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## Bexar Metro. Water Dist. v. Texas Comm'n on Env'tl. Quality, 185 S.W.3d 546 (Tex. Ct. App. 2006)

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supply “continuous and adequate service” to Bulverde residents. The court next considered whether the Commission had the authority to enforce regulations against GBRA, as a non-certificate holder. The court found that there were adequate safeguards, both legislative and contractual, for the Commission to hold GBRA accountable. Finally, the court examined the regionalization rule, § 13.241(d), which requires an applicant proposing a “physically separate” water system to demonstrate that it is not economically feasible to consolidate with another regional water facility. The court agreed with the Commission that the Bulverde system was not “physically separate,” and thus did not fall under the rule, because it was part of the “Western Canyon Project” operated by GBRA.

The court affirmed the trial court ruling and concluded that the Commission granted a certification to Bulverde, based on its contractual relationship with GBRA, in compliance with the Texas Water Code.

*Kathy Ott*

**Bexar Metro. Water Dist. v. Texas Comm’n on Evntl. Quality, 185 S.W.3d 546 (Tex. App. 2006)** (holding a municipality seeking a water service certificate under the Texas Water Code could demonstrate the statutory requirements through contracts and interlocal agreements with a river authority).

In 2000, the City of Bulverde (“City”), located in the growth corridor north of San Antonio, applied for a certificate to provide water utility service for its incorporated limits, extra-territorial jurisdiction and some outlying areas. The City contracted with Guadalupe-Blanco River Authority (“GBRA”) to construct, finance, operate and maintain a water distribution and treatment system using water from the Western Canyon Lake Treated Water Supply Project. Subsequently, Bexar Metropolitan Water District (“Bexar”) requested a hearing and amended its certificate to provide water service to an area overlapping the City’s requested service area.

At the hearing, the Administrative Law Judge (“ALJ”) evaluated the merits of the City’s application in light of the Commission’s permit requirements. Commission statutory requirements for applicants include: (1) possession of financial, managerial, and technical capacity to provide continuous and adequate service, (2) capability of providing drinking water meeting specified statutory requirements, and (3) access to an adequate supply of water. Ultimately, the ALJ recommended that the City’s application be denied, and Bexar’s approved in part. The Texas Commission of Environmental Quality (“Commission”), overruling the ADJ’s recommendation, granted the City’s request for a service certificate. The District Court of Travis County affirmed the Commission’s order.

Bexar appealed. The issue before the Court of Appeals of Texas for the Third District was whether the Commission violated the water code and their permitting rules in granting the City's application. Bexar asserted three claims against the Commission. First, the City's reliance on contracts with GBRA to satisfy the statutory requirements violated the Water Code ("Code"). Second, the agreement between the City and GBRA did not grant the City sufficient control to satisfy the "continuous and adequate" statutory requirement. Third, the Commission, by not requiring that the City prove consolidation with another existing utility in the area was economically infeasible, constituted an abuse of discretion.

Regarding the first claim, the court found the Code required that certificate applicants "possess the financial, managerial, and technical capability to provide continuous and adequate service." Neither the Code nor the Commission's regulations defined "possess." Through statutory interpretation and companion statutes, the court determined no requirement existed of actual ownership of facilities by the certificate applicant. Thus, the Commission had broad discretion in determining which applicants met the statutory requirements. The court held, based on legislative intent allowing demonstration of capabilities by contract, municipalities could contract for construction and operations of water systems with river authorities such as GBRA.

As to Bexar's second claim, the court found the City also met the statutory requirement regarding capabilities of providing drinking water. The court reasoned that a certificate alone does not mean the Commission approves of all aspects of a proposed plan or that a carrier is ready to begin supplying water. The court analyzed GBRA's business history, facilities and customer base in determining GBRA had adequate water delivery experience. The court also found the City's contract with GBRA, as well as the City's liquid assets set aside for such, were enough to provide long-term water service. In addition, the City, as a certificate holder and a public water supplier, is liable under any Commission enforcement actions. Through its contract with the City, GBRA must also operate the water system in compliance with all applicable legal mandates. Thus, the court reasoned the Commission may use all statutory enforcement options available to them against the City or GBRA should the need arise. After this factual review, the court held the Commission's decision to grant the City a certificate satisfied the regulatory standards and the enforcement provisions of the "continuous and adequate service" statutory requirement.

Finally, the court addressed Bexar's claim that the Commission failed to comply with their own regionalization rules. The Code requires that a certificate applicant demonstrate that regionalization or consolidation with another public utility is not economically feasible before the Commission grants a certificate for a "physically separate" water system. In reviewing the facts, the court found GBRA's water

treatment, storage, and delivery system would connect directly to the City's water distribution system. Hence, the court held the City's water system was a regional system under the statutory scheme, and the Commission was within its statutory right to grant the certificate.

Therefore, the court affirmed the district court's findings that the Commission acted within its authority by granting the City a certificate.

*Matthew Willson*

**Edwards Aquifer Auth. v. Chem. Lime, Ltd., 2006 Tex. App. LEXIS 1127 (Tex. Ct. App. 2006)** (holding that a court's enjoining of a statute only delays its enforcement and does not alter its effectiveness).

In the 1993 Edwards Aquifer Authority Act ("Act") and the Texas state legislature ("legislature") established the Edwards Aquifer Authority ("Authority") to govern and administer the use of groundwater from the Edwards Aquifer. The legislature granted a preference under the Act's permitting system to existing users of aquifer water. Existing users had to file a declaration of historical use with the Authority by March 1, 1994, six months after the Act's effective date. Existing users were defined as persons who withdrew and beneficially used underground water from the aquifer on or before June 1, 1993.

The Act provided that the Authority's board of directors would be appointed by various governing bodies affected by the Authority. This appointment procedure was required to be submitted to the United States Department of Justice ("Department") for administrative pre-clearance under section 5 of the Voting Rights Act. The Department refused pre-clearance on the basis that the Act contemplated appointive rather than elective selection of the Authority's board. This made the appointment provision unenforceable. The legislature did not remedy the Act's section 5 problems until the 1995 legislative session. Thus, the Act's original September 1, 1993 effective date and the March 1, 1994 deadline for existing users to file declarations of historical use, both passed during a period in which the Act was made unenforceable by federal law.

In 1995, the legislature amended the Act to change the board's selection method from appointment to election. The legislature provided that the amendments would take effect on August 28, 1995, and the Department pre-cleared the amended Act. However, the legislature did not amend the Act's original March 1, 1994 historical use declarations filing deadline, or otherwise address how the expired deadline was to be adjusted.

Six days before the amendments to the Act were to take effect, a group of local underground water conservation districts and agricultural interests brought a constitutional challenge to the Act in the district court of Medina County, and sought to restrain the Act's administration and enforcement. The court, in *Barshop v. Medina County Un-*