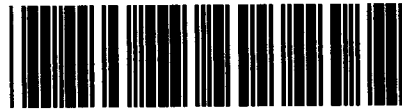




Control Number: 43965



Item Number: 15

Addendum StartPage: 0

SOAH DOCKET NO. 582-03-2282  
TCEQ DOCKET NO. 2003-0033-UCR

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APPLICATION OF DENTON COUNTY §  
FRESH WATER SUPPLY DISTRICT §  
NO. 10 TO AMEND WATER AND §  
SEWER CCNS IN DENTON COUNTY §  
(APPLICATION NOS. 34068-C/34069-C) §

BEFORE THE STATE OFFICE  
PUBLIC UTILITY CASES  
FILED CLERK  
ADMINISTRATIVE HEARINGS

**PROSPER INDEPENDENT SCHOOL DISTRICT'S  
BRIEF IN RESPONSE TO THE CERTIFIED ISSUE**

COMES NOW Prosper Independent School District ("Prosper ISD"), by and through its attorney, and files its brief in response to the following certified issue.

The following certified issue as been submitted for the Texas Commission on Environmental Quality's ("Commission") consideration:

Does Prosper Independent School District have standing to be a party in the referenced case under applicable statutory and rule standards?

**Standing and Affected Person Issue**

Section 5.115(a) of the Texas Water Code provides that, "For the purpose of an administrative hearing held by or for the commission involving a contested case, 'affected person,' or 'person affected,' or 'person who may be affected' means a person who has personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest..."

Title 30 TAC §55.29 provides that, "For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or

economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.”(Emphasis added.)

It was stipulated at the Pre-hearing Conference that Prosper ISD’s boundaries include the amended service area. Prosper ISD is concerned about the Applicant’s ability to provide continuous and adequate service to the school(s) that will be built within the amended service area. The Applicant claims that Prosper ISD is not an affected person based on the fact that the developer is not going to sell any property to Prosper ISD for a school site within the amended service area. Despite the fact that the developer has no intention of selling any property to Prosper ISD for a school site, Prosper ISD will eventually build a school within the amended service area. Mr. Watkins testified that Prosper ISD, if necessary, would condemn an area to build a school within the amended service area. The District argues that Prosper ISD can build a school to serve this subdivision anywhere and that it does not need to be located within the subdivision. However, Mr. Watkins testified that elementary schools are generally built within the subdivision that they are going to serve.

Denton County Fresh Water Supply No. 10 (“District”) is now on notice that Prosper ISD will build a school within the amended service area. Therefore, the application should be amended to reflect that service will be provided to at least one school. The fact that the application does not indicate that a school will be served is not evidence that Prosper ISD is not an affected person.

Section 13.002 of the Texas Water Code provides in pertinent part that, “Affected person means any retail public utility affected by any action of the regulatory authority, any person or corporation whose utility service or rates are affected by any proceeding

before the regulatory authority...” Prosper ISD argues that utility service to the school that will be built within the proposed service area is affected by this proceeding. Prosper ISD contends that it does not have to actually own property or receive service at this time to be an affected person. In this instance, is unreasonable to require one to own property or require that one receive service to be considered an affected person. At this time no homes have been built in this area and no one is receiving utility service in this subdivision. The application that is the subject of this proceeding is to amend Denton County Fresh Water Supply District No. 10’s CCN to provide water and sewer service to a new subdivision. Based on the testimony provided by Drew Watkins, Superintendent for Prosper ISD, there will be at least one school built within the amended service. The fact that Prosper ISD is going to receive service for its school(s) within the amended service area demonstrates that it is an affected person.

Section 13.250 provides in pertinent part that “...any retail public utility that possesses or is required to possess a certificate of public convenience and necessity shall serve every customer within its certificated area and shall render continuous and adequate service within the area or areas.” Therefore, Prosper ISD as a future customer of the District has an interest in ensuring that its school(s) receive continuous and adequate service, and clearly this right is affected by this application.

“One’s right to appear in an agency proceeding should be liberally recognized since an agency should be apprised of diverse viewpoints in order to determine where the public interest lies and how it should be furthered.” Railroad Com’n of Texas v. Ennis Transp. Co., 695 S.W.2d 710 (Tex. App.- Austin 1985); Texas Industrial Traffic League v. Railroad Commission of Texas, 628 S.W.2d 197 (Tex. App. – Austin 1982).

In addition, Section 5.115 of the Texas Water Code contemplates that an affected person includes a person who may be affected. Prosper ISD argues that it may be affected by this application. If Denton County Fresh Water Supply District No. 10's application is granted it will have the exclusive right to provide water and sewer in that area. Any Prosper ISD schools within that area would receive service from Denton County Fresh Water Supply District No. 10.

Prosper ISD does not have to demonstrate that it will ultimately prevail on the merits. "This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have justiciable interest that will be affected." United Copper Industries, Inc. v. Grissom, 17S.W.2d 803( Tex. App. - Austin 2000); Heat Energy Advanced Tech, Inc. v. West Dallas Coalition for Env'tl. Justice, 962 S.W. 2d 288, 289 (Tex. App. – Austin 1998, pet. denied). Prosper ISD contends that it has a justiciable interest that is not common to the public that is affected by this application.

The factors to be considered in determining whether an individual is an affected person are listed under Section 55.29 of the TCEQ rules. One of the factors listed is whether the interest claimed is one protected by the law under which the application will be considered. Clearly, Prosper ISD's interest is one protected by the law under which the application will be considered. Ability to provide adequate service is one of the factors considered in granting or amending a certificate of convenience and necessity ("CCN") Texas Water Code Section 13.246(c). Another factor listed under Section 55.29 is whether a reasonable relationship exists between the interest claimed and the activity regulated. Prosper ISD's interest in receiving adequate utility service is reasonably

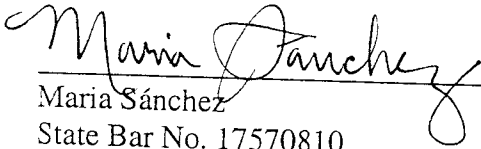
related to the activity regulated. A third factor, to consider in determining whether a person is affected, is the likely impact of the regulated activity on the health, safety and use of property of the person. Receiving adequate utility service has a direct impact on the health and safety of Prosper ISD's students and teachers.

What action is taken with respect to this application will determine whether continuous and adequate service is provided to the area in question. For instance, pursuant to Section 13.246(d), the commission may require an applicant utility to provide a bond or other financial assurance in a form and amount specified by the commission to ensure that continuous and adequate utility service is provided.

Based on the foregoing, Prosper ISD maintains it has standing to be a party in this proceeding pursuant to the Commission's statutory and rule standards.

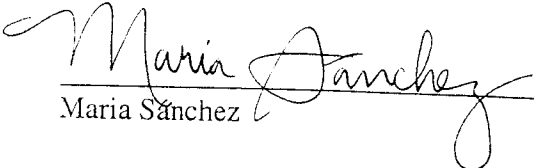
Respectfully submitted,

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By:   
Maria Sánchez  
State Bar No. 17570810  
Attorney for Prosper ISD

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent by first class mail and/or by facsimile to all parties of record on this the 6th day of November 2003.

  
Maria Sánchez

43965

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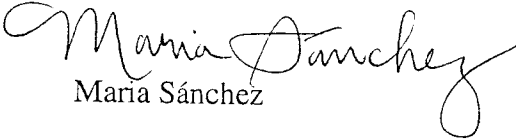
November 6, 2003

La Donna Castañuela, Chief Clerk  
Texas Commission on Environmental  
Quality MC- 105  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: SOAH Docket No. 582-03-2282; TCEQ Docket No. 2003-0033-UCR;  
Application of the Denton County Fresh Water Supply District No. 10 to  
Amend Water and Sewer Certificates of Convenience and Necessity

Dear Ms. Castañuela:

Enclosed for the Commission's consideration is Prosper Independent School  
District's Brief on the certified question submitted by James W. Norman, ALJ. Thank  
you for your attention to this matter.

Sincerely,  
  
Maria Sánchez

Enclosure

cc: Service List

CHIEF CLERK'S OFFICE  
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