



Control Number: 43585



Item Number: 63

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

43585



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Fax Cover Letter

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63



Kenneth Ramirez
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September 30, 2004

Mr. Glen Shankle
Executive Director
Texas Commission on Environmental Quality
MC 109
P.O. Box 13087
Austin, Texas 78711-3087

Re: Hornsby Bend Utility Company
City of Austin, Texas
TCEQ Docket Nos. 2002-0189-UCR and 2002-0112-UCR

Dear Mr. Shankle:

The City of Austin ("City" or "Austin") files this letter in response to the September 15, 2004 letter of Austin Estates Limited Partnership ("AELP") regarding the City's application for a wastewater certificate of convenience and necessity ("CCN"), Application No. 33563-C. AELP is complaining that it should have received notice of the City's application to transfer CCN areas to Hornsby Bend pursuant to a settlement agreement reached with that entity.

Additionally AELP now requests a contested case hearing, a full three years after the City filed its original application, and ten months after the administrative law judge remanded this matter back to TCEQ for issuance of the City's CCN.

For the many substantive reasons set forth below, AELP's assertions are legally incorrect and woefully dilatory, and should therefore be disregarded. AELP is not entitled to a hearing or any other relief in this matter.

PROCEDURAL BACKGROUND

The City filed applications for both water and wastewater CCNs on August 13, 2001. AELP's letter addresses the wastewater application only, and raises no questions about the water CCN application, hence this response will be limited to wastewater issues only.



Approximately 931 acres of AELP's property ("AELP Tract") falls within the CCN area originally requested by the City. The City sent notice of its original application by individual mail to 133 entities, including all cities, retail utilities, and districts whose corporate boundaries or service area falls within five miles of the City's proposed service areas. Of these 133 notices, 50 specifically announced the City's wastewater application. The City sent these notices by certified mail on September 24, 2001, pursuant to 30 TAC §291.106(b)(1).

In addition, the City published newspaper notice in Travis, Hays, and Williamson Counties. Specifically, newspaper notice of the City's wastewater CCN application, pursuant to 30 TAC § 291.106(c), appeared in the following newspapers on the following dates:

Austin American Statesman:

Monday, September 24, 2001 at page B6

Monday, October 1, 2001 at page B3

San Marcos Daily Record:

Tuesday, September 25, 2001 at page 5

Tuesday, October 2, 2001 at page 5

Williamson County Sun:

Wednesday, September 26, 2001 at page 8A

Wednesday, October 3, 2001 at page 4A

Documentation of both the individual notices and the newspaper notices can be found in the TCEQ files.

During the comment period, the TCEQ received eleven protest letters, including three from individual landowners. AELP was silent during this process. TCEQ later referred the City's applications to the State Office of Administrative Hearings ("SOAH"). The City and the landowners settled their differences before the Administrative Law Judge took jurisdiction. At the preliminary hearing, an additional landowner (Gary Bradley for Capital Pacific Holdings, LLC) and a municipality (the City of Mustang Ridge), were granted party status.



Over the course of the next 16 months, all parties, including the Executive Director, worked very hard and expended valuable resources to complete both pre-hearing discovery and settlement negotiations, culminating in settlement with all but one party. The City executed a settlement agreement with that last remaining protestant, Hornsby Bend Utility Company ("Hornsby Bend"), on October 20, 2003, and SOAH referred the City's water and wastewater applications back to TCEQ on November 7, 2003. At that time, then, the contested case hearing was over.

Pursuant to the settlement agreement with Hornsby Bend, Austin then filed Application No. 34449-S on November 24, 2003 to transfer a portion of Hornsby Bend's CCN No. 20650 to the City under existing CCN No. 20636. The City mailed notice of the application to transfer CCN areas as required by TCEQ rules. It is this notice that AELP now complains about not having received even though it was not entitled to receive this or any other notice as explained in detail below. The City submitted copies of the mailed notice and the affidavit that notice was provided to the appropriate utilities on December 30, 2003. TCEQ received no protest letters, and informed the City, by letter dated February 27, 2004, that it had "reviewed the criteria in Texas Water Code (TWC), Section 13.301(e) and determined that a public hearing will not be requested." AELP was silent during this process as well.

As of this moment, the only remaining task before TCEQ issues final CCNs is for Staff to complete computer mapping of the geographic territory covered by the CCNs. Staff informs us that it will complete the mapping process this week.

THE CITY PROPERLY ISSUED NOTICE FOR BOTH THE WASTEWATER CCN APPLICATION AND THE WASTEWATER CCN TRANSFER APPLICATION

Wastewater CCN Application

Under 30 TAC §291.106(a)(1), for issuance of a new CCN, the applicant must:

Mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within five miles of the requested service area boundaries, and any city with an extra-territorial jurisdiction which overlaps the proposed service area boundaries.

AELP, as a landowner, does not fall within the categories of entities entitled to individual mailed notice under section 291.106, and hence was not entitled to receive such notice. Regardless, the City also, in accordance with 30 TAC §291.106(c) published "the notice in a newspaper having general circulation in the county or counties where a certificate of convenience and necessity is being requested, one each week for two consecutive weeks beginning with the week after the notice is received from the commission." Thus, AELP, like the three individual landowners discussed above who filed timely protest letters,



received the required published notice of the City's wastewater CCN application. Individual notice to landowners is not required.

Contemporaneously with the notices discussed above, the City also completed significant public outreach to inform the interested public, including meetings with the Real Estate Council of Austin, Austin Area Research Organizations, Inc., and the Austin Chamber of Commerce. Furthermore, the Austin-American Statesman published a lengthy article fully describing the City's CCN applications and reporting on some reactions to those applications on August 21, 2001. The article included a map of the potentially affected areas. And finally, the Austin Business Journal ran a front page article on the City's applications in its April 26-May 2, 2002 issue. Both of these articles appeared well before the July 9, 2002 preliminary hearing at SOAH.

In sum, the City not only properly met all applicable regulatory notice requirements, but went out of its way to inform the public as to its plans. It is almost impossible to understand how AELP could not have known about the CCN applications, yet they chose to remain silent.

Wastewater CCN Transfer Application

At the time that Hornsby Bend and the City entered into their settlement agreement, both parties had competing applications on file at TCEQ for sewer CCNs that included a portion of the AELP Tract. As part of the settlement, the parties agreed that:

1. The City would remove certain tracts from both its water and wastewater CCN applications, thereby removing acreage from the noticed application areas;
2. Hornsby Bend would remove certain tracts from both its water and wastewater CCN applications, thereby removing acreage from the noticed application areas; and
3. Hornsby Bend would transfer certain areas included in its existing wastewater CCN to the City by way of a separate CCN transfer application.

The notice requirements for applications 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 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 The applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an



extraterritorial jurisdiction which overlaps the proposed service are boundaries. 30 TAC §§291.112(c)(1) and 291.112(c)(3).

The City provided mailed notice, with TCEQ's approval, to entities that fit the above regulatory criteria. In addition, as stated in its letter to the City dated February 27, 2004, TCEQ determined that a public hearing would not be necessary under the criteria listed in Texas Water Code §13.301(e); this section states in pertinent part that "[t]he executive director may request a hearing if: (1) the application filed with the commission or the public notice was improper" The City once again met all required notice obligations.

AELP Is Not A Customer Under Applicable Regulations

It is undisputed that AELP does not fall within the category of neighboring municipality or retail public utility. Instead, AELP is now claiming to be a "customer" who is entitled to notice. AELP has never been a customer of Hornsby Bend or the City, and therefore was not entitled to mailed notice of the transfer. AELP is simply wrong about this issue.

"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" is in turn defined as "[a]ny act performed, anything furnished or supplied, and any facilities used by a retail public utility in the performance of its duties under the Texas Water Code 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." 30 TAC §291.3(41).

AELP's claim to customer status appears to rest solely upon the document entitled "Agreement to Provide Wastewater Service" between Hornsby Bend and AELP, which was executed on February 2, 2000. There is not now and never has been any wastewater plants, wastewater lines, wastewater connections, or any infrastructure whatsoever on the AELP Tract. No wastewater facilities have ever been used to provide wastewater service to the AELP Tract. Indeed, AELP had never even formally requested service until this week, September 20, 2004. To the best of the City's knowledge, there is not even any development on the AELP Tract.

At best, the agreement between Hornsby Bend and AELP is a commitment to provide future wastewater service in the event that AELP develops its Tract, but it does not, in and of itself, constitute wastewater service or even an act performed by Hornsby Bend in the performance of its duties under the Water Code. Indeed, because the agreement is fully assignable, and has now been assigned to the City, it is nothing more than a commitment by Hornsby Bend to ensure that AELP will receive service from some utility – not necessarily Hornsby Bend – under the terms of the agreement. Consequently, AELP was not in the past, and is not currently, a customer of either Hornsby Bend or the



City. As such, AELP had no right to notice under 30 TAC §291.112(c), and is not entitled to be heard at this late date because of alleged lack of notice.

THE SETTLEMENT AGREEMENT BETWEEN HORNSBY BEND AND THE CITY DID NOT CONSTITUTE A MAJOR AMENDMENT REQUIRING NEW NOTICE

The only change to the City's application resulting from the settlement agreement was the *removal* of a portion of the originally requested CCN area from the application. Notice of such removal was not required by any rule or law. In fact, it would not have made any sense to publish notice of this removal, as such "notice" would have been nothing more than mere announcement of the status quo – that the City is *not* applying for a CCN for that area. Such notice would have served no purpose.

Moreover, even if removal of areas from the City's application did constitute a major amendment, AELP was not entitled to notice in the first place, for reasons discussed above, and therefore would not receive the revised notice.

Finally, the original portion of the ABLP Tract that was included in the City's application remained in the City's application and was not affected by the settlement. The other half of the AELP Tract—the portion that was in Hornsby Bend's existing CCN—was transferred to the City through a separate transfer application as described above. Therefore, the removal of area from other portions of the City's application had no affect whatsoever on the ABLP Tract.

For the above reasons, the City requests that TCEQ take no action with respect to AELP's September 15, 2004 letter.

Very truly yours,

Bracewell & Patterson, L.L.P.

A handwritten signature in black ink, appearing to read 'Kenneth Ramirez', written over a horizontal line.

Kenneth Ramirez

/mk

Enclosure

cc: Bart Jennings, City of Austin
Marty Terry, City of Austin
Doug Holcomb, TCEQ