

1 service from Lindsay requires them to file a petition
2 for annexation if they want to get service?

3 A Yes.

4 MR. RODRIGUEZ: Your Honor, I'm going to
5 object to the question as to the relevancy of this.
6 This ordinance that he's examining the witness about
7 actually provides -- it's a process to actually
8 receive service where all these -- what we're talking
9 about DLM-10 are requests for service. This is a
10 process for you to become a qualified applicant for
11 service. It's not to request service from the city.
12 So I'd object to the relevancy of the question.

13 JUDGE NORMAN: I'm going to overrule it,
14 but I note your argument on that, and it may well be
15 accurate, but I'm going to allow as much evidence as I
16 reasonably can on this. Go ahead.

17 Q (BY MR. CARLTON) So the beginning of that
18 paragraph, in fact, says that any person desiring
19 utility services furnished by the city for property
20 outside the city limits shall prior to getting that
21 service file a petition for annexation. Correct?

22 A Yes.

23 MR. RODRIGUEZ: Your Honor, just please
24 note my running objection on that.

25 JUDGE NORMAN: Certainly; certainly.

1 Q (BY MR. CARLTON) If you would turn to the
2 second page, Section (B) and in particular Subsection
3 (1) there it has, in caps, WATER.

4 A WATER.

5 Q It basically states that anybody that desires
6 to use water has to make an application to the public
7 works department. Correct?

8 A Correct.

9 Q And in that application, they have to state
10 the exact location of the premises to be served and
11 the purposes for which water is going to be provided.
12 Right?

13 A Yes.

14 Q Okay. None of these letters do either of
15 those things, do they? The letters don't state the
16 exact location?

17 A The letters have a location on them.

18 Q Okay.

19 A Don't they? I mean, they have the address
20 listed right below their name. Is that not the
21 location?

22 Q I don't know. You tell me. I'm relying upon
23 you for these letters and the information about the
24 letters.

25 A That would be the location, the address

1 listed below the name of these people.

2 Q Okay. Does it --

3 A Now, the intent, it doesn't say whether it's
4 going to be used for their home or agriculture.

5 Q It also states that they have to agree to pay
6 all the city's rates and charges, doesn't it?

7 A Yes.

8 Q And the letters don't have any sort of
9 agreement in that respect, do they?

10 A No, they do not.

11 Q Do the letters specify a timeframe in which
12 they request service?

13 A At some point in the future.

14 Q And do the level -- do the letters request or
15 state anything as far as how service -- they'd like
16 for service to be provided to them?

17 A No, they do not.

18 Q And we've already discussed that they don't
19 talk about how much service, how many homes or
20 anything other than the one that has five lots?

21 A Other than the one address listed on each
22 application, no, they do not.

23 Q Would you agree with me that these letters
24 were probably prepared in response to a request by the
25 agency that Mr. Rodriguez referred to to provide

1 copies of written requests for service?

2 A I have a hard time doing that. Not having
3 been involved in any of the discussion in 2005
4 concerning these, I don't know what prompted these
5 letters.

6 Q Okay. Who would be the person at the city
7 most likely to know how these letters were prepared?

8 A The mayor would have probably -- would be one
9 person you could go to, Mr. Swinggi.

10 Q So he would be able to testify about these
11 letters?

12 A I would think so.

13 Q Would the city secretary?

14 A She was employed at that time. I would think
15 she could.

16 Q Neither of them are here now, are they?

17 A One of them is.

18 Q Who is here?

19 A The city secretary.

20 Q Okay.

21 A Ms. Fleitman.

22 MR. CARLTON: Your Honor, I'm just
23 taking a minute --

24 JUDGE NORMAN: Sure.

25 MR. CARLTON: -- to make sure I don't

1 have anything else.

2 (Brief pause)

3 MR. CARLTON: I'll pass the witness.

4 JUDGE NORMAN: Anything further,

5 Mr. Rodriguez?

6 REDIRECT EXAMINATION

7 BY MR. RODRIGUEZ:

8 Q Mr. Metzler, I think we established you're
9 the mayor pro-tem for the city. Did you review city
10 records in -- well, let me ask it this way: Is
11 DLM-10, which is the 55 requests for -- letter
12 requests for service, taken from the city records?

13 MR. CARLTON: Art?

14 JUDGE NORMAN: DLM-10, is it taken from
15 the city records?

16 A Yes, it is.

17 Q (BY MR. RODRIGUEZ) And does the city
18 understand these to be requests for service for both
19 water and sewer service for that matter?

20 A Yes, we do.

21 Q And those requests for service are being made
22 to the City of Lindsay. Is that accurate?

23 A Yes.

24 Q Let me also -- let me ask you to turn to
25 Lindsay Pure Water Exhibit 8, which I believe is City

1 Ordinance 0805-3 because there were some questions on
2 that. Go to Page 2 of that. I believe there were
3 some questions with respect to Subsection (B)(1)
4 WATER.

5 A Yes.

6 Q Do you remember that testimony?

7 A Yes.

8 Q What are the words right after "WATER" in
9 that section?

10 A "Application; construction and materials
11 required."

12 Q Do you see anything in this ordinance,
13 Mr. Metzler, that provides a process for someone to
14 request service from the city, or does this only
15 require one to -- a process for how they apply for
16 service from the city?

17 MR. CARLTON: Objection; leading.

18 A There --

19 JUDGE NORMAN: I'm going to sustain the
20 objection, the second part of it. The first part of
21 it is, do you see anywhere --

22 MR. RODRIGUEZ: Do you see anywhere --
23 I'll rephrase, Your Honor.

24 JUDGE NORMAN: Okay.

25 Q (BY MR. RODRIGUEZ) Mr. Metzler, how do you

1 characterize (B)(1) with respect to someone requesting
2 service?

3 A Well, they would make some kind of a written
4 application to the public works department asking for
5 a water service.

6 Q So they would need to do that if they were
7 seeking to apply for service. Correct?

8 A Yes.

9 Q Is there a process in there for one to
10 request service from the city?

11 A No.

12 Q So at least your understanding, Mr. Metzler,
13 is that this ordinance speaks to the application for
14 service?

15 A Yes.

16 Q Okay. Now, Mr. Metzler, there were some
17 questions with respect to the quantity of service and
18 the amount of service that was provided. I'm going to
19 ask you to read 291.102 as it's currently constituted
20 from the city's -- from the TCEQ rules and ask you to
21 read Subsection (d)(2) of 291.102.

22 A The need --

23 Q And read it to yourself.

24 A Okay.

25 Q I don't need you to read it into the record.

1 A Okay.

2 Q Can you please tell me in there where it
3 provides that a request -- actually are requests for
4 service even mentioned in that subsection?

5 A It's not.

6 Q And --

7 JUDGE NORMAN: In (d) -- and what is it?

8 MR. RODRIGUEZ: In (d)(2), (A) and
9 Subsection (D).

10 JUDGE NORMAN: It is in there?

11 MR. RODRIGUEZ: Yeah, requests for
12 service are in there.

13 Q (BY MR. RODRIGUEZ) Is that correct?

14 A Yes.

15 Q Okay. Now, can you please tell me,
16 Mr. Metzler, where in there it talks about needing a
17 requirement that you need to have a certain amount of
18 service demand in your request for service?

19 A I don't see it in those two statements.

20 Q Is there anything in there that would require
21 a timeline to provide service in order for it to be a
22 valid service request?

23 A I don't see that.

24 Q Is there anything in those sections that we
25 just read that provides a detailed step or process

1 that one needs to go through in order to make a
2 request for service?

3 A No.

4 MR. RODRIGUEZ: I pass the witness, Your
5 Honor.

6 JUDGE NORMAN: Mr. MacLeod?

7 RECROSS-EXAMINATION

8 BY MR. MacLEOD:

9 Q Mr. Metzler, these requests for service
10 requests, they're all coming from I think the city of
11 Gainesville and the City of Lindsay -- is that
12 correct -- that's where these requestors are located?

13 A They would be located south, west and north
14 of Lindsay with mailing addresses that would probably
15 be Gainesville and Lindsay.

16 Q And did you travel here from Lindsay today or
17 yesterday?

18 A Yesterday.

19 Q Did you fly, or did you drive?

20 A I drove.

21 Q How far did you drive?

22 A Two hundred and fifty miles.

23 Q And how long did it take you to do that?

24 A Four hours and five minutes.

25 JUDGE NORMAN: That's pretty precise.

1 Q (BY MR. MacLEOD) And I was also -- on the
2 applications for service question -- no, I'm going to
3 hold off on that.

4 Now, there was some reference in the
5 earlier cross-examination to the fact that you weren't
6 aware that this could be -- that they could testify by
7 telephone. I suppose you probably aren't also aware
8 that the SOAH Rules 155.45 require a motion to be
9 acted on in order to have participation by telephone.
10 You're not aware of that either, are you?

11 A No.

12 Q But you are aware that if motions are
13 prepared, you have to pay an attorney to do that
14 motion, aren't you?

15 A Yes.

16 Q Now, you also are aware of what telephone
17 conferences are like. I'm guessing you --

18 A I have.

19 Q -- participated in -- have you ever done a
20 telephone conference with 55 people?

21 A No, I have not.

22 Q Do you think that that would be a reasonable,
23 fairly easy thing to do, to have a telephone
24 conference with 55 people?

25 A Probably not reasonable. I don't know how

1 easy it is with today's technology. Three to five
2 would probably be more reasonable.

3 Q Have you ever had difficulty reaching people
4 if you were trying to reach them in order, like trying
5 to call somebody next and they're not there?

6 A Yes, I have.

7 Q Have you ever had phone calls dropped from
8 telephone conferences?

9 A Yes.

10 Q Is that with how many people have they been
11 dropped? Were there 55 people in that conference?

12 A No. Five.

13 Q Have you ever done a telephone conference
14 with 55 people?

15 A No, I have not.

16 Q What's the most people you've ever had in a
17 telephone conference?

18 A Five.

19 Q Do you currently have where these requests
20 are coming from? Let me restart again because I want
21 the record to be clear.

22 In the areas where these requests have
23 come from, do you have lines in those areas ready to
24 serve? Could you serve those people right now or not?

25 A No, we couldn't.

1 Q Could you even take an application from these
2 people at this time?

3 A Well, from some of them closer to the city
4 limits, yes, we could.

5 MR. MacLEOD: Pass the witness.

6 JUDGE NORMAN: Mr. Carlton?

7 MR. CARLTON: I don't have any
8 questions.

9 JUDGE NORMAN: Okay. Okay. And you
10 wanted to get Mr. Maroney -- is that right -- to
11 testify on this matter? Is that right?

12 MR. RODRIGUEZ: No, sir.

13 JUDGE NORMAN: Okay.

14 MR. RODRIGUEZ: Mr. Metzler as far as
15 the limited issue --

16 JUDGE NORMAN: Okay.

17 MR. RODRIGUEZ: -- of the letters are
18 concerned.

19 JUDGE NORMAN: And this is I think -- I
20 think Mr. Myrick has, you know, asserted in his
21 testimony that this is not needed, has he not?

22 MR. CARLTON: True, yes.

23 JUDGE NORMAN: And he's also asserted
24 that that's why he did not -- he himself did not file
25 a CCN application. Is that true?

1 MR. CARLTON: Yes.

2 JUDGE NORMAN: So this is a key issue.

3 MR. CARLTON: And it's also important to
4 Ms. Benter's testimony because she asserts that one of
5 the reasons she's recommending the CCN be granted is
6 because we didn't file a competing CCN application --

7 JUDGE NORMAN: Right.

8 MR. CARLTON: -- even though I don't
9 know of any requirement in the rules to do so.

10 JUDGE NORMAN: Right. So I'm spending a
11 lot of time on this is what I'm saying because it's a
12 very important issue.

13 The city secretary is here?

14 MR. RODRIGUEZ: She's here, yes, sir.

15 JUDGE NORMAN: Is there anyone here that
16 was named on these -- any of these 55 people here in
17 the room?

18 MR. RODRIGUEZ: Not that I know of, Your
19 Honor.

20 JUDGE NORMAN: Okay. All right.
21 Anybody who wants to call the city secretary I'm going
22 to permit them to do it, you know, before I rule on
23 this.

24 But now, Mr. MacLeod, I want to hear
25 testimony from Ms. Benter if you want to provide that.

1 MR. MacLEOD: Yes, we will. So I go
2 ahead and call Ms. Tammy Benter.

3 JUDGE NORMAN: And she'll take your
4 place over there, Mr. Metzler.

5 You've been sworn, Ms. Benter?

6 THE WITNESS: Yes, I have.

7 JUDGE NORMAN: Okay.

8 PRESENTATION ON BEHALF OF THE EXECUTIVE DIRECTOR

9 TAMMY HOLGUIN-BENTER,
10 having been first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. MacLEOD:

13 Q Could you state your name for the record,
14 please?

15 A Tammy Lee Holguin-Benter. I go by
16 Tammy Benter.

17 Q And where do you work?

18 A TCEQ, Water Supply Division, Utilities and
19 Districts section on the financial review team.

20 Q And what's your current position there?

21 A I am the team leader of the financial review
22 team.

23 Q And how long have you been working at the
24 TCEQ?

25 A Ten years.

1 Q And what's your educational background?

2 A My undergraduate is economics and biology.
3 It's a bachelor of science, and my masters is a
4 masters of business administration.

5 Q Now, in working with the TCEQ, do you deal
6 with CCN applications?

7 A Yes, on a daily basis.

8 Q Do you deal with TCEQ and ED, Executive
9 Director, policy on how TCEQ CCN applications are
10 processed?

11 A Yes.

12 Q And could you give me an estimate as to how
13 many CCN applications you've reviewed? Would it be
14 hundreds?

15 A Yeah.

16 Q Thousands?

17 A Yeah, we process 200 -- I think last year it
18 was 285 or somewhere through there, about 260, 250 a
19 year, and all of those come across my desk initially
20 when I make the assignment and then reviewing them
21 before they're actually granted.

22 Q So how well acquainted are you with the
23 practices of the Commission and the Executive Director
24 policy for determining whether or not there is a need
25 for service?

1 A I'm extremely aware of the policies.

2 Q And how long has the agency relied on
3 requests for service as a factor determining whether
4 there is a need for service?

5 A Since I've been at the agency, the need for
6 service has been one of the criteria, and we've always
7 relied on applications or letters for service.

8 Q And why do we rely on them?

9 A Because it's showing -- to us it shows a
10 need. It demonstrates that there are individuals
11 living out in the requested area that are actually
12 seeking service at some point.

13 Q Do experts in your field, in particular those
14 who determine whether the requirement for a need for
15 service for the issuance of a CCN are met, do those
16 experts reasonably rely on requests for service and
17 form opinions on the subjects of whether there is a
18 need for service?

19 A Yes, we do.

20 Q Now, the new rules and the new statute, which
21 we've all stipulated aren't the ones that apply to
22 this, do specifically state that requests for service
23 are to be considered in determining whether there's a
24 need for service. Is that right?

25 A That's correct. It's one of the subparts.

1 Q Was that the agency's practice before these
2 rules were put into effect?

3 A Yes, it was.

4 Q So they're just codifying agency practice?

5 A Correct.

6 Q Is there a test for what a request for
7 service is when the agency is considering requests for
8 service?

9 A No, not -- not really. The new rules have
10 specific -- they break it down further. So there's
11 different ways of demonstrating a need for service in
12 the new rules.

13 Now, if I understand this application,
14 we're not looking at it under the new rules, but the
15 new rules do allow applications for service and
16 environmental need and economic need and different
17 things that you can, you know, specify in order to
18 demonstrate a need.

19 JUDGE NORMAN: But the old rules require
20 a request for service. Is that right?

21 A Correct, or a need for service.

22 JUDGE NORMAN: Or a need for service?

23 A Yes.

24 JUDGE NORMAN: A need for service?

25 A I'd have to look at the old rules.

1 JUDGE NORMAN: Why don't you do that.

2 MR. RODRIGUEZ: It's right in front of
3 you.

4 A It says "Copies of written requests seeking
5 to obtain service from each of the public" -- wait,
6 that's the wrong one. I'm looking at the wrong one.

7 MR. MacLEOD: That's the new rule.

8 A Oh, okay, here it is. "The need for
9 additional service in the requested area."

10 JUDGE NORMAN: Just simply the need for
11 requested service --

12 A Uh-huh.

13 JUDGE NORMAN: -- in the requested area?

14 MR. MacLEOD: And that was -- sorry.

15 JUDGE NORMAN: Okay. Go ahead.

16 Q (BY MR. MacLEOD) That was the old rule, the
17 rule that this was brought under. Is that right?

18 A Yes, that's correct.

19 Q But I believe your testimony was that even
20 under the old rule the agency practice, in your ten
21 years of working there, has been that requests for
22 service are a part of how that need is shown. Is that
23 correct?

24 A Yes, that's correct.

25 Q And that's information experts in your field

1 rely on in making their determinations. Is that
2 correct?

3 A That's correct.

4 JUDGE NORMAN: Now, when you say "need
5 for service," is that an indispensable part of the
6 need for service under the old rules, that someone
7 wants it?

8 A Yes.

9 JUDGE NORMAN: All right.

10 Q (BY MR. MacLEOD) Now, there was some
11 reference to the expedited release rule. That's not
12 the same as request for service, is it?

13 A No, it's not.

14 Q On that they've got to have -- don't they
15 have to be requesting nonstandard service in order
16 to -- no?

17 A No, not necessarily. They have to request
18 service from the entity that covers your CCN. The
19 expedited release, you already have to be in someone's
20 CCN in order to request to be released from it. And
21 once you -- for that type of application, you have to
22 ask or seek service from the utility which you're in
23 the CCN of, and you also have to seek service from --
24 and they have to be able to respond to you.

25 You have to request the level and manner

1 of service that you're asking for. For example, if
2 you're trying to do a development and you're putting
3 in dense population -- or you're putting in a dense
4 development and you're seeking fire flow, and you're
5 in a CCN and that CCN holder cannot provide fire flow,
6 then they cannot provide the level or manner that
7 you're seeking, so you can ask to be released
8 expeditedly from the CCN if you have an alternate
9 service provider.

10 Q So the criteria for determining whether or
11 not someone should have expedited release would be a
12 lot different than the criteria for a need for service
13 in issuing a CCN. Is that correct?

14 A That's correct.

15 Q What does the agency consider when they're
16 looking at a request for service? What are we looking
17 for? Are we looking for -- do we require that it show
18 a date? How much specificity are we looking for? Is
19 there any test? I'm just wondering what we're really
20 looking for in those.

21 A The application does ask -- there's a
22 specific -- I can't even talk today -- place in the
23 application that says "Have you received any requests
24 for service, written, verbal," and you can check the
25 box, and then we ask for extra detail.

1 One thing that we do typically ask for
2 are written applications for service, letters for
3 service where someone has actually written showing
4 their name, address and basically just something
5 saying, "Hey, I'm wanting service from you," or "I
6 want to be in the CCN."

7 And then we also look at maybe planned
8 plat maps, things of that nature. We also look at
9 growth studies. We look at population densities and
10 other information submitted by the applicant.

11 Q And that's for need, not service in general?

12 A Correct.

13 Q But need for service when we're looking at
14 the requests, I believe you said that we have been
15 requesting -- we've been asking applicants to give us
16 their requests for service even before the new rules
17 came into effect. Is that correct?

18 A Yes, that's correct.

19 Q And you've been doing that ever since you
20 started working with the agency?

21 A Yes.

22 Q And I don't want to mess up my exhibit
23 numbering, but did you take a look at the letter?
24 Maybe Mr. Rodriguez may want to enter this into
25 evidence later. Did you take a look at the letter

1 that was sent to the applicant by our agency that he
2 handed out?

3 A Yes, I have it here in front of me.

4 Q What's the date on that letter?

5 A September 21, 2005.

6 Q And this is dealing with this very
7 application. Is that right?

8 A That's right.

9 Q And this application is under the old rules.
10 Is that right?

11 A That's correct.

12 Q And this letter requests, as you said -- I'm
13 not going to use the word "request" because I don't
14 want to confuse -- asks that requests for service be
15 provided?

16 A Yes, it does.

17 Q . And I just want to kind of make sure we've
18 got this. A request for service -- I heard you say
19 you're looking for an address and some statement that
20 somebody wants service. Is that right?

21 A Right, either they want service or sometimes
22 they just say "I want to be in the CCN." We assume
23 that as being -- that obviously there's a need for
24 service out there if this individual is saying "I want
25 to be in this service area."

1 Q Now, I want to -- I want to try to be as open
2 about this as I can. Requests for service by
3 themselves is not -- that's just one fact. That by
4 itself won't establish a need for service all by
5 itself, will it?

6 A It can.

7 Q It can, but not as a matter of law. I'm
8 wondering is that true? I don't know. Tell me. A
9 request for service -- if somebody sends in one
10 request for service, that means they automatically get
11 the CCN?

12 A No, not necessarily.

13 Q So it's just a bunch of -- you weigh this
14 evidence --

15 A Right.

16 Q -- along with a bunch of other stuff?

17 A Right. And it depends. If we have one
18 request for service and we have an applicant that's
19 asking for a thousand acres to be added to their CCN,
20 and we have a request for service from a developer or
21 the landowner of the whole thousand-acre tract, that
22 might be sufficient for us. It all depends.

23 Q Now -- and again, I'm trying to be as open
24 and candid as we can with this. You just re-examined
25 all of the -- what we're calling requests for service.

1 Is that right?

2 A That's correct.

3 Q And did you notice that -- we have been
4 saying 55, but you want to change that number because
5 of that examination?

6 A Yes.

7 Q Do you want to explain that?

8 A Yes. I went through all the letters to make
9 sure there weren't any duplicates, and initially I had
10 taken some out. Then I went back and I went through
11 them and just double-checked, and there were one --
12 there were two letters. One of them I think it was
13 like a P.O. Box -- I can't remember -- and it had like
14 maybe a spouse name, and then there was a subsequent
15 letter that had the same spouse name. Or it had -- it
16 had a male and a female name, same last name, same
17 address, and so I took one of them out, didn't count
18 that one.

19 And then there was another one that had
20 the same last name. One I think was a P.O. Box. I
21 don't know, I'd have to go back and look, but it had
22 the same number, so I took -- phone number, so I took
23 that one out.

24 Q So we may be changing that in your prefiled
25 when we offer it -- I don't want to get into that

1 now -- to 53 from 55?

2 A Yes.

3 Q And finally, these 53 requests with two of
4 them possibly being duplicates, two requests from the
5 same household, do we -- does the agency -- would the
6 agency consider these to be requests for service?

7 A Yes.

8 MR. MacLEOD: Pass the witness.

9 JUDGE NORMAN: Okay. Mr. Rodriguez?

10 CROSS-EXAMINATION

11 BY MR. RODRIGUEZ:

12 Q Ms. Benter, it's been offered into evidence
13 already, but I'm going to take you to what's been
14 offered as Applicant's Exhibit No. 1 and ask if you
15 recognize that as the City of Lindsay's application
16 for a CCN?

17 A Yes, I do.

18 Q Now, the date on that is what?

19 A October 7, 2008 -- oh, nevermind. I'm
20 sorry -- August 31, 2005.

21 Q Okay. Now, you would agree with me, wouldn't
22 you, Ms. Benter, that that application was filed prior
23 to the new -- what we've been calling the new CCN
24 rules?

25 A Yes.

1 Q And so that application was actually the
2 Commission-approved application under the old rules?

3 A Yes.

4 Q The pre-House Bill 2876 rules?

5 A Yes, that's correct.

6 Q Now, I'm going to ask you to go to the second
7 page of that -- I'm sorry -- it would be the third
8 page of that, APP -- Bates Page APP002 -- 1002.

9 Excuse me.

10 A Okay.

11 Q Now, would you agree with me that even under
12 the old rules, Ms. Benter, in kind of following up on
13 the questions that you provided on direct examination,
14 under Subsection (2)(B) there, there is a provision
15 there for service requests, isn't there?

16 A Yes.

17 Q And so even under the old rules, it was
18 important enough for the Commission, even at that
19 time, asked whether there were verbal or written
20 requests for service?

21 A That's correct.

22 Q And so it wasn't even necessarily that
23 you-all were limited to written requests back when
24 this application was filed?

25 A That's correct.

1 Q There were -- verbal was -- I don't want to
2 say as good, but it was a factor that you-all looked
3 at?

4 A Yes, it's one of the factors.

5 Q Okay. Now, in Subsection 2, Location
6 Information, would you agree with me that there isn't
7 anything else in there that would -- that discusses
8 population projections?

9 A That's correct.

10 Q And there's nothing in there that talks about
11 master plans? I think those were two of the things
12 that you discussed as far as need for service goes.

13 A No, there's nothing in here that does.

14 Q Okay. And you determined that -- or you
15 stated that requests for service was a factor to
16 consider, a factor used in determining need?

17 A That's correct.

18 Q And those other factors, although they are
19 important, were not important enough to make it into
20 the Commission-approved application. Is that right?

21 A Not at this time, yes.

22 Q Okay. Now, would you agree with me,
23 Ms. Benter, that with respect to requests for service
24 that that is -- not only is it important for a CCN
25 because it's important to the Commission to not grant

1 service requests to people that don't want it. Is
2 that right?

3 A That's correct.

4 Q And it's an important planning tool for
5 utilities to be able to also determine where their
6 service is going to be in the future?

7 A That's correct.

8 Q Is that one of the considerations or why you
9 look at need for service as a factor in determining
10 whether a CCN should be granted?

11 A No, we don't really consider it as a planning
12 tool. I mean, we don't take planning into
13 consideration. We just take the fact that we've got
14 different forms of requests for service as a factor.

15 Q And so the -- in looking at the 55 or 53
16 requests, however you want to count them, it's
17 important not only that they say "I'm requesting
18 service," or "I'm interested in service," but it's
19 also important that they say they wish to be included
20 in the CCN. Is that right?

21 A Yes.

22 Q Okay.

23 A That's right.

24 Q Ms. Benter, you've been with the Commission
25 for ten years approximately?

1 A (Nodded)

2 Q Do you know --

3 JUDGE NORMAN: Yes? Yes?

4 A Yes. October 15th will be ten years.

5 JUDGE NORMAN: Okay.

6 Q (BY MR. RODRIGUEZ) Ms. Benter, do you know
7 the difference between making a request for service
8 and being a qualified applicant for service?

9 A Yes.

10 Q Okay. It's actually two very --

11 A It's two --

12 Q -- two distinctly different --

13 A That's correct.

14 Q -- terms. Is that correct?

15 A We view them as two different -- totally
16 different things, yes.

17 Q Okay. To be a qualified applicant under the
18 CCN rules would then obligate the CCN holder to
19 provide service if they met the qualifications.
20 Correct?

21 A That's correct.

22 Q Whereas if you were just requesting service,
23 there's no incumbent requirement to provide service
24 under the CCN rules. Is that right?

25 A That's correct, unless you meet the service

1 requirements.

2 Q Right, unless you become a qualified
3 applicant?

4 A Correct.

5 Q Okay. Now, Ms. Benter, is there anything in
6 the TCEQ rules, either the old rules or the new
7 rules or even in the water code, pre- or post-House
8 Bill 2876 that stipulates that a request for service
9 indicate a level of service that's being demanded?

10 A No, there's not.

11 Q Is there anything in the rules or the statute
12 that requires a timeframe in which service needs to be
13 provided?

14 A I would need my rule book, but we
15 typically -- if someone is a qualified applicant
16 and -- if they make application, they're a qualified
17 applicant --

18 Q I'm not even talking about qualified
19 applicants. I'm talking about requests for service.
20 Is there anything in either the statutory or the
21 statutes or the regulations that provide that in order
22 to make a request for service you have to make a
23 demand for service within any certain period of time?

24 A No, there's not.

25 Q Now, the letter, the November 2005 letter I

1 believe that --

2 A September 21?

3 Q September 21. Excuse me.

4 A Okay.

5 Q -- 2005 letter that's in front of you, you
6 recognize that as a document from the TCEQ. Correct?

7 A Yes.

8 Q And that was your predecessor that signed it?

9 A Yes. It was Michelle Abrams.

10 Q And you hold that position now. Is that
11 correct?

12 A That's correct.

13 Q And is there anything in that letter that
14 Ms. Abrams was requesting that you don't typically
15 request of applicants with respect to requests for
16 service today?

17 A Yes. Page 2, (e) --

18 Q Uh-huh.

19 A -- landowners consent for all proposed area
20 located outside the area, that's something that we
21 don't --

22 Q That you don't do anymore?

23 A We don't, yeah.

24 Q Okay.

25 A We don't require that.

1 Q Specifically for municipalities?

2 A Correct.

3 MR. RODRIGUEZ: Actually, Your Honor, I
4 didn't offer it earlier because it was just basically
5 an argument that we were making previously when I
6 actually brought this out, but I would at this point
7 seek to enter that into evidence.

8 JUDGE NORMAN: As?

9 MR. RODRIGUEZ: APP Exhibit 5.

10 (Exhibit APP No. 5 marked)

11 JUDGE NORMAN: APP Exhibit 5, all right.
12 Any objection to that?

13 (No response)

14 MR. MacLEOD: None from the ED.

15 JUDGE NORMAN: It's admitted.

16 (Exhibit APP No. 5 admitted)

17 JUDGE NORMAN: And I'd like for you to
18 before the hearing is over to get me a copy of that so
19 I'll have that. You may have it now.

20 MR. RODRIGUEZ: We'll get you one now.

21 JUDGE NORMAN: All right. Okay. Go
22 ahead.

23 MR. RODRIGUEZ: I pass the witness, Your
24 Honor.

25 JUDGE NORMAN: Okay. Mr. Carlton?

1 CROSS-EXAMINATION

2 BY MR. CARLTON:

3 Q Good morning, Ms. Benter.

4 A Good morning.

5 Q Do you have the application over there in
6 front of you?

7 A Yes, I do.

8 Q It's APP-1.

9 A I do.

10 Q Would you turn to page -- well, we can do it
11 a number of ways. Page 7 of 17 may be the way you're
12 most familiar with, but it's Bates labeled APP-1002.

13 A Okay.

14 Q And I'm going to point you to Location
15 Information, 2B.

16 A Okay.

17 Q And the applicant in this case said that they
18 had received requests for service. Correct?

19 A Yes, they did.

20 Q But that they were all verbal?

21 A That's correct.

22 Q Okay. And so underneath the answer to
23 written or verbal, there's a requirement that there be
24 a list of the names, addresses, phone numbers of the
25 people who are requesting service. Correct?

1 A There is a requirement. Otherwise it says
2 "If no, please justify the need for service in the
3 proposed area." So they can do it one of two ways.

4 Q Okay. Did they do either of those things in
5 this application when it was filed?

6 A Not when it was filed.

7 Q Okay. So the letters that you received you
8 received after you provided Applicant's Exhibit 5?

9 A Which is the September 21 letter?

10 Q Yes.

11 A Yes.

12 Q Okay. But prior to that time, you didn't
13 have anything to show that there was -- that the
14 applicant met this particular requirement of the
15 application. Correct?

16 A That's correct.

17 Can I add to my response? What I was --
18 what I was going to --

19 Q Sure.

20 A -- add was at the time the application was
21 filed, we went through our administrative review
22 process before we accepted it for filing, and we asked
23 for that additional documentation before it was
24 accepted.

25 Q So when was the application accepted for

1 filing?

2 A I don't have the file in front of me to see
3 that date.

4 Q Would that have been after the date of the
5 effective date of the new rules?

6 A It had to have been.

7 Q Okay. Because the new rules went into effect
8 September 1st -- correct -- of 2005?

9 A Yes.

10 Q And you don't consider an application to be
11 complete or acceptable for filing --

12 MR. RODRIGUEZ: Your Honor, can I make
13 an objection actually?

14 JUDGE NORMAN: I'm going to let him ask
15 his question, though, first, and then you can object.

16 MR. RODRIGUEZ: It was actually to the
17 previous question, Your Honor.

18 MR. CARLTON: That water is under the
19 bridge, sir.

20 MR. RODRIGUEZ: With respect to the
21 question, I believe the question was -- was it the new
22 rules or was he talking about the statute that was
23 passed on -- that became effective September 1st?

24 MR. CARLTON: I probably said the new
25 rules.

1 MR. RODRIGUEZ: Okay. Well, I'll --
2 thank you.

3 JUDGE NORMAN: All right. You meant to
4 say the new rules anyway?

5 MR. CARLTON: I probably did --

6 JUDGE NORMAN: Okay.

7 MR. MYRICK: -- but I'll ask it the
8 other way, too.

9 Q (BY MR. CARLTON) When did the statute, House
10 Bill -- was it 2867?

11 A 2876, when did it become effective?

12 Q See, you know better than me. You testified
13 on that bill, didn't you?

14 A Yes, I did.

15 Q Okay. Good.

16 JUDGE NORMAN: And so the question is
17 when did it become effective?

18 Q (BY MR. CARLTON) When did that statute
19 become effective?

20 A I don't recall. I'd have to go back and
21 look.

22 Q If I represented to you that it was
23 September 1, 2005, would that surprise you?

24 A No, it wouldn't.

25 Q All right. And did your rules go into effect

1 at the same time that the statute became effective?

2 A We didn't have the rules written at that
3 time.

4 Q And how would we determine when the
5 application was determined to be complete and accepted
6 for filing?

7 A The administrative review process basically
8 just looks for, you know -- I mean information in the
9 application, just checks all the blanks, makes sure
10 that the information is provided. Now, whether the
11 response to these items is accurate or whether it's --
12 all we look for is a check or payment for the
13 application and that all the I's are dotted and T's
14 are crossed. Then it's accepted for filing. We don't
15 really go into the technical review to actually look
16 at the documentation in detail until that point.

17 Q Okay. So you don't consider an application
18 filed until you have all that information?

19 A No. We actually consider the application
20 filed on the date it's received with the agency. And
21 then we consider it accepted for filing, which is a
22 little bit different in our eyes.

23 JUDGE NORMAN: Accepted for filing when
24 the application is completed in accordance with your
25 instructions. Is that right?

1 A Correct.

2 JUDGE NORMAN: Okay.

3 MR. CARLTON: I realize we haven't
4 admitted it -- I don't know, have we -- DLM-9. I
5 think we offered and admitted that. Do you have DLM-9
6 over there?

7 JUDGE NORMAN: Well, I think so. I
8 think it was.

9 MR. CARLTON: I think it was admitted.

10 MR. RODRIGUEZ: I think it was removed,
11 Your Honor.

12 JUDGE NORMAN: DLM-9 was removed? Okay.

13 MR. RODRIGUEZ: Oh, I'm sorry. It was
14 admitted, Your Honor.

15 MR. CARLTON: Yeah, DLM-8 was removed.
16 DLM-9 was admitted.

17 JUDGE NORMAN: All right. Go ahead.

18 Q (BY MR. CARLTON) Can you identify DLM-9 for
19 me, Ms. Benter?

20 A Yes, it's a letter dated November 21, 2005,
21 and it's the letter accepting the application for
22 filing.

23 Q Okay. So what was the -- what would you
24 consider then the date that the application was
25 accepted for filing?

1 A November 21, 2005.

2 Q Okay. Now, you talked a little bit in your
3 testimony with Mr. MacLeod and Mr. Rodriguez about
4 House Bill 2876 and the expedited release process.

5 A Uh-huh.

6 Q And you were one of the state's witnesses in
7 providing resource testimony to the legislature on the
8 adoption of that bill. Correct?

9 A No, not at that time, I wasn't.

10 Q Oh, you weren't?

11 A No.

12 Q I thought you said you testified on the bill.

13 A Like talking about it here, but not in front
14 of the lege, no. That was Doug Holcomb. I'm sorry.
15 I guess I misunderstood.

16 Q Okay. So when you say "talking about it
17 here," what do you mean?

18 A Here during this testimony and in other
19 contested CCN matters where it's come up, but not in
20 front of the legislature.

21 Q Okay. Now, are you familiar with why that
22 legislation was passed?

23 A Yes.

24 Q And why do you understand that legislation
25 was passed?

1 A The legislation actually came through as a
2 petition for rulemaking, and it came through from a
3 group of developers in the Houston area, and it had
4 different parts to it, not just the expedited release,
5 but it had different parts to it. And the Commission
6 decided at that point to seek direction from the
7 legislature when the session started, and it came
8 through that way.

9 Q Okay. And do you know what those developers
10 were trying to -- what problem were they trying to
11 solve in filing that petition for rulemaking and then
12 seeking the legislation?

13 A They had --

14 MR. RODRIGUEZ: I'll object to
15 speculation as to what they -- what those developers
16 thought. Secondly, Your Honor, to the relevancy to
17 these requests for service.

18 JUDGE NORMAN: Well, I am allowing --
19 have allowed inadmissible -- in order to rule on this
20 inadmissible testimony. So I'm going to permit it.
21 Go ahead. Repeat your question. Or do you even
22 remember the question?

23 A Can you repeat the question, please?

24 MR. CARLTON: Kim, can you repeat the
25 question?

1 (Requested portion read)

2 A I don't know what they were thinking, but I
3 can speculate that I believe they were trying to make
4 certain that their -- that they were providing the
5 level or manner of service that they needed. And if
6 they couldn't get that from whoever or whomever they
7 were currently within their CCN of, they could file
8 for expedited release. They were also seeking for
9 clarification on cities expanding their CCNs at that
10 time.

11 JUDGE NORMAN: And doing what now?

12 A Cities expanding their CCNs --

13 JUDGE NORMAN: Cities expanding their
14 CCNs?

15 A -- outside of their ETJ at that time, which
16 that has since gone away. And they were also seeking
17 landowner notification for landowners owning 25 acres
18 or more in the area. And there were some other items
19 in there. I don't remember all of them off the top of
20 my head.

21 Q (BY MR. CARLTON) So would it be -- would it
22 be safe to say that those developers were having
23 trouble getting service at a reasonable timeframe,
24 manner, cost from current CCN holders, and so they
25 were looking for a way out?

1 A I'm not sure. I mean, that could be. It's
2 also a possibility that some of these landowner were
3 wanting to get released from their current CCN holder
4 to develop and create their own distribution in the
5 area to serve their development. So there's different
6 ways of looking at it.

7 Q Have you been involved in conversations with
8 the representatives of the Texas Rural Water
9 Association on this particular issue on expedited
10 releases?

11 A No, I have not.

12 Q Okay. How many applications for
13 decertification of a CCN have you reviewed in the last
14 ten years?

15 A For decertification, you're talking about
16 13.254 type decertifications, or are you talking about
17 expedited? Because we look at them differently.

18 Q Let's start with 254.

19 A 254(a), 254(b), 254(a)(1), they're all
20 different.

21 Q I understand. Let me pull my 254 out, and
22 I'll tell you.

23 A Okay. I probably need my rules, too.

24 Q Well, 254(a) is a Commission decertification
25 action where the Commission gets petitioned, and

1 (a)(1) is the expedited release process. Correct?

2 A That's correct. And I can tell you on (a)(1)
3 we've had maybe five or six total filed, one or two
4 that were not accepted for filing out of that.

5 Q Okay. And how many under (a)?

6 A I'd have to look at (a) exactly. Let me get
7 my rule book. One second.

8 Q Okay.

9 (Brief pause)

10 A We've received one water and sewer petition,
11 that I know of, filed under 13.254(a), and it
12 actually -- we prefiled on that matter, and then it
13 settled right before that. It involved the city of
14 Presidio.

15 Q (BY MR. CARLTON) So in the past ten years
16 you've only received one application under (a), or
17 you've only been involved in one?

18 A I've only been involved in one.

19 Q Okay. In your role as the team leader for
20 your group --

21 A Uh-huh.

22 Q -- do you meet with utility owners about
23 their obligations to provide service when they have
24 questions about that?

25 A I'm sorry. Can you repeat the question?

1 Q In your role as kind of the team leader for
2 your group, do you have occasion to meet with utility
3 owners or representatives regarding their obligations
4 to provide service within their CCN outside of a
5 formal CCN application process?

6 A Absolutely.

7 Q Okay. And in those situations, have you
8 experienced circumstances under which a utility is
9 concerned that a developer within their service area
10 is going to try and get released or removed from their
11 CCN?

12 A Yes, we've heard of that happening.

13 Q And wouldn't it be -- is it true that those
14 situations usually arise when a developer is concerned
15 about the cost for extending service to them, that
16 they'd have to pay the utility for that?

17 A Sometimes. Sometimes it's also timeframe.

18 JUDGE NORMAN: Mr. Carlton -- no, I'm
19 just going to tell you that, you know, all this
20 evidence and testimony right now is for whether or not
21 to admit. And so if you want, you may be developing
22 evidence that's going to aid your case in chief, but
23 that's not what this is for right now, and you're
24 going to have to redo it.

25 MR. CARLTON: I understand.

1 JUDGE NORMAN: Okay.

2 MR. CARLTON: I'm trying to figure out
3 how to get somewhere as quickly as I can.

4 JUDGE NORMAN: Okay. Okay.

5 MR. CARLTON: So I appreciate your --

6 JUDGE NORMAN: All right. That's fine.

7 MR. CARLTON: I appreciate your
8 statements, though.

9 JUDGE NORMAN: Okay.

10 Q (BY MR. CARLTON) In those situations, do the
11 developers usually have an alternative utility that's
12 available to them?

13 A In what situations?

14 Q In situations where the certificated utility
15 has got a developer that's applying for service,
16 they're concerned about costs, and they want to not
17 have to pay that much costs. Are they usually looking
18 at a different utility for service that might cost
19 less?

20 A Yes.

21 Q Okay. And --

22 A But not that might cost less. Sometimes it
23 might be able to provide the level and manner, which
24 is totally different.

25 Q Okay. All right. So those are both options.

1 Would that be a problem if there was not a CCN for the
2 area over which the developer was trying to develop
3 their land? They wouldn't need to get released from
4 the CCN if that CCN hadn't been issued for that area?

5 A I'm not sure I understand what you're asking.

6 Q I suppose what I'm trying to get at is that
7 if there is truly a need for service, then that need
8 is relatively imminent in terms of developers or a
9 homeowner wants service to be provided to them so they
10 can have water. Right?

11 A I don't know what you mean by the word
12 "imminent."

13 Q Well, let me put it this way: If I am a
14 property owner and I have a well and I'm providing
15 myself water from my well, and I say "Gee, I'm going
16 to send in this letter that says I'd like to be in
17 your CCN," do I have a need for service?

18 A You may in the future.

19 Q You may in the future?

20 A Yes.

21 Q And so how far in the future is important to
22 the TCEQ?

23 A It depends. I mean, for us it's not "do you
24 need" an immediate need?" I mean, it's do you need it
25 today? Do you need it tomorrow? Do you need it next

1 week or next month? If that person wants to be in the
2 CCN and they show us that they want to be in the CCN,
3 then we say okay, you want to be in there.

4 Q But doesn't that situation lead to or doesn't
5 that policy lead to situations where areas are locked
6 in to a CCN and when it may be more reasonable for
7 them to obtain service in another way, they can't?

8 A It's possible that they could.

9 Q So how many expedited release petitions have
10 been approved by the agency?

11 A Two, maybe three. I can't recall exactly how
12 many.

13 Q Have been approved where the area was
14 actually released?

15 A Yes. We had one that was denied.

16 Q Would you say that it's an easy process to be
17 decertified?

18 A It depends on how you're filing it.

19 Q If you found out that these letters were not
20 prepared by these individuals but were prepared by
21 somebody who then walked around and circulated form
22 letters for signature by these folks, would that give
23 you any concern about the real need for service or why
24 these folks were filing these letters?

25 A Not necessarily. Most of these letters are

1 actually signed. In fact, they are signed by the
2 individual. They're all different, handwritten. They
3 have a phone number and everything. I mean we could
4 call and verify whether or not --

5 Q But if you found out that the city had
6 prepared a form letter and taken it around to all
7 these people and said, "You know, by having these
8 letters signed, you're going to be able to protect and
9 be a part of the City of Lindsay instead of having
10 Gainesville come out and control your area," would
11 that give you concern over why these letters were
12 filed?

13 A I don't know that happened.

14 Q If you did, would it give you concern over
15 why these letters were filed?

16 A It may, but --

17 Q Is it the Commission's policy to allow
18 utilities to be certificated for reasons other than
19 providing utility service? Do you support
20 applications in that instance?

21 A Other than utility service, no.

22 MR. CARLTON: No further questions.

23 JUDGE NORMAN: Okay. Are there -- we've
24 gone a long time without a break, and some people may
25 need a break.

1 MR. MacLEOD: I almost need one --

2 THE WITNESS: Yeah.

3 MR. MacLEOD: -- but I would like to
4 clarify one thing real quickly if I could.

5 JUDGE NORMAN: All right. Go ahead.

6 REDIRECT EXAMINATION

7 BY MR. MacLEOD:

8 Q I just wanted to clarify something on the
9 applicable statute, the effective date and the date
10 the application was filed because there's some
11 question on that. Does the date the application was
12 filed change if the ED requires further information?

13 A No, it does not.

14 Q Does the phrase "has not been accepted for
15 filing" change the date the application was actually
16 filed?

17 A No.

18 Q Does that phrase relate to whether an
19 application that has already been filed is
20 administratively complete?

21 A Yes, it does.

22 Q Do you know whether the act which changed the
23 language in CCN criteria provided that it would apply
24 to applications filed after September 1, 2005 or the
25 application is administratively complete after

1 September 1, 2005?

2 A Filed before the September 1 date.

3 MR. MacLEOD: Pass the witness.

4 MR. RODRIGUEZ: Actually, Tammy, I want
5 to start right where you -- or Ms. Benter, excuse
6 me -- where you --

7 JUDGE NORMAN: Well, let me ask, do we
8 need -- does someone need for us to take a break right
9 now?

10 MR. RODRIGUEZ: I do in a little bit
11 Your Honor.

12 THE WITNESS: I do.

13 JUDGE NORMAN: You do? Okay. I'm not
14 going to leave you up there then.

15 MR. RODRIGUEZ: All right.

16 JUDGE NORMAN: We'll be back in ten
17 minutes.

18 (Recess: 10:50 a.m. to 11:01 a.m.)

19 JUDGE NORMAN: Okay. We are back on the
20 record. And, Mr. Rodriguez, you had some questions.

21 RECROSS-EXAMINATION

22 BY MR. RODRIGUEZ:

23 Q Yes, Ms. Benter, I'm going to ask you -- kind
24 of follow up on the very few last questions that
25 Mr. MacLeod asked you with respect to House Bill