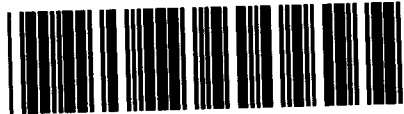


Control Number: 43945



Item Number: 20

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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TRANSCRIPT OF PROCEEDINGS BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AUSTIN, TEXAS

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APPLICATION OF THE TOWN OF
LINDSAY TO AMEND WATER AND
SEWER CERTIFICATES OF
CONVENIENCE AND NECESSITY
(CCN) NOS. 13025 AND 20927 IN
COOKE COUNTY, TEXAS
APPLICATION NOS. 35096-C & 35097-C)

SOAH DOCKET NO.
582-06-2023

TCEQ DOCKET NO.
2006-0272-UCR

HEARING ON THE MERITS

TUESDAY, OCTOBER 7, 2008

BE IT REMEMBERED THAT AT approximately
9:00 a.m., on Tuesday, the 7th day of October 2008,
the above-entitled matter came on for hearing at the
State Office of Administrative Hearings, 300 West
15th Street, Hearing Room 402, Austin, Texas, before
JAMES W. NORMAN, Administrative Law Judge; and the
following proceedings were reported by Kim Pence, a
Certified Shorthand Reporter of:

Volume 1

Pages 273
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TABLE OF CONTENTS

| | PAGE |
|--|------|
| PROCEEDINGS - TUESDAY, OCTOBER 7, 2008 | 3 |
| PRESENTATION ON BEHALF OF THE CITY OF LINDSAY | 23 |
| DONALD METZLER | |
| - Direct (Rodriguez) | 23 |
| - Cross (MacLeod) | 37 |
| - Cross (Carlton) | 38 |
| - Redirect (Rodriguez) | 49 |
| - Recross (MacLeod) | 53 |
| PRESENTATION ON BEHALF OF THE EXECUTIVE DIRECTOR | 58 |
| TAMMY HOLGUIN-BENTER | |
| - Direct (MacLeod) | 58 |
| - Cross (Rodriguez) | 69 |
| - Cross (Carlton) | 77 |
| - Redirect (MacLeod) | 93 |
| - Recross (Rodriguez) | 94 |
| PRESENTATION ON BEHALF OF LINDSAY PURE WATER COMPANY | 101 |
| BETSY FLEITMAN | |
| - Direct (Carlton) | 101 |
| PRESENTATION ON BEHALF OF THE CITY OF LINDSAY (CONTINUED) | 112 |
| DONALD METZLER | |
| - Further Redirect (Rodriguez) | 112 |
| - Further Recross (MacLeod) | 115 |
| - Further Recross (Carlton) | 122 |

TABLE OF CONTENTS

| | PAGE |
|--|------|
| AFTERNOON SESSION | 153 |
| PRESENTATION ON BEHALF OF THE CITY OF LINDSAY (CONTINUED) | 153 |
| DONALD METZLER | |
| - Further Recross (Carlton - cont'd) | 153 |
| - Further Redirect (Rodriguez) | 174 |
| - Further Recross (MacLeod) | 187 |
| - Further Recross (Carlton) | 190 |
| - Further Redirect (Rodriguez) | 198 |
| KERRY D. MARONEY | |
| - Direct (Rodriguez) | 202 |
| - Cross (Carlton) | 207 |
| - Redirect (Rodriguez) | 253 |
| - Recross (MacLeod) | 266 |
| - Recross (Carlton) | 268 |
| - Further Redirect (Rodriguez) | 272 |
| PROCEEDINGS RECESSED | 273 |

EXHIBIT INDEX

APPLICANT - CITY OF LINDSAY

MARKED RECEIVED

| | | | |
|----|--------------------------------------|----|-----|
| 1. | Direct Testimony of Donald Metzler | 3 | 32 |
| 2. | Application of the City of Lindsay | 3 | 32 |
| 3. | Direct Testimony of Kerry D. Maroney | 3 | 204 |
| 4. | Direct Testimony of Jack E. Stowe | 3 | -- |
| 5. | Notice of Deficiency dated 9/21/05 | 76 | 76 |

EXHIBIT INDEX

EXECUTIVE DIRECTOR

MARKED RECEIVED

1. Map

120

122

EXHIBIT INDEX

| LINDSAY PURE WATER COMPANY | MARKED | RECEIVED |
|---|--------|----------|
| 8. Ordinance 0805-3, City of Lindsay | 44 | 141 |
| 9. Building Permits 2002-208 for the City of Lindsay | 160 | 162 |
| 10. Map | 238 | 273 |
| 11. Map | 238 | 273 |

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P R O C E E D I N G S

TUESDAY, OCTOBER 7, 2008

(9:00 a.m.)

(Exhibit APP Nos. 1 through 4 marked)

JUDGE NORMAN: This is State Office of Administrative Hearings Docket 582-06-2023, the same being TCEQ Docket No. 2006-0272-UCR, the Application of the Town of Lindsay. I think sometimes it's now called the City of Lindsay, is it not?

MR. RODRIGUEZ: Yes, sir.

JUDGE NORMAN: Which is correct?

MR. RODRIGUEZ: City of Lindsay.

JUDGE NORMAN: City of Lindsay -- the City of Lindsay to Amend Water and Sewer Certificate of Convenience and Necessity, CCN Nos. 13025 and 20927 in Cooke County, Texas, Application Nos. 35096-C and 35097-C.

I issued an order yesterday that severed out the sewer CCN application, and so that would be -- would that be CCN 20927?

MR. RODRIGUEZ: Yes.

JUDGE NORMAN: And Application No. 35097-C?

MR. RODRIGUEZ: I believe it is -- 97 is the sewer one, yes.

1 JUDGE NORMAN: Okay. So I am going to
2 recall the case as the -- the style of the case as the
3 Application of the City of Lindsay to Amend Water
4 Certificate of Convenience and Necessity, CCN No.
5 13025 in Cooke County, Texas, Application No. 35096-C.

6 My name is James Norman. I'm the
7 Administrative Law Judge in the case. Today's date is
8 October 7, 2008. At this time, I'd ask the parties to
9 identify themselves, beginning with the applicant.

10 MR. RODRIGUEZ: Your Honor, my name is
11 Art Rodriguez. I'm the attorney for the City of
12 Lindsay. I'm joined today by Betsy Fleitman, who is
13 our city secretary --

14 JUDGE NORMAN: Okay.

15 MR. RODRIGUEZ: -- and her husband;
16 Mr. Metzler, Mayor Pro-Tem of the city; as well as
17 Jack Stowe and Kerry Maroney, who are both experts
18 testifying on the city's behalf.

19 JUDGE NORMAN: Okay. Thank you. And
20 for the protestant?

21 MR. CARLTON: John Carlton on behalf of
22 Lindsay Pure Water Company, and I have with me Mr. Jim
23 Myrick.

24 JUDGE NORMAN: Okay. Okay. Good. And
25 for the Executive Director?

1 MR. MacLEOD: I'm Brian MacLeod for
2 the Executive Director, and with me is Tammy
3 Holguin-Benter and Second Chair Attorney,
4 Christiaan Siano.

5 JUDGE NORMAN: Okay. Good. Thank you
6 very much.

7 Mr. Rodriguez, would you like to
8 proceed?

9 MR. RODRIGUEZ: Yes, Your Honor,
10 actually --

11 JUDGE NORMAN: Excuse me. I'm going to
12 interrupt you.

13 Everyone who is going to testify, please
14 stand and raise your right hand.

15 (Witnesses present sworn)

16 JUDGE NORMAN: Okay. Go ahead,
17 Mr. Rodriguez.

18 MR. RODRIGUEZ: Actually, Your Honor,
19 we've got a couple of housekeeping --

20 JUDGE NORMAN: All right.

21 MR. RODRIGUEZ: -- things that we'd like
22 to get done first.

23 JUDGE NORMAN: Sure.

24 MR. RODRIGUEZ: Because of the -- I've
25 got the updated TCEQ rules.

1 JUDGE NORMAN: Okay.

2 MR. RODRIGUEZ: Because of the date of
3 this application, I think we ought to recognize that
4 this case is governed by the TCEQ rules that appeared
5 in a previous iteration of this book.

6 JUDGE NORMAN: Right. Does everybody
7 agree to that, that the previous TCEQ rules apply to
8 this application?

9 MR. MacLEOD: Yes.

10 MR. RODRIGUEZ: Now, what I'd like is
11 the --

12 JUDGE NORMAN: And did you say -- what
13 did you say?

14 MR. CARLTON: I didn't say anything yet.

15 JUDGE NORMAN: Okay.

16 (Laughter)

17 MR. CARLTON: I will agree that the
18 application was filed prior to the effective date of
19 the statutory changes that Art is taking about.

20 JUDGE NORMAN: And do you -- I'd like --
21 and do you have a position at this time on which set
22 of rules apply?

23 MR. CARLTON: I haven't taken a formal
24 position one way or the other on that yet.

25 JUDGE NORMAN: Uh-huh.

1 MR. CARLTON: But the issue is -- I
2 think those rules apply, but I think the subsequently
3 adopted rules could give us some guidance as to policy
4 as to how this ought to be considered, but not
5 necessarily be the rules that are applicable.

6 JUDGE NORMAN: Okay.

7 MR. MacLEOD: We would agree with that
8 position, yes.

9 JUDGE NORMAN: Okay.

10 MR. RODRIGUEZ: So, Your Honor, I'd just
11 like you to take administrative notice of 291.102 as
12 it existed the date this application was filed.

13 JUDGE NORMAN: Any objection?

14 (No response)

15 JUDGE NORMAN: I do so.

16 MR. RODRIGUEZ: Okay. Secondly, Your
17 Honor, I think there was some -- and with respect to
18 policy on how this is -- how this proceeding should
19 take -- how we should take a look at some of the 291
20 rules --

21 JUDGE NORMAN: Uh-huh.

22 MR. RODRIGUEZ: -- with respect to this
23 proceeding. I think there was some discussion last
24 week with respect to the 55 service requests that were
25 attached to both Mr. Metzler's testimony as well as

1 Mr. Maroney's testimony.

2 JUDGE NORMAN: Right.

3 MR. RODRIGUEZ: And you had requested, I
4 guess, some clarification with respect to basically
5 how you're going to -- how you're going to handle
6 those.

7 JUDGE NORMAN: Well, I had given you an
8 opportunity to come in and make an argument, either
9 under the rules, the statute or under 2001.081 to lay
10 a foundation.

11 MR. RODRIGUEZ: And I think that -- and
12 we'll work through all of that, Your Honor.

13 JUDGE NORMAN: Okay.

14 MR. RODRIGUEZ: So I think we can
15 probably just handle that through argument at this
16 point.

17 If you look at -- if you look at
18 291.102(d) as it's currently constituted, after the
19 January 6, 2006 rule changes --

20 JUDGE NORMAN: Right.

21 MR. RODRIGUEZ: -- as well as the Texas
22 Water Code 13.246(c)(3) --

23 JUDGE NORMAN: Okay.

24 MR. RODRIGUEZ: -- both of them
25 specifically provide for requests for service or allow

1 requests for service to be considered in a CCN
2 application.

3 JUDGE NORMAN: And that's (d) what?

4 MR. RODRIGUEZ: 291.102(d), actually
5 (2).

6 JUDGE NORMAN: All right. The need for
7 additional service in the requested area?

8 MR. RODRIGUEZ: Yes. And actually
9 (2)(a) and (2)(d), both of those.

10 JUDGE NORMAN: (2)(a) and (2)(b) also?

11 MR. RODRIGUEZ: (d) as in "dog."

12 JUDGE NORMAN: Uh-huh.

13 MR. RODRIGUEZ: And it includes whether
14 any landowners have requested service. And then (d),
15 written application or written requests for service.
16 So both the TCEQ -- the TCEQ rules themselves
17 contemplate that written requests for service are
18 what's needed.

19 MR. CARLTON: Art, point me to those
20 sections again. I'm sorry, I missed one.

21 MR. RODRIGUEZ: 291(d) as in "dog"
22 (1) -- I mean (2)(a) and (2)(d) as in "dog."

23 MR. CARLTON: Okay. That's where I'm
24 confused because you just handed out 291.102.

25 MR. RODRIGUEZ: I'm talking about the

1 rules as they currently are constituted.

2 MR. CARLTON: As they currently exist,
3 okay.

4 JUDGE NORMAN: Okay.

5 MR. RODRIGUEZ: I'm handing those out.

6 MR. CARLTON: That's where I was not
7 following. My apologies.

8 MR. RODRIGUEZ: Have you found those
9 sections, Judge?

10 JUDGE NORMAN: I have.

11 MR. RODRIGUEZ: Okay. Secondly, what
12 Faith has just handed out is a certified copy of a
13 November -- September 21, 2005 letter actually from
14 the agency to the city. And if you flip to Page 2 of
15 that letter, in the second paragraph of that, it says
16 "In addition of the notice requirements, the following
17 information is also necessary to proceed with your
18 applications." If you look to Section (b), it says
19 "Provide copies of service of application(s) and/or
20 written request(s) from all landowner(s) seeking to
21 obtain water and/or sewer service in the requested
22 area."

23 JUDGE NORMAN: Okay.

24 MR. RODRIGUEZ: Not only do the agency
25 rules now -- if Mr. Carlton is right in that the new

1 rules are supposed to provide guidance as to how this
2 case is supposed to take place, then obviously written
3 requests for service are both contemplated in the
4 rules, also in the statute, the new statute that was
5 adopted after House Bill 2876.

6 So I think from both those -- from both
7 those standpoints, the written requests for service
8 should be allowed in for all purposes as it meets both
9 regulatory and statutory requirements.

10 JUDGE NORMAN: Okay. And, Mr. Carlton?

11 MR. CARLTON: A couple of things, Your
12 Honor. Let's take a look at the exhibit, which is --

13 JUDGE NORMAN: Okay.

14 MR. CARLTON: -- being offered.

15 JUDGE NORMAN: It's 5, isn't it? I
16 forget.

17 MR. CARLTON: If I can find it here. It
18 is DLM-10. Let's work off that copy. Mr. Maroney has
19 got it attached to his testimony later as well. And
20 I'm just going to take a look at the first page, which
21 is the first letter.

22 JUDGE NORMAN: Okay.

23 MR. CARLTON: And the reason this is
24 really important in terms of hearsay is these letters
25 don't request service. And in order to meet the

1 statutory criteria, you have to have a service
2 request. These letters really say, "You know what,
3 I'm interested in water service at some point in the
4 future," but they don't request service. They don't
5 request service now. They don't specify the time in
6 which they request the service. They don't specify
7 the manner in which service is requested to be
8 provided.

9 And so to be able to take these letters
10 on their face without cross-examining witnesses or
11 having those declarants available for testimony
12 doesn't really provide you with much of anything in
13 terms of helping evaluate the facts.

14 So clearly they're hearsay. The
15 question we're talking about is, is there some valid
16 exception. Mr. Rodriguez would point you to the
17 statute and the rules that say you need to attach
18 service requests. I agree you need to attach service
19 requests. In this instance, we don't have any.

20 There are only two letters in this
21 packet, in this exhibit, that are worded differently
22 from the very first one you've just looked at. One of
23 them just adds the phrase "Oh, I've got five lots."
24 The other one is -- it's Bates No. 0413 and just says
25 "Hey, we're willing to be included." It doesn't

1 request service.

2 So I think we fall short of that
3 statutory that's required for the application, service
4 requests should be included. It's not there, and
5 there's no way to really evaluate what these mean. So
6 we'd point that out to you.

7 Also, I think the evidence is going to
8 show you that Lindsay has an ordinance that they
9 adopted in August of 2005 prior to filing the
10 application that has a process for how you request
11 service when you live outside the city limits. These
12 letters don't meet that process. They don't meet that
13 standard.

14 The other issue is that there's also
15 some statutory guidance in the new rules that were
16 passed on -- it's expedited release from a CCN, but
17 all we're starting is the process where we begin and
18 we create the CCN that might ultimately require a
19 release. But that process says when you request
20 service of a city, you have to -- or of a provider,
21 you have to do the time, the manner and place that you
22 need service. These don't do that. They don't have
23 any information along those lines.

24 I'll go to what the Executive Director's
25 attorney brought up in the prehearing as well, which

1 was are these operative words or operative facts. I
2 don't think they are. Number one, because they don't
3 operate to do anything. They don't operate to request
4 service we're talking about. But number two, even if
5 they did request service, the cases on operative facts
6 really are more of contracts, offering and acceptance,
7 "Did I say I accept?" It doesn't matter whether it's
8 true or not, but "Did I say I accept?" That's an
9 operative fact. Okay?

10 Criminal cases, "Did I say I did it?"
11 It doesn't matter whether it's true or not. I
12 admitted that I did it. That's not the case here with
13 these particular letters. The truth of what these
14 letters say is important. It's not just the fact that
15 they were -- that they were sent in.

16 So I think that we have hearsay here. I
17 think it's questionable as to the usefulness of this
18 information in your -- in your process, and I think
19 that this information could have been proved in
20 another way. There could be affidavits filed that say
21 "I request service. I need this many LUEs of service.
22 I need it at this time." Let's move forward. Could
23 have had a witness, "I need service." It wasn't done.
24 I don't think they should come in.

25 JUDGE NORMAN: Okay. Go ahead.

1 MR. MacLEOD: I believe that while these
2 may not rise to the level of an offer and acceptance
3 on a contract, they are -- they are not being
4 offered -- they aren't actually assertions. The
5 effect on the hearer is what's important. These
6 aren't statements that somebody is manifesting a
7 belief in. They don't rise to the level of being an
8 application, but they do rise to the level of
9 something that the ED has always considered to be
10 something that would show a need for service.

11 And I think the fact that they tend --
12 they look like they're exact copies of each other and
13 that they aren't really clear -- clearly stating "I
14 want service" and what date goes to the weight rather
15 than the admissibility of the evidence.

16 So I think that -- and I think that the
17 new statute just -- the new rule, excuse me, and
18 statute dealing with whether or not we consider --
19 specifically the statute and the rule start stating
20 that requests for service are important criteria in
21 determining whether or not a CCN will be issued.

22 I think that those new rules are just
23 codifying long-standing agency practice. Sure there
24 may be an argument that these are -- I mean these may
25 not have enough weight to show a lot of interest, but

1 I think the main thing it shows is somebody's made a
2 statement that they wanted service. Whether or not --
3 you know, anything beyond that I think would be an
4 attempt to try to impeach whether or not these
5 statements were authentic. And I think all we have to
6 do is prove they're authentic, and it shows people
7 stated that they wanted service. The statement you
8 don't really need "Were you lying when you said that?"
9 You don't need to cross-examine someone on something
10 like that. If somebody says they want service, you
11 can act on it. If somebody says they want to buy your
12 car, you drive your car over there and have them look
13 at it, you know. It isn't like "Well, I need to
14 cross-examine them to see if they lie about this sort
15 of stuff a lot."

16 It certainly doesn't rise to the level
17 of your textbook example of operative words, but I
18 think that the main thing is it's not assertive
19 behavior. The effect on the hearer is what's
20 important. Therefore, I think it's outside of
21 hearsay. And to the extent it might be close, I think
22 it goes to the weight and not the admissibility.

23 Furthermore, I think under 2001.081 of
24 the Texas Government Code, this is the type of
25 information somebody would normally rely on in

1 determining whether or not somebody was interested in
2 getting service. If somebody says "I'm interested in
3 getting service," you'd normally believe that they
4 weren't just joking.

5 And secondly, I think that it's not
6 susceptible to proof easily in other ways because
7 these people live, you know, about -- probably
8 220 miles from here, you know. And if we -- if we put
9 them in the form of an affidavit, they'd still be
10 hearsay. Putting a jurat in hand doesn't make a
11 person suddenly subject to cross-examination. They'd
12 have to be here and subject to cross-examination. For
13 them to get 55 people to come 220 miles, I think
14 that's not reasonably possible.

15 So our position is that they should be
16 admissible in evidence. However, their weight may be
17 in question.

18 JUDGE NORMAN: Okay. Mr. Rodriguez?

19 MR. RODRIGUEZ: Yeah, and I agree with
20 the Executive Director, and I'm glad he made the point
21 I was about --

22 JUDGE NORMAN: But not with Mr. Carlton.
23 Right?

24 MR. RODRIGUEZ: That's right.

25 JUDGE NORMAN: Okay.

1 MR. CARLTON: Surprising.

2 JUDGE NORMAN: Okay.

3 MR. RODRIGUEZ: The objection, as I
4 understand it, is that there's a hearsay objection to
5 these and --

6 JUDGE NORMAN: Well, there's also a
7 relevance objection.

8 MR. RODRIGUEZ: Well, I didn't -- I
9 didn't hear the relevancy.

10 JUDGE NORMAN: Is that right?

11 MR. RODRIGUEZ: I didn't hear the
12 relevancy objection.

13 JUDGE NORMAN: I mean, he didn't say
14 those records.

15 MR. CARLTON: There's an aspect of this
16 that Mr. MacLeod brought up that we hadn't talked
17 about because we didn't get to it, which is, you know,
18 once we get to are these hearsay, the statements in
19 and of themselves, if we get over that hurdle, we
20 still have the problem, as he put it, authentication
21 under 803(6) and the affidavit that's supposed to be
22 filed to authenticate those. We haven't argued that
23 yet, and I'd like to reserve the ability to do so if
24 we need to.

25 JUDGE NORMAN: All right.

1 MR. RODRIGUEZ: And I'm getting to the
2 base hearsay argument, Your Honor. Regardless of
3 whether they're affidavits or not, they would still
4 be -- if that's the case, they would still be hearsay.
5 I don't know exactly how we get over that because
6 these would still be out-of-court statements.

7 The one thing -- what I think is
8 operative here is that whether -- there's a difference
9 between a request for service and being a qualified
10 applicant, not only in the rules, but in the statutes
11 as well.

12 I think the ordinance -- and I'm not
13 sure exactly the specific ordinance that Mr. Carlton
14 is referring to, but the ordinance that I'm familiar
15 with I believe provides -- it talks about for those
16 that are outside the city to be -- it provides terms
17 for them to be qualified applicants. It's not a
18 process for them to even request service, but it's a
19 process for them to become qualified to get service
20 from the city. It's an important distinction there.

21 The one thing -- now, the language
22 that's in here in the approximately 55 landowner
23 requests, when we can -- there's nothing in the
24 statute, there's nothing in the rules, there's nothing
25 in policy decisions that I've actually seen where it's

1 a prescribed language that's needed in there to
2 basically say "I request service." If you look at the
3 hearing rules and you look at the notice that goes
4 out, there's actually specific language that the TCEQ
5 requires for you to do certain things. If you want a
6 contested case hearing, it's very specific. You need
7 to write the words "I request a contested case hearing
8 on this."

9 There's nothing in these rules that
10 would indicate that there has to be prescriptive
11 language to them in order for them to be requests for
12 service. Not only has the -- and in reviewing
13 Ms. Benter's testimony and Mr. Maroney's testimony,
14 both people that practice in this area often, both
15 rely on this type of information to determine that
16 service requests have been made.

17 We've been in other CCN applications --
18 CCN hearings, Your Honor, where other staff members
19 said the same thing, that the terms "request for
20 service" are not operative to determine that one is
21 a -- one is a service request. And if we want to --
22 if we want to debate the ability for this to be a
23 request for service, that's fine, and I think it
24 goes -- it does go to the weight, not the
25 admissibility of the evidence, to take a look at

1 these.

2 Mr. Metzler, Mr. Maroney, both see
3 these, and it has a certain effect to them as to what
4 they are, and the same thing with -- same thing with
5 Ms. Benter. I don't think it actually obviates the
6 need to consider them at all because I think it -- I
7 think there is a necessity to take a look at this.

8 Obviously both sides are going to argue
9 as to what they actually mean with respect to what
10 requirement does it meet, but that doesn't -- that
11 doesn't necessarily mean that we need to ignore the
12 statute because the statute is clear. The new rules
13 that, according to Mr. Carlton, should provide some
14 guidance to us in this case actually provide the
15 statement "written requests for service."

16 So, Your Honor, that's what these are,
17 and nowhere in here does it say that the requests need
18 to be -- have affidavits according to them. There's
19 actually a certification in here that these were
20 actually taken from the city records from the city
21 secretary, and that's the very first -- the very first
22 page of DLM-10, that they are true and correct copies
23 taken from city records.

24 JUDGE NORMAN: Okay. You know what I'm
25 going to do is I'm going to hold off on ruling on

1 this, and I'm going to allow you to establish further
2 foundation under 2001.081.

3 MR. RODRIGUEZ: Okay.

4 JUDGE NORMAN: And I'll also hear
5 testimony from you, Mr. MacLeod --

6 MR. MacLEOD: Yes.

7 JUDGE NORMAN: -- that that -- you know,
8 with regard to what you asserted just a moment ago on
9 what the Commission relies on. Okay?

10 MR. MacLEOD: Yes, sir. Thank you, Your
11 Honor.

12 JUDGE NORMAN: Yes, go ahead.

13 MR. CARLTON: And, Your Honor, that
14 presents a particular problem as we move forward in
15 that I certainly don't want to open the door for the
16 evidence that -- this hearsay evidence to come in by
17 virtue of how I cross-examine and what I do with
18 Ms. Benter going at the tail end of the process. If
19 you're going to hold off ruling on the admissibility
20 of this information, then I've lost my opportunity in
21 case you rule that it should come in --

22 JUDGE NORMAN: Right.

23 MR. CARLTON: -- to deal with that. So
24 I'm concerned with --

25 JUDGE NORMAN: Well, you know what, we

1 might just take that up first. This is obviously very
2 important. I mean, this is key. We might just take
3 up that testimony first and -- to see whether or not
4 this comes in. If you want to call a witness?

5 MR. RODRIGUEZ: Okay. Your Honor, at
6 this point, we'll call Mr. Metzler to the stand.

7 JUDGE NORMAN: Okay. Good morning,
8 Mr. Metzler.

9 THE WITNESS: Good morning, Judge.

10 JUDGE NORMAN: And you have been sworn?

11 THE WITNESS: Yes, sir.

12 JUDGE NORMAN: You're under oath.

13 PRESENTATION ON BEHALF OF THE CITY OF LINDSAY

14 DONALD L. METZLER,

15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. RODRIGUEZ:

18 Q Good morning, Mr. Metzler.

19 A Good morning.

20 Q Of course you and I have met before. Can you
21 please introduce yourself to the Judge?

22 A My name is Donald L. Metzler, and I'm Mayor
23 Pro-Tem of the City of Lindsay.

24 Q Mr. Metzler, in front of you --

25 MR. RODRIGUEZ: And, Your Honor, at this

1 point I don't know whether we want to -- if you want
2 to go ahead and --

3 JUDGE NORMAN: Yeah, you can go ahead
4 and get in his exhibit if you want to.

5 MR. RODRIGUEZ: Okay. Everything, both
6 his prefiled testimony and --

7 JUDGE NORMAN: Right.

8 MR. RODRIGUEZ: -- the testimony
9 regarding the 55 letters?

10 JUDGE NORMAN: Yes.

11 MR. RODRIGUEZ: Okay.

12 JUDGE NORMAN: You can go and it will
13 be -- you know if it comes in, it will be subject to
14 previous rulings and objections.

15 MR. RODRIGUEZ: Okay.

16 JUDGE NORMAN: Everybody should
17 understand that. Go ahead.

18 MR. RODRIGUEZ: All right. Then
19 actually let me -- if I could do some additional house
20 cleaning then --

21 JUDGE NORMAN: Sure, go ahead.

22 MR. RODRIGUEZ: -- before we call him as
23 a witness, Your Honor.

24 Because of your ruling yesterday with
25 respect to remanding the sewer CCN application back to

1 the Executive Director, it caused us to have to make
2 certain changes to the testimonies.

3 JUDGE NORMAN: Right.

4 MR. RODRIGUEZ: And at this point, not
5 only Mr. Metzler's testimony, but also that of
6 Mr. Maroney and Mr. Stowe. So I'd like to just take
7 about ten minutes to go through all of those --

8 JUDGE NORMAN: Absolutely.

9 MR. RODRIGUEZ: -- with you-all, if I
10 could.

11 JUDGE NORMAN: Okay.

12 MR. RODRIGUEZ: And all the replacement
13 pages have been provided to the parties already --

14 JUDGE NORMAN: All right.

15 MR. RODRIGUEZ: -- as well as the record
16 copy and the appeal copy has been -- has been provided
17 to the --

18 JUDGE NORMAN: Now, are these -- what
19 you've provided, are they full copies of these
20 witnesses' testimony?

21 MR. RODRIGUEZ: No, sir.

22 JUDGE NORMAN: They're just pages?

23 MR. RODRIGUEZ: They're just replacement
24 pages.

25 JUDGE NORMAN: I see. Okay.

1 MR. RODRIGUEZ: So if you go to Page 4
2 of Mr. Metzler's testimony, there's been some language
3 added to reflect that the water CCN has been changed
4 by virtue of the September 30, 2008 change in the
5 water testimony. As well as you can see on Page 4 and
6 4A, much has been removed because that all dealt with
7 nunc pro tunc, and all that kind of stuff.

8 JUDGE NORMAN: Right, okay.

9 MR. RODRIGUEZ: So all that on the page
10 went away.

11 On Page 5 and on Page 6 testimony
12 regarding the wastewater system was removed, Lines 19
13 through 21 on Page 5 as well as 1 through 4 on Page 6.

14 The next change was on Page 8 at the
15 very end on Line 20 to just add some language that
16 the city is training an employee to become a
17 wastewater -- I mean, a licensed operator.

18 On Page 10, Lines 7 through 13 were
19 changed to reflect the change in the water CCN
20 territory in our requested service territory for water
21 and which caused the remainder of Page 10 to go on to
22 what's now Page 10A --

23 JUDGE NORMAN: Okay.

24 MR. RODRIGUEZ: -- of that testimony.

25 On Page 11, we've got certain testimony

1 redacted because of -- because of both the sewer issue
2 as well as the water CCN issue.

3 On Page 14, Lines 3 through 5, there was
4 some testimony that was removed because of --
5 voluntarily removed pursuant to some objections --

6 JUDGE NORMAN: Yes, I remember that.

7 MR. RODRIGUEZ: -- we had had.

8 On Page 6 -- or Line 6 of that same
9 page, "out future planning area" was changed to "our
10 future planning area."

11 JUDGE NORMAN: Okay.

12 MR. RODRIGUEZ: That was just a
13 typographical change on that.

14 On Page 16, Lines 6 and 7, there were --
15 the water and sewer customer numbers were updated on
16 that.

17 On Exhibit DLM-16 -- DLM-16 we
18 circulated to the parties, the brand new, beginning
19 October 1, 2008, water and sewer rates for the city.

20 JUDGE NORMAN: Okay.

21 MR. RODRIGUEZ: That's to provide the
22 most current information to everyone, which does
23 reflect an increase in rates.

24 And on Page 22, Lines 10 through 13,
25 that was removed pursuant to Your Honor's ruling on

1 that.

2 JUDGE NORMAN: All right.

3 MR. RODRIGUEZ: DLM-4 was conformed to
4 include the certification of that water CCN map, which
5 you discussed earlier.

6 We removed DLM-5 through 8. Those dealt
7 with all the nunc pro tunc. Those have been removed
8 because of the -- because we've got the new map now.

9 DLM-11, which is the map with all the
10 service requests on it --

11 JUDGE NORMAN: Okay.

12 MR. RODRIGUEZ: -- has been updated to
13 show our current water service territory map.

14 DLM-12 was removed entirely.

15 DLM-13, which shows the city's water CCN
16 requested service territory with the city limits and
17 ETJ has been relaced to reflect the change from
18 October --

19 JUDGE NORMAN: Right.

20 MR. RODRIGUEZ: -- September 30th.

21 I believe I talked about 16 already, and
22 DLM-17 is a new map. This is the map that was issued
23 by the Commission on September 30th to show the city's
24 current water CCN map.

25 JUDGE NORMAN: Okay.

1 MR. RODRIGUEZ: So those are the changes
2 that have been -- that have been made to Mr. Metzler's
3 testimony.

4 JUDGE NORMAN: All right.

5 MR. RODRIGUEZ: Do you want to do
6 Mr. Maroney's at this point, or do you want to wait
7 until he gets on the stand?

8 JUDGE NORMAN: Oh, let's wait for him --

9 MR. RODRIGUEZ: Okay.

10 JUDGE NORMAN: -- you know, until
11 he's -- rather than getting Mr. Metzler off the stand,
12 making him walk over there and have to walk back.

13 MR. RODRIGUEZ: Okay.

14 Q (BY MR. RODRIGUEZ) Good morning,
15 Mr. Metzler.

16 A Good morning.

17 JUDGE NORMAN: Before you go, and I'm
18 going to tell this to all parties, in determining
19 admissibility, I'm going to direct your attention to
20 Rule 104 of the Texas Rules of Evidence. In
21 determining questions of admissibility generally,
22 104(b) says "In making its determination, the Court is
23 not bound by the rules of evidence except with respect
24 to privileges." So I'm going to permit hearsay
25 testimony from everybody or -- in order to make my

1 determination under 2001.081. Okay?

2 MR. CARLTON: So are we specifically
3 dealing with the service request issue now?

4 JUDGE NORMAN: We're going to, I think,
5 pretty soon. And then you have -- later on you have
6 testimony that you need to prove up, too, as you
7 recall.

8 MR. CARLTON: Sure.

9 JUDGE NORMAN: And in making my
10 determination -- again, in making my determination on
11 admissibility, I'm not going to be limited by the
12 rules of evidence except with regard to privilege.
13 Okay?

14 All right. Thank you. Go ahead.

15 Q (BY MR. RODRIGUEZ) Good morning,
16 Mr. Metzler.

17 A Good morning.

18 Q I believe we got on the record who you are.
19 Right? I already asked you that?

20 JUDGE NORMAN: Yes.

21 A Yes.

22 Q (BY MR. RODRIGUEZ) I'm not sure exactly
23 where I was at this point that we went through the
24 exercises of going through your changes to your
25 testimony.

1 You've got something that's in front of
2 you that's marked Lindsay Exhibit APP-2?

3 MR. CARLTON: Can you pull your mic
4 closer, Art?

5 Q (BY MR. RODRIGUEZ) Do you recognize that
6 document, Mr. Metzler?

7 A Yes.

8 Q Can you identify it for me, please?

9 A It's my -- my pretrial testimony.

10 Q And, Mr. Metzler, you just heard me go
11 through several changes to that -- to that testimony,
12 and do you agree with those changes?

13 A Yes, I do.

14 Q Now, if I ask you the questions that are in
15 Metzler -- or Applicant's Exhibit APP-2 now as revised
16 by my statements earlier, would your answers today be
17 the same?

18 A Yes, they would.

19 Q Okay. And, Mr. Metzler, can you please
20 identify for me Lindsay Exhibit APP-1? It's this
21 document right here.

22 A Our application.

23 MR. RODRIGUEZ: Okay. At this time,
24 Your Honor, we offer Lindsay Exhibits APP-1 and 2.

25 JUDGE NORMAN: And I know there've

1 already been objections, and those are noted and
2 preserved:

3 MR. CARLTON: Thank you.

4 JUDGE NORMAN: And any other objections?

5 MR. CARLTON: None apart from what we've
6 already discussed.

7 JUDGE NORMAN: All right. Okay.

8 Mr. MacLeod?

9 MR. MacLEOD: No objections.

10 JUDGE NORMAN: They're admitted on that
11 basis.

12 (Exhibit APP Nos. 1 and 2 admitted)

13 MR. RODRIGUEZ: At this point, Your
14 Honor, do you want the 2001.081 testimony, or do you
15 want him to provide his narrative to you?

16 JUDGE NORMAN: I'd rather get that out
17 of the way. Yeah, we're going to get that out of the
18 way, the .081 testimony, from your witnesses and from
19 the staff's witnesses.

20 MR. RODRIGUEZ: Okay.

21 JUDGE NORMAN: And then we're going
22 to -- I'm going to rule on that, and then we're going
23 to -- then we're going to go forward with the hearing.
24 Okay?

25 Q (BY MR. RODRIGUEZ) Mr. Metzler, I'm going to

1 ask you in your testimony, APP-2, Exhibit APP-2, to
2 turn to DLM-10, Exhibit DLM-10. And I'm going to ask
3 you if you can -- if you'll identify those
4 documents -- can identify those documents for me.

5 A They are the letters that the City of Lindsay
6 received in 2005 concerning the water and sewer
7 service.

8 Q Okay. Mr. Metzler, let me ask you this:
9 You've heard today that there have been some
10 objections to the testimony based on hearsay, that
11 Mr. Myrick's or Lindsay Pure Water's attorney wouldn't
12 have the opportunity to cross-examine these folks.
13 Can you please detail for me -- would it be reasonable
14 to bring all these 55 people to Austin to provide
15 testimony that they are requesting service from the
16 city?

17 A It would seem to me to be a little
18 unreasonable to bring all 55. Several of these people
19 are 80 plus years old, one or two of them have been in
20 and out of rest homes, rehabilitation homes for
21 physical ailments over the past few years. One or two
22 of them --

23 MR. CARLTON: Objection.

24 JUDGE NORMAN: Okay.

25 MR. CARLTON: I don't think there's been

1 a foundation laid as to this witness' personal
2 knowledge regarding what really is 22 requests for
3 service and the people that wrote those requests for
4 service. And he's testifying about why they can't be
5 here.

6 JUDGE NORMAN: Right.

7 MR. CARLTON: Does he know them? Does
8 he have information about each of them that allows him
9 that personal knowledge to testify about that?

10 JUDGE NORMAN: Well, I'm going to let
11 you cross. And again, I'm going to let in hearsay.
12 I'm going to let in hearsay evidence.

13 MR. CARLTON: I understand, but I have
14 to preserve the objection.

15 JUDGE NORMAN: I understand, and
16 before -- in fact, I'm going to let you -- before I
17 make my ruling, I'm going to let you take him.

18 MR. CARLTON: Thank you.

19 JUDGE NORMAN: All right. Go ahead.

20 Q (BY MR. RODRIGUEZ) Mr. Metzler, have you
21 reviewed the requests that are contained in DLM-10?

22 A Yes, I have.

23 Q Do you have -- do you personally know many of
24 those people?

25 A I do.

1 Q Okay. Now, can you please detail for me
2 exactly why you believe it would be unreasonable to
3 have these people come to Austin to testify that these
4 are their signatures and that they are requesting
5 service?

6 A There's one of them in here from a Vincent
7 Zimmerer who is right at 90 years old and has been in
8 poor health for several years, and I believe a trip to
9 Austin would be pretty difficult for him. There's one
10 in here from Ms. Marsha Dill. If I'm not mistaken,
11 she has several young children, and it might be
12 difficult for her to get down here. There's one in
13 here from Frances Zimmerer, who is 90 something years
14 old, that a trip to Austin may be a little difficult.

15 Q Okay. Also, what type of expense would be
16 related to bring some -- bring these people down to
17 Austin for testimony, Mr. Metzler?

18 A Well, we would be required to put them up in
19 a hotel for one or two nights, meals, transportation
20 expenses. I don't know if the city would be looking
21 at chartering a bus to bring them all down here or
22 expecting all of them to drive down here on their own.

23 Q Mr. Metzler, you serve as the Mayor Pro-Tem
24 for the City of Lindsay. Is that correct?

25 A Yes, I do.

1 Q Now, in making decisions based on -- policy
2 decisions for the city, is this the type of
3 information that you would rely upon, what's contained
4 in DLM-10, to make a policy decision for the city?

5 A It would be one piece of information we would
6 use, yes.

7 Q Okay. Do you think that it's reasonable
8 and prudent for you to take these letters into
9 consideration in determining whether you've got --
10 whether you need to expand your CCN?

11 A Yes, I do.

12 Q Mr. Metzler, with respect to having these
13 people come in and testify or provide testimony, in
14 your opinion as a policymaker for the City of Lindsay,
15 are these -- are the service requests that are
16 contained in DLM-10 the type of information that you
17 need in order to determine whether you need to proceed
18 with this application or not?

19 A Yes, it is.

20 Q And is there other mechanisms that are both
21 cost-effective and -- well, that are cost-effective or
22 other reasonable areas to be able to provide this
23 proof short of providing these letters?

24 A Well, other than the persons attending a city
25 council meeting requesting service, I can't imagine

1 what that would be. So they either provide us -- show
2 an interest, you know, written or showing up at city
3 council and asking how soon or when something could
4 happen for them.

5 MR. RODRIGUEZ: Your Honor, I guess on
6 this limited issue I would tender him for
7 cross-examine with respect to that.

8 JUDGE NORMAN: Okay. And I think
9 probably -- I'll hear what you-all have to say, but I
10 think given the Executive Director's position on the
11 application, it probably would be best to let him go
12 second, and then you can cross.

13 MR. CARLTON: Thank you.

14 JUDGE NORMAN: Okay. Go ahead.

15 CROSS-EXAMINATION

16 BY MR. MacLEOD:

17 Q I just had one area I had some concern about,
18 and that is that on recovering the costs if you had to
19 bring the 55 people down here, would you recover those
20 costs from general funds, or would you recover them in
21 the water rates?

22 A Well, since this is tied to the water and
23 sewer program, right now I would assume we would look
24 at recovering it from that point, but that would be a
25 council decision, and we could look at spreading it

1 out over both the general and the water and sewer
2 funds.

3 MR. MacLEOD: I don't have any other
4 questions.

5 JUDGE NORMAN: I'm sorry?

6 MR. MacLEOD: I don't have any other
7 questions.

8 JUDGE NORMAN: Okay. Mr. Carlton?

9 CROSS-EXAMINATION

10 BY MR. CARLTON:

11 Q Good morning. Mr. Metzler?

12 A Metzler.

13 Q Okay. I want to make sure I get it right.

14 A Good morning.

15 Q I don't want to mess it up.

16 Have you ever participated in a hearing
17 like this before?

18 A No, sir.

19 Q So you don't really know what the rules are
20 for how you call witnesses and how people are
21 available and all those kinds of things, do you?

22 A No, I really don't.

23 Q Okay. So you're not aware that witnesses
24 that have trouble traveling could be called by
25 telephone to testify?

1 A No, I wasn't.

2 Q Okay. So that would be another way to prove
3 up this evidence, wouldn't it?

4 A I would think so.

5 Q Okay. And then you mentioned that one
6 example -- do you follow sports in Lindsay?

7 A To some degree, yes.

8 Q Everybody kind of follows high school. Are
9 you familiar the team went to the state playoffs?

10 A Yes.

11 Q You know Ms. Dill attended that game. Right?

12 A No, I don't know that.

13 Q Okay.

14 A I didn't go myself.

15 Q Okay. All right.

16 JUDGE NORMAN: Was that in football?

17 MR. MYRICK: Basketball.

18 JUDGE NORMAN: Basketball.

19 MR. CARLTON: State Championship in 1A.

20 JUDGE NORMAN: All right.

21 MR. CARLTON: Just on the record,
22 Lindsay, congratulations.

23 (Laughter)

24 Q (BY MR. CARLTON) Were you on the city
25 council at the time this application was prepared?

1 A In 2005, I was not.

2 Q Okay. Were you on the planning and zoning
3 commission at the time this application was prepared?

4 A I had just started my first term on P&Z.

5 Q And when did your term start in?

6 A 2005.

7 Q In 2005. A particular month?

8 A June.

9 Q June of 2005? Okay. And this application
10 was filed August 31, 2005. Right?

11 A Yes.

12 Q Okay. One day before the rules changed to
13 implement the new statutes?

14 (No response)

15 Q (BY MR. CARLTON) Okay. Nevermind.

16 And have you looked at all of these
17 letters?

18 A Yes, sir.

19 Q Are any of them dated before August 31, 2005?

20 A No.

21 Q Okay. So the city filed its application
22 without having these letters in its possession.
23 Correct?

24 A I would have to assume that.

25 Q Okay. But you don't know why the city

1 filed -- or whether the city filed its application
2 without the letters?

3 A No, I do not know that.

4 Q Okay. Do you know how the letters were
5 prepared?

6 A No, I do not.

7 Q Do you have any idea why they all are
8 duplicates of each other except for the names and
9 addresses?

10 A No, I do not.

11 Q Okay. Do you know whether these individuals
12 separately prepared these letters?

13 A No, I do not.

14 Q So did the city make these letters?

15 A I don't know. I didn't have -- I wasn't a
16 party to obtaining these letters. So I have no idea
17 how that process worked.

18 Q Okay. So you can't give me any information
19 as to how these letters were prepared or why they were
20 prepared?

21 A No, I can't.

22 Q Okay. When you testified that you felt these
23 were reasonable to rely upon, that was your opinion.
24 Correct?

25 A Yes.

1 Q Okay. So you're not speaking for the city
2 council here today?

3 A I am speaking for the city council. Whether
4 or not these are reliable people, I would think even
5 our city council would agree that they're reliable
6 people.

7 Q Okay. But the city council hasn't authorized
8 you to speak on their behalf as to the truth of these
9 letters or the reliability of them, have they?

10 A Well, I guess they haven't formally voted to
11 send me down here if that's the question you're
12 asking.

13 Q And that's the way the council takes action.
14 Correct?

15 A To -- yes, we would vote on something. I'm
16 down here -- the mayor couldn't be here, and so I'm
17 here in his place.

18 Q Would you agree with me that these letters
19 don't request service at any particular time?

20 A I would have to agree to that.

21 Q Would you agree with me these letters don't
22 request any certain amount or quantity of service?

23 A Well, I don't -- "quantity" meaning?

24 Q Do any of these letters say how many homes
25 are going to be served?

1 A No, no, they don't, other than the one that
2 talks about having five lots, but I'm assuming there's
3 no homes on those five lots right now.

4 Q And I assume the city hasn't taken any steps
5 to begin to provide service to these folks, have they?

6 A Not at this time.

7 Q And are you familiar with the rule that the
8 city is not required to have a CCN to provide service
9 out anywhere?

10 A Well, I am aware of that, yes.

11 Q Okay. All right. Has the city received any
12 requests for service, let's say, since you've been on
13 city council where the city has actually extended
14 water service outside the city limits?

15 A No.

16 Q Were you familiar with the circumstances of
17 the adoption of Ordinance 0805-3, which is attached to
18 Mr. Stowe's testimony regarding utility service
19 outside the city? Are you familiar with the adoption
20 of that ordinance in August of '05?

21 A No.

22 MR. CARLTON: Your Honor, if I could
23 have just a minute, please?

24 JUDGE NORMAN: Sure.

25 (Brief pause)

1 (Exhibit LPWC No. 8 marked)

2 Q (BY MR. CARLTON) Would you take a look at
3 that document that's in front of you? Can you tell me
4 what that is?

5 A It's a city ordinance --

6 Q Okay.

7 A -- passed by the City of Lindsay.

8 Q And that ordinance was passed in August of
9 '05. Correct?

10 A Yes.

11 Q And were you on the city council at that
12 time?

13 A No, sir.

14 Q Were you on the planning and zoning
15 commission then?

16 A Yes.

17 Q Did the planning and zoning commission have
18 any involvement in advising the council about how the
19 city should serve properties outside the city limits?

20 A In my one or two months prior to this being
21 passed, I don't recall that being a part of our
22 agenda.

23 Q Okay. Would you look in Section 1,
24 Paragraph (A), and would you agree with me that that
25 paragraph requires that somebody who wants utility