

Control Number: 43585



Item Number: 57

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
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

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December 13, 2004

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RE: City of Austin;CCN Nos.11322 and 20636;Application Nos.33562-C and 33563-C
TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR, 2002-0756-UCR and
2002-1197-UCR; SOAH Docket No. 582-02-3056

Dear Chief Clerk:

We enclose one original and eleven copies of Austin Estates Limited Partnership's Motion to Overturn.

Sincerely,


Patrick W. Lindner
For the Firm

PWL:md
Enclosure

Cc:

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2. AELP's Motion to Overturn is limited only to that portion of the Order that includes AELP's property within the wastewater service area of the City of Austin

("Austin"). The Order is defective as it pertains to AELP's property due to lack of due process, specifically the lack of notice, and failure to comply with applicable requirements, described in more detail below. AELP is an affected person for the reasons described below.

3. AELP is the owner of land located within the vast area of undeveloped land to be included within Austin's sewer CCN, if the Order is not set aside. AELP never requested sewer service from Austin or to be included within Austin's sewer CCN area. Austin did not ask AELP if AELP wanted to be within Austin's sewer CCN nor did Austin attempt to give AELP actual notice of the application.

4. By contrast, AELP requested wastewater service from Hornsby Bend Utility Company, Inc. ("Hornsby") as most of AELP's property was located in Hornsby's then-existing wastewater CCN area. Prior to Austin filing its application, Austin approved a preliminary plat of the initial development within AELP's property and the plat specifically states that wastewater service would be provided by Hornsby. AELP entered a contract with Hornsby to obtain wastewater service to the AELP property from Hornsby and AELP paid Hornsby \$25,000 for service. By virtue of the contract and the payment of money, AELP became a customer of Hornsby.

5. The Order is based upon a settlement agreement between Austin and Hornsby that expressly refers to the AELP property. Contrary to the terms of the plat approved by Austin and the contract signed by Hornsby, Austin and Hornsby agreed between themselves that Austin should provide wastewater service to AELP's property. The Order implements the terms of the settlement agreement that requires Hornsby to transfer that part of the AELP within Hornsby's wastewater service area to Austin and amend its application to delete the remainder of the AELP property from Hornsby's

application. Due to lack of notice as described below, AELP was never provided an opportunity to object to the settlement agreement.

6. Contrary to the conclusion stated on page 2, beginning on line 19, of the Order, Austin did not mail notice of its application to affected persons, or if mailed notice was sent to some affected persons, mailed notice was not sent to all affected persons, such as AELP. AELP submits that (1) the notice provided by Austin was not sufficient to place AELP on notice of the above-referenced applications and (2) the notice predated the settlement agreement that adversely affected AELP's interests.

7. Pursuant to Water Codes Section 13.246(a), the commission shall cause notice of the application to be given to affected parties and, if requested, shall fix a time and place for a hearing and give notice of the hearing.... "Affected person" means any retail public utility affected by any action of the regulatory authority, *any person or corporation whose utility service or rates are affected by and proceeding before the regulatory authority....*" (Emphasis added.) Clearly, in this instance, AELP is an affected person and should have been provided notice of the CCN application. Since Austin had approved a preliminary plat of the first phase of AELP's development designating another wastewater service provider, Austin had a statutory duty to provide actual notice of the application to AELP.

8. Neither Austin nor Hornsby provided actual notice of the settlement agreement to AELP and there is no finding of fact to the contrary. AELP is a customer of Hornsby and as such should be provided notice of the settlement agreement and the transfer of service areas contemplated by the settlement agreement. "Customer" is defined as "[a]ny person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility." 30 TAC §291.3

(15). "Service" means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities." Section 13.001(21), Texas Water Code. A utility that is transferring its service area to another utility is required to provide notice to its customers of the sale and transfer. The notice requirements for application to transfer CCN areas from one provider to another are, in pertinent part, as follows:

Unless notice is waived by the executive director for good cause shown, mailed notice shall be given to the customers of the water or sewer system to be sold, acquired, leased or rented or merged or consolidated and other affected parties as determined by the executive director. 30 TAC § 291.112(c)(1).

9. In addition, Section 5.115 of the Texas Water Code contemplates that an affected person includes a person who may be affected. Based on the statutory definition of affected person, AELP is clearly an affected person and should have been provided notice of these CCN applications, the major amendments to the CCN applications after referral to SOAH, and transfer of that portion of Hornsby's CCN covering AELP's property to Austin.

10. The Settlement Agreement upon which the Order is based required Hornsby to amend its then pending application to delete a portion of the AELP property from its competing application, thus making Austin's application uncontested between the two applicants. This deletion of territory was a major amendment of Hornsby's application after the application had been referred to the State Office of Administrative Hearings. AELP was not given any notice of this major amendment of Hornsby's application and no published notice occurred.

11. The Settlement Agreement is an agreement between Austin and Hornsby designating service areas under Texas Water Code, section 13.248. The Order implements the terms of the Settlement Agreement, but contrary to the express provisions of Texas Water Code section 13.248, neither Austin nor Hornsby provided notice of the agreement to AELP or any other person. Approval of the Order as it pertains to AELP's property is premature before providing the notice and opportunity for hearing required by Water Code, section 13.248.

12. The Order is not based upon findings of fact and conclusions of law required by the Administrative Procedures Act. The Order, as it relates to AELP and its property, is not based upon evidence and there are no findings required by Texas Water Code, section 13.246. The following recitations in the Order, shown by italics, are wrong for the reasons described earlier in this Motion:

- A. Page 2, lines 10-12, "The City of Austin provided mailed notices of its water CCN to neighboring utilities and affected persons on September 15, and 26, 2001 and mailed notice of its sewer CCN application to neighboring utilities *and affected persons* on September 25, 2001." Austin did not mail notice to AELP. After notice was published, there was a major amendment to the application.
- B. Page 2, lines 19-21, "The notices of the City of Austin's applications to obtain water and sewer CCN *complied* with the notice requirements of 30 Texas Administrative Code (TAC) Section 291.106 and *were sufficient to place affected person on notice of the applications.*" Austin did not provide notice to AELP as required by Water Code, Section 13.246(a). After notice was published, there was a major amendment to the application.
- C. Page 3, lines 13-14, "Hornsby Bend mailed notice of Application No. 32800-C, seeking to amend sewer CCN NO. 20650, to neighboring utilities *and affected persons* on December 3, 1999." Hornsby did not mail notice to AELP. After the notice was published, there was a major change in the application.
- D. Page 4, lines 1-4, "The notices of Hornsby Bend's applications to amend water CCN No. 11978 and sewer CCN No. 20650 *complied* with the notice requirements of 30 TAC Section 291.106 *and were sufficient to place affected persons on notice of the applications.*" Hornsby did not mail notice to AELP. After the notice was published, there was a major change in the application.

- E. Page 6, lines 20-24, The City of Austin possesses the financial, managerial and technical capability to provide continuous and adequate water and sewer utility service to every customer in the area proposed to be included in amended water CCN No. 11322 and amended sewer CCN 20636, *and the certification of the City of Austin is necessary for the service, accommodation, convenience, or safety of the public.*" The record contains no evidence to support this conclusion.

The statement of procedural history within the Order is deficient for the previously stated reasons and because it omits any reference to the following facts:

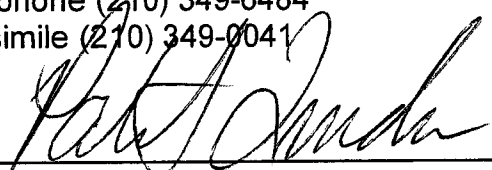
- A. Hornsby made a major amendment to its application after referral to SOAH, abandoning its contractual obligation to provide service to AELP.
- B. No notice of the settlement agreement and the terms of the settlement agreement were given to affected persons, including but not limited to AELP.

WHEREFORE, PREMISES CONSIDERED, Austin Estates Limited Partnership respectfully prays that, upon consideration, its Motion to Overturn be granted.

Respectfully submitted,

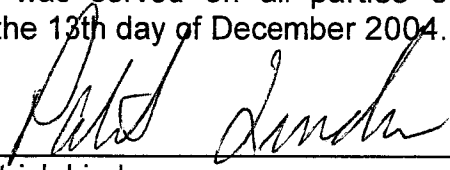
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By: _____


Patrick W. Lindner
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Austin Estates Limited Partnership's Motion for Reconsideration was served on all parties of record via facsimile transmission or U.S. mail on this, the 13th day of December 2004.



Patrick Lindner