



Control Number: 43572



Item Number: 71

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83<sup>rd</sup>  
Legislature, Regular Session, transferred the functions  
relating to the economic regulation of water and sewer  
utilities from the TCEQ to the PUC effective  
September 1, 2014

SOAH DOCKET NO. 582-03-3725  
TCEQ DOCKET NO. 2003-0664-UCR

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<p><b>IN RE: THE APPLICATION OF BEXAR</b></p> <p><b>METROPOLITAN WATER DISTRICT</b></p> <p><b>TO AMEND WATER CCN NO. 10675 IN</b></p> <p><b>BEXAR COUNTY</b></p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p><b>BEFORE THE STATE OFFICE</b></p> <p><b>OF</b></p> <p><b>ADMINISTRATIVE HEARINGS</b></p>
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**ORDER NO. 22**  
**GRANTING PARTIAL SUMMARY DISPOSITION MOTION AND**  
**DENYING MOTION FOR FURTHER ABATEMENT**

On August 31, 2005, Bitterblue, Inc., (Bitterblue) filed a motion for summary disposition in this case, requesting a ruling that the application of Bexar Metropolitan Water District (Bexar Met) for expanding the boundaries of Water Certificate of Convenience and Necessity (CCN) No. 10675 (the application) be dismissed as to property Bitterblue owns or controls. Bitterblue argued that 2003 legislation that defined the Bexar Met's boundaries barred issuance of expanded CCN authority for Bexar Met to serve areas in which Bitterblue's property is located.<sup>1</sup> Bexar Met opposed the action, arguing that the matter of the reach of the 2003 legislation, SB 1494<sup>2</sup>, had not yet been fully resolved by the courts and that the legislation may not be constitutional.<sup>3</sup>

After hearing the argument of parties, on October 19, 2006, the Administrative Law Judge (ALJ) abated the pending case until January 15, 2005. The abatement was based on the determination by the ALJ that the legal issues presented in the contested case regarding the application of SB 1494, were substantially the same as those being presented in a lawsuit then pending in the District Court of Comal County, Texas, 274<sup>th</sup> Judicial District (Comal County suit).<sup>4</sup> On May 5, 2006, Judge Gary Steel of the 274<sup>th</sup> District Court ruled that, following the passage of SB

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<sup>1</sup> Motion to Intervene and for Dismissal by Summary Disposition, August 31, 2005, as supplemented through May 2006.

<sup>2</sup> Act of June 18, 2003, 78<sup>th</sup> Leg., R. S., Ch. 375, 2003 Gen. Laws 1593 ("SB 1494" or the Act).

<sup>3</sup> Response in Opposition to Summary Disposition, September 15, 2005, as supplemented through May 2006.

<sup>4</sup> Cause No. C2003-1201A.

1494, Bexar Met had no legal authority to annex additional service area into its district beyond the boundaries defined in SB 1494.<sup>5</sup> The tract at issue which is controlled by Bitterblue, the Kinder Ranch, is outside the Bexar Met boundaries described in SB 1494.

The abatement of the pending case was lifted on April 16, 2006, and on May 12, 2006, Bitterblue renewed its request for relief. Bexar Met renewed its opposition to such relief and also sought further abatement of the pending case until appeals of other pending district court cases are concluded. On May 30, 2006, the ALJ heard further oral argument on the current status of the law and permitted the parties to argue their positions on identifying the date the case was referred to SOAH. Per SB 1494, the referral date to State Office of Administrative Hearings (SOAH) determines whether the new law applied to pending cases.<sup>6</sup>

Having considered written and oral argument by parties, evidence, and applicable legal authority, the ALJ hereby *grants* Bitterblue's motion for summary disposition, pursuant to 1 TEX. ADMIN. CODE § 155.57.<sup>7</sup> Further, the ALJ hereby *denies* Bexar Met's request for additional abatement of this case.

Absent further order of the ALJ, the application—exclusive of certain Bitterblue-controlled property—will proceed to hearing under the schedule in Order No. 19, with the hearing on the merits to commence on **October 30, 2006**, in Austin, Texas.

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<sup>5</sup> Final Judgment, May 5, 2005. The holding, in pertinent part, states as follows:

...  
(iii) Following passage of Senate Bill 1494, Bexar Met has no authority to annex and incorporate additional area to its territory.

<sup>6</sup> See Order No. 20, transmitting SOAH referral documents, and No. 21, seeking argument and authority specifically on the issue of establishing the referral date.

<sup>7</sup> Although TEX. R. CIV. P. 166a does not directly apply in SOAH cases, the elements and principles of that rule and SOAH's summary disposition rule, Rule 155.57, are substantially similar. In analyzing this issue, the ALJ has been guided by case law interpreting and applying Rule 166a. 1 TEX. ADMIN. CODE § 155.3(g).

### A. Evidentiary Issues

Bexar Met's objection to affidavit testimony of Gene Dawson, Jr., regarding the proposed boundaries of the amended CCN and Bitterblue's properties was rendered moot by Bexar Met's admission in court that most of the service territory sought in the application lies outside its service territory as described in SB 1494.<sup>8</sup>

Following are rulings on several evidence questions relating to the date on which Bexar Met's application was referred to SOAH. The "Request to Docket Case" form filed by the Chief Clerk or other staff of the Texas Commission on Environmental Quality (TCEQ) is hereby admitted to the record by official notice.<sup>9</sup> Objections by Bitterblue to the admission of the last sentence of Michelle Abrams' affidavit regarding the referral date are overruled.<sup>10</sup> However, all objections to portions of her affidavit as constituting a legal conclusion were considered in evaluating the weight to be given to her statement. In support of its position, Bexar Met also requested consideration of certain stipulations filed in the Travis County suit regarding referral and pre-referral dates.<sup>11</sup> Bexar Met identified them as dates salient to establishing the referral date and also as sufficient to raise a factual issue regarding the referral date.<sup>12</sup> Bitterblue, not a party to the Travis County suit, did not dispute the accuracy of the dates listed in the stipulation, only arguing as to their significance or legal impact. Thus, as there was no dispute regarding the accuracy of the dates included, the ALJ considered them in ruling on the summary disposition motion.

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<sup>8</sup> The affidavit of Gene Dawson, Jr., and attached Exhibits Nos. 1 and 2, are hereby admitted to the record in support of the summary disposition motion.

<sup>9</sup> TEX. GOV'T CODE ANN. § 2001.090. A copy of the "Request to Docket Case" form was provided to the parties in this case on May 31, 2006, after discussion of this issue at the motion hearing.

<sup>10</sup> Submitted May 12, 2006.

<sup>11</sup> *City of San Antonio, acting by and through the San Antonio Water System, v. Kathleen Harnett White, et al.*, Cause No. D-1-GV-000053, Travis County Dist. Court, 200<sup>th</sup> Judicial District (Travis County suit).

<sup>12</sup> Submitted June 23, 2006.

## **B. Motion for Abatement**

At the motion hearing on May 30, 2006, Bexar Met asked for an extension of the abatement period to allow the appellate process in several other cases to be completed. Specifically, Bexar Met anticipated that it would be requesting the judge in the Comal County suit to consider its constitutional claims and then might appeal the final decision in that suit. Also, Bexar Met stated that the declaratory judgment action pending in Travis County, is also expected to address the scope of Bexar Met's authority to expand its service territory, and asserted that a decision in the Travis County is expected to be issued in the near future. Bitterblue opposed the abatement motion, arguing that the matter is ripe for decision and that it has financial interests in regard to developing its properties that would be harmed by an abatement that would extend through the conclusion of the appellate process. The Executive Director (ED) of TCEQ did not take a position on further abatement.

The ALJ concludes that this matter is ripe for decision in this forum. The scope and meaning of the Act that governs this motion has been determined by a District Court of the state. Interpretation of the scope and meaning of legislation is a legal question and questions of law are reserved to the state courts, as answering them does not necessitate agency expertise.<sup>13</sup>

Nor is a contested case hearing at SOAH the appropriate place to raise the issues of constitutional infirmity and legitimacy of the enactment of SB 1494 which Bexar Met argued in this case and which it has also raised in the pending district court cases.<sup>14</sup> Those matters are reserved for the constitutional courts of the state so will not be further considered in this proceeding.<sup>15</sup>

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<sup>13</sup> *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W. 3d 212 (Tex. 2004), *Juliff Gardens, L. C. v. Tex. Comm'n on Env'tl. Quality*, 131 S.W. 3d 271 (Tex. App.—Austin 2004).

<sup>14</sup> *Central Power & Light Co. v. Sharp*, 960 S.W. 2d 617 (Tex. 1997), *Juliff* at 278-280.

<sup>15</sup> TEX. GOV'T CODE ANN. § 2001.174(2)(A), *USA Waste Services of Houston, Inc. v. Strayhorn*, 150 S.W. 3d 491 (Tex. App.—Austin 2004, review denied).

### C. Summary Disposition Issues

For summary disposition to be warranted, there must be no genuine issue as to any material fact. The court must also resolve all doubts about the existence of a genuine fact issue against the party moving for the motion, and resolve every reasonable inference in favor of the party opposing the motion.<sup>16</sup>

The applicable law, SB 1494, lists the facts that are material to consideration of this issue. In pertinent part, it reads as follows:

SECTION 3. Chapter 306, Act of the 49<sup>th</sup> Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), is amended by adding Section 5A to read as follows:

Sec. 5A. (a) The District's [Bexar Met's] boundaries for purposes of the exercise of its powers and duties is defined in Section 5 of this Act.

(b) In conformity with the court's judgment dated April 22, 1996, in Cause No. SA96CA0335, *Rios v. Bexar Metropolitan Water District, et al.*, in the United States District Court, Western District of Texas, and for the purpose of the exercise of its current retail water utility services, the District's boundaries shall include the territory defined in all or applicable portion of census tracts of property situated within any area certificated by the Texas Commission on Environmental Quality to the District on the date of passage of the Act adding this section pursuant to Certificates of Convenience and Necessity Nos. 10675, 12759, and 12760.

...

SECTION 5. ... (c) The repeal of Sections 6, 6a, and 20, Chapter 306, Acts of the 49<sup>th</sup> Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), does not affect a pending application for a certificate of convenience and necessity that has been referred by the Texas Commission on Environmental Quality to the State Office of Administrative Hearings before the effective date of

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<sup>16</sup> *State v. Durham*, 860 S.W.2d 63 (Tex. 1993), *Harper v. Fikes*, 336 S.W.2d 631 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).

this Act. An application referred before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

Under the provisions of SB 1494 set forth above, there are three facts material to the resolution of Bitterblue's motion: (1) whether Bitterblue's tracts lie in areas beyond Bexar Met's district boundaries described in Sec. 5A(b) of the Act, (2) the effective date of the Act, and (3) the date the application was referred to SOAH for contested case hearing.

There is no dispute as to the first two questions. The parties differed as to the third point, the referral date. Bexar Met's position is that the referral occurred on June 16, 2003, two days before the effective date of SB 1494.<sup>17</sup> Bexar Met argued that the TCEQ Staff's referral decision constituted the legally-significant act and that acts by the Chief Clerk or others to transmit the case to SOAH after that date were ministerial, hence, not determinative. Bitterblue argued that the regulatory scheme makes the acts of the Chief Clerk in referring the case to SOAH the ones which define when a case referral occurs. Thus, in Bitterblue's view, since the earliest date on which the Chief Clerk handled this matter, June 23, 2003, was after the effective date of SB 1494, the Act applies.<sup>18</sup>

In regard to these facts, the ALJ finds as follows:

1. Bitterblue controls properties that lie in areas beyond the Bexar Met district boundaries described in Sec. 5A(b) of SB 1494.
2. The Act was effective on June 18, 2003.
3. Bexar Met's application for the amendment of Water CNN No. 10675 was referred to SOAH on July 2, 2003.

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<sup>17</sup> Bexar Met letter, June 17, 2006.

<sup>18</sup> Bitterblue letter, June 23, 2006.

Having found those three material facts as stated above, the ALJ concludes that the provisions of SB 1492 affect Bexar Met's application, making it subject to the ruling issued on May 5, 2006, by Judge Steel. Thus, Bitterblue's motion for summary disposition is granted as to relevant tracts located outside Bexar Met's district boundaries.

The only fact on which there was any substantial dispute was the date on which the contested case was referred to SOAH. In their most-recent pleadings, the parties failed to identify any Water Code or TCEQ rule language fixing that date. Rather, the parties offered extensive argument regarding which of the steps in the referral evaluation, decision-making, and preparation process that took place at TCEQ constituted the "referral" date. However, the parties were unable to supply authority mandating the use of any of those earlier dates or authority for the preference of one date over another. The ALJ concludes that the matter can be resolved by reference to existing procedural rules of TCEQ and SOAH, without the need to analyze internal TCEQ processes.

SOAH has adopted the procedural rules of TCEQ by reference and SOAH must follow TCEQ's rules on topics on which that agency has adopted rules.<sup>19</sup> However, if TCEQ's rules are silent, SOAH follows its own procedural rules.<sup>20</sup> TCEQ's rule on referrals specifies that when a case is referred to SOAH, the Chief Clerk shall file with SOAH a request for setting of hearing form, or request for assignment of ALJ form.<sup>21</sup> This rule harmonizes with SOAH's rule, Rule 155.7, regarding the date on which SOAH acquires jurisdiction over a referred case. Rule 155.7 states that SOAH acquires jurisdiction over a case referred by an agency at the time that agency files a "Request

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<sup>19</sup> 1 TEX. ADMIN. CODE § 155.1(b).

<sup>20</sup> 1 TEX. ADMIN. CODE § 155.3(c) and (d).

<sup>21</sup> 30 TEX. ADMIN. CODE § 80.6. This rule applies to applications declared administratively complete on or after September 1, 1999. The referral language in regard to applications from before that date is identical. 30 TEX. ADMIN. CODE § 80.5.



to Docket Case” form and that the “Request to Docket Case” form shall be considered to be filed on the date the form is received by SOAH.<sup>22</sup>

In this case, TCEQ’s “Request to Docket Case” form was received by SOAH on July 2, 2003, as indicated both by a handwritten date of receipt and the facsimile time signature on the form. Based on that, the ALJ concludes that the referral date fell after the effective date of the Act on June 18, 2003.

#### **D. Affected Tract**

Having reviewed pleadings and argument in this case, the ALJ concludes that the only tract affected by this ruling is the tract identified as the Kinder tract (Kinder Ranch).<sup>23</sup> The order admitting Bitterblue as a party ruled that Bitterblue established it had authority to proceed in regard to that tract.<sup>24</sup>

#### **D. Summary**

Bitterblue’s motion for summary disposition to exclude from the application tracts it owns or control outside the district boundaries as determined under the terms of SB 1494 is granted as to the Kinder Ranch tract. Bexar Met’s motion for further abatement is denied.

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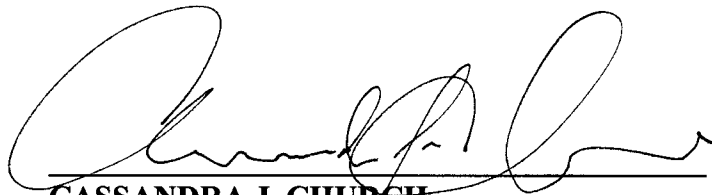
<sup>22</sup> 1 TEX. ADMIN. CODE § 155.7.

<sup>23</sup> In its motion to be admitted as a party, Bitterblue had also asserted it had developmental control over three other tracts in the proposed CCN expansion area, Friesenhahn Tracts Nos. 1 and 2, the Bass residential tracts, and the Bass commercial tracts. (August 31, 2005) (The description of the Bass tracts in Bitterblue’s motion differs somewhat from their description on the Dawson maps, on which they are labeled as Bass Tracts I, II, and III, without regard to purpose.)

<sup>24</sup> Order No. 15 (September 28, 2005).

As the Kinder Ranch tract does not comprise the entire area for which Bexar Met seeks authority to serve under the proposed amendment to CCN No. 10675, this matter will proceed to contested-case hearing on the remaining portions of the application.

**SIGNED July 7, 2006.**

A handwritten signature in black ink, appearing to read 'Cassandra J. Church', is written over a horizontal line.

**CASSANDRA J. CHURCH  
ADMINISTRATIVE LAW JUDGE  
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**STYLE/CASE: IN THE APPLICATION OF BEXAR METROPOLITAN WATER  
DISTRICT TO AMEND WATER CCN NO. 10675 IN BEXAR COUNTY**

**SOAH DOCKET NUMBER: 582-03-3725**

**TCEQ DOCKET NUMBER: 2003-0664-UCR**

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**ADMINISTRATIVE COURT**

**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**CASSANDRA J. CHURCH  
PRESIDING ADMINISTRATIVE LAW JUDGE**

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REGARDING:

**ORDER NO. 22 GRANTING PARTIAL SUMMARY DISPOSITION  
MOTION AND DENYING MOTION FOR FURTHER ABATEMENT**

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