Failed to Secure Jonah's Consent

Evidence in the record reflects that the Applicant seeks the issuance of the Permit to provide wastewater service within Jonah's certificated service area and district boundary.⁶ More specifically, the map admitted as Exhibit JWSUD-4 (also numbered MW-1) depicts that the location of the proposed facility is within both Jonah's water certificate of convenience and necessity ("CCN") and district boundaries.⁷ This evidence is uncontroverted. Mr. Brown testified that the Applicant did not seek Jonah's consent to provide wastewater service in Jonah's CCN service area and Jonah does not consent to such service therein.

TWC § 13.044(c) requires the Applicant to obtain consent from Jonah and provide evidence of Jonah's consent as part of the Application. TCEQ's form permit application requests information concerning two types of entities for which an applicant could potentially need consent, but fails to include information regarding the third type of entity from which consent may be required before service can be provided in a particular area.⁸ TWC § 13.244(c) requires that "[e]ach applicant for a certificate or for an amendment shall file with the utility commission evidence required by the utility commission to show that the applicant has received the required consent, franchise, or permit of the proper municipality or other public authority." This includes special utility districts such as Jonah and thus, without Jonah's consent, the Applicant will be legally barred from providing service.⁹

⁶ Administrative Record Exhibit A, Subtab D, bates pages 25,64,72, and 121; *see also* Exhibit JWSUD -4 District/Water CCN Map (also labeled as Exhibit MW-1).

⁷ Transcript Vol. 1 at 15, lines 13-14 (Aug. 15, 2023).

⁸ *See Exhibit A*, APP. EXHIBIT A000332-000333 (TCEQ 10054 (06/01/2017) Domestic Wastewater Permit Application Technical Reports Pages 21-22 of 80; Bates 046-47).

⁹ TWC § 13.244(c) requires that "[e]ach applicant for a certificate or for an amendment shall file with the utility commission evidence required by the utility commission to show that the applicant has received the required consent, franchise, or permit of the proper municipality or other public authority."

Special utility districts, like cities, may provide water and wastewater service within their territorial boundaries without the necessity of a CCN.¹⁰ This authority also comes with the authority requiring consent before another provider provides service within those boundaries.¹¹ Jonah, as a special utility district, has this authority.¹²

As reflected on page 21 of the TCEQ's form permit application regarding regionalization, the TCEQ requires an applicant to indicate whether "any portion of the proposed service area is located in an incorporated city" and "[i]f consent to provide service is available from the city," the applicant must attach "a justification for the proposed facility and a cost analysis of expenditures that includes the cost of connecting to the city versus the cost of the proposed facility or expansion attached." In addition, the TCEQ's application also requires an applicant to indicate whether any portion of the proposed service area is located inside another utility's CCN area and if so, the applicant must provide "a justification for the proposed facility and a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion."¹³

Neither the Application, nor any supplemental documentation, evidence, or testimony address Applicant's failure to obtain Jonah's consent. While the Applicant and ED were both aware of the deficiency identified by Jonah, neither party provided additional evidence to controvert these claims or support the draft permit in accordance with Tex. Govt. Code § 2003.047(i-3).¹⁴ While ED's counsel cross examined Mr. Brown regarding his knowledge of a "TCEQ rule that says an applicant for a new TPDES permit must get consent from the state CCN

¹⁰ Many cities and water districts have CCN territories. The boundary lines for the certificated areas may be concurrent with the entities jurisdictional boundary or include areas beyond them. *See* TWC § 13.242 and 65.201.

¹¹ *Id.*

¹² *See* TWC § 13.244(c) and 16 TAC § 24.225(c); 16 TAC § 24.229. Jonah is a special utility district, a political subdivision of the State of Texas operating under Texas Water Code Chapter 65 and thus has all of the rights, powers, privileges, authority and functions conferred by, and shall be subject to all duties imposed by, the rules and regulations of the Texas Commission on Environmental Quality and the general laws of the State of Texas relating to special utility districts. This includes the power to provide wastewater service. Jonah Water SUD was created via Texas Water Commission Order in the matter of the petition of Jonah Water Supply Corporation for creation of and conversion to Jonah Water Special Utility District, Ordering Provision No. 6, May 15, 1992.

¹³ *See* Admin Record Subtab D, bates page 46-47 and 185-186.

¹⁴ Jonah raised this deficiency in its response to the Applicant's Motion for Summary Disposition, *see* Jonah Water Special Utility District's Response to R040062, LP's Motion for Summary Disposition at 7-9 (Jul. 24, 2023).

holder in order to obtain a permit,”¹⁵ this line of questioning does not provide evidence to support or controvert the Applicant’s failure to comply with TWC §13.244(c).

Similarly, Applicant’s witness Mr. Tuckfield testified that it does not matter that the proposed facility as presented is within Jonah’s district boundaries, citing to the TCEQ website and focusing on whether there is an existing facility or system within 3 miles.¹⁶ Mr. Tuckfield’s reliance on the TCEQ’s website is faulty because TCEQ’s website is not a substitute for applicable state law — here, TWC § 13.244(c). Additionally, the relevant statutory requirement is not tied to or dependent on TCEQ’s regionalization analysis. Pursuant to TWC § 5.557 and subject to the process in Tex. Govt. Code § 2003.047, the SOAH ALJ (and ultimately the Commission) must determine whether the Application complies with all statutory and regulatory requirements. The uncontroverted evidence in the record demonstrates that the Applicant has not obtained the statutorily required consent to provide service within Jonah’s district boundaries.¹⁷ This deficiency renders the Application incomplete for failing to comply with all applicable statutory and regulatory requirements, warranting denial.

ii. The Applicant’s Regionalization Demonstration Remains Incomplete

The Applicant and ED staff accurately cite to portions of the state’s regionalization policy in TWC §§ 26.003 and 26.0282, but omit analysis under TWC § 49.230, applicable when a district is affected by an application for wastewater permit. This section provides:

AREA-WIDE WASTEWATER TREATMENT. The powers and duties conferred on the district are granted subject to the policy of the state to encourage the development and use of integrated area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state whenever economically feasible and competitive to do so, it being an objective of the policy to avoid the economic burden to the people and the impact on the quality of the water in the state that result from the construction and operation of numerous small wastewater collection, treatment, and disposal facilities to serve an area when an integrated area-wide wastewater collection, treatment, and disposal system for the area can be reasonably provided.¹⁸

¹⁵ Transcript Vol. 1 at 29, lines 12-15 (Aug. 15, 2023).

¹⁶ See Exhibit C, Direct Testimony and Attachments of David Tuckfield, Esq. filed on Behalf of R040062, LP at 22:22-27.

¹⁷ TWC § 13.244(c).

¹⁸ TWC § 49.230.

Both Mr. Brown and Mr. Whitney testified that the expected number of new residents and the proximity of the numerous proposed wastewater plants to Jonah's existing water infrastructure could affect water quality. Mr. Brown testified that Jonah provides water service to "about 13,500" customers and "about 35,000 people" in its service area and "that number is growing significantly."¹⁹ As reflected in Exhibit No. JWSUD-4 (also numbered as MW-1) there are ten proposed wastewater permits pending in or near Jonah's district boundaries.²⁰ This testimony and Exhibit JWSUD-4 confirm that Jonah's territory is located within a concentrated area of significant growth, necessitating an analysis of whether an integrated area-wide wastewater collection, treatment, and disposal system can be reasonably provided to avoid an economic burden to the people and a negative impact on the quality of water in the state. The construction and operation of numerous small wastewater collection, treatment, and disposal facilities, such as proposed for the area, may result in multiple negative impacts to customers served by Jonah and statewide. Although necessary, ED witness Sonia Bhuiya confirms that no such analysis was conducted. When asked about the state law applicable to regionalization in Chapter 49, ED witness, Ms. Bhuiya testifies that "for this application, I did not review those things."²¹

Mr. Tuckfield testified that he did not address TWC Chapter 49 in his written testimony, believing it is not relevant.²² However, Mr. Tuckfield's opinion fails to respect the objective of TWC § 49.230, which states:

... an objective of the policy to avoid the economic burden to the people and the impact on the quality of the water in the state that result from the construction and operation of numerous small wastewater collection, treatment, and disposal facilities to serve an area when an integrated area-wide wastewater collection, treatment, and disposal system for the area can be reasonably provided.²³

The absence of any analysis by the ED or Applicant of whether an integrated area-wide wastewater collection, treatment, and disposal system for the area can be reasonably provided as reflected in

¹⁹ See JWSUD-1, Direct Testimony of William Brown, at 4:6-8, and as corrected on direct at Transcript Vol 1. Pg 24, lines 3-10 (Aug. 15, 2023).

²⁰ See JWSUD-4, District/Water CCN Map (also labeled as Exhibit MW-1).

²¹ Transcript Vol. 1 at 47, lines 5-6 (Aug. 15, 2023).

²² Transcript Vol. 2 at 19, lines 23-25 (Aug. 16, 2023).

²³ TWC § 49.230.

the state's regionalization policy in TWC § 49.230 renders the Application deficient and warrants denial.

III. CONCLUSION

The Applicant's choice of direct referral for this Application to SOAH for a contested case hearing on whether the Application complies with all applicable statutory and regulatory requirements means exactly what it states — all applicable statutory and regulatory requirements. Although the Applicant may have established a prima facie demonstration that the draft permit meets state and federal legal and technical requirements,²⁴ and a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property, this demonstration is not iron clad. Applicant's failure to address two applicable statutory requirements, regardless of the fact that they are not included in TCEQ's permit application, renders the Application deficient. Here, the Applicant failed to seek and secure Jonah's consent to provide service within its district boundary in accordance with TWC § 13.044(c), and the ED and Applicant failed to conduct any analysis of whether an integrated area-wide wastewater collection, treatment, and disposal system for the area can be reasonably provided as reflected in the state's regionalization policy in TWC § 49.230. These two omissions are fatal to the application and thus warrant a recommendation of denial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Jonah Water Special Utility District, Protestant in this proceeding, hereby prays that the Honorable Administrative Law Judge recommend denial of the permit and award any such other and further relief to which it may show itself to be granted, at law or in equity.

²⁴ By filing the Application with the office, the draft permit prepared by the ED, the preliminary decision issued by the ED, and other sufficient supporting documentation in the administrative record for the permit application.

Respectfully submitted,



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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 18th day of September 2023, as follows:

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