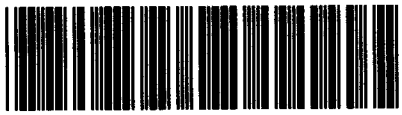

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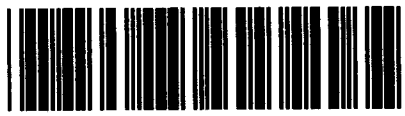

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SOAH DOCKET NO. 582-03-2282
TCEQ DOCKET NO. 2003-0033-UCR

APPLICATION OF DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10 TO AMEND WATER AND SEWER CERTIFICATES OF CONVENIENCE AND NECESSITY NOS. 13021 AND 20923 IN DENTON COUNTY, APPLICATION NOS. 34068-C AND 34069-C	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CERTIFYING QUESTION TO THE COMMISSION

I. Certified Question

The Administrative Law Judge (ALJ) asks the Texas Commission on Environmental Quality (Commission) to consider the following certified question:

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

The ALJ recommends that the Commission conclude that PISD is a proper party to the case. The ALJ intends to go forward with the hearing with PISD as a party unless the Commission determines otherwise.

II. Background

In Application Nos. 34068-C and 34069-C, Denton County Fresh Water Supply District No. 10 (District) applied to the Commission to amend water and sewer Certificate of Convenience and Necessity Nos. 13021 and 29023 in Denton County, Texas. In a preliminary hearing held on May 13, 2003, PISD, Mahard Egg Farm, Inc. (Mahard), and the City of Prosper were admitted as protesting parties. The District did not oppose the admission of the City of Prosper or Mahard, but did oppose PISD's admission. On June 3, 2003, the District submitted an amendment to its application, in accordance with the terms of a settlement agreement with the City of Prosper, pursuant to which it reduced its requested service area from approximately 5100 acres to approximately 475 acres.

IV. ALJ's Rationale for Concluding PISD is a Proper Party

The ALJ's rationale for concluding that PISD should be a party and the parties' arguments on the issue (as of July) are set forth in the attached Order No. 6. **Please note** that this issue is addressed in the first six pages of the order. The last paragraph on page nine is also relevant. Other portions of the order relate to the issue of Mahard's party status, which is now moot, and an entirely different motion filed by Mahard.

Thank you for your consideration of this certified question.

Issued November 3rd, 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

JAMES W. NORMAN
Administrative Law Judge

requested;[1] PISD does not own or have an option to purchase land in the requested service area; the requested service area is within the PISD district; and the requested service area is surrounded by a service area requested by the City of Prosper in a separate CCN application.

Evidence from the owner-developers of the 475 acres showed: they do not intend to donate or sell land to PISD for a school; they realize PISD could condemn land in the area for a school site; they anticipate selling 200 to 250 homes per year and this will lead to the need for a school in about five years; the development will eventually include about 2000 homes; there is no intention of serving customers outside the 475-acre requested service area; and they believe the best place for a school is immediately outside the requested service area where there is good road access.

PISD Superintendent Drew Watkins testified that: as a general rule, there is a need for a school with every 1000 homes, depending on community characteristics, based on an expectation of .75 to 1.25 children per home; an elementary school holds about 500-600 children; there would be a minimum of one school and likely two schools to serve a development with 2000 homes; he cannot be 100 percent certain that a school would be placed within the requested service area, but PISD wants schools as close to the children as possible and schools are typically in the development where children come from; PISD likes to acquire property as early in the development process as possible; and although PISD is not certain it will condemn land in the requested service area, a school in that area is a strong possibility and more likely than not. He acknowledged there has been no authorization to purchase a school site in the requested service area.

PISD board member Stan Toleson testified the district has about two to three million dollars earmarked for school site acquisition, including condemnation, and it is negotiating with developers for about five other school sites.

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[1]The District amended its application in accordance with a settlement agreement with the City of Prosper pursuant to which the City of Prosper withdrew its protest.

It asserted that PISD's real interest in this application is in opposing development rather than assuring adequate service.

The Executive director maintained the term "affected person" is narrowly defined at § 13.002(1) of the Water Code. She asserted that PISD does not qualify in this case because it is not a person or corporation whose utility service or rates are affected by the application, is not itself a retail public utility, and is not a competitor of a retail public utility. She argued PISD's claim is only speculative–it may never be realized. She argued that PISD does not qualify under the factors listed in 30 TAC § 55.29.

PISD cited Superintendent Watkins' testimony, based on several years of experience, that PISD will have one or two schools in the area in the future. It argued it had a legitimate interest in determining whether there will be continuous and adequate service. Citing 55 TEX. ADMIN. CODE § 55.29(c)(1), which specifies "relevant factors" to be considered in determining whether an entity is an "affected person," PISD contended its interest (ability of the District to provide adequate service) is protected by the law under which the application will be considered; that a reasonable relationship exists between the interest claimed and the activity regulated; and there is a likely impact on the health, safety, and use of the property by PISD's students and teachers.

b. Analysis

The ALJ concludes that PISD is a person affected by the District's CCN application and should remain a party in the case. It should be pointed out initially that § 5.115[4] of the Water Code,

[4]The section was enacted in 1995. Acts May 28, 1995, 74th Leg., R.S., ch 882 1995 Tex. Gen. Laws 4381. (A later amendment, which is not relevant to the issue addressed here, removed language saying the Commission was not required to hold a hearing if it determined that the basis for a request for party status was unreasonable.)

to provide adequate service is thus not speculative at all, as argued by the District and the Executive Director, but is certain and present given the likelihood of a school in the requested service area. The fact that it has not met the purported "standard" of having already acquired a school site in an undeveloped area and that it is possible (but not likely) that both school sites will be outside the requested service area does not detract from its present interest that an area where a school is likely have adequate service. The necessity of planning ahead in school development was amply demonstrated by Mr. Watkins' testimony.

PISD also qualifies under § 55.29(c) standards. The interest it claims (adequate water and sewer service) is protected by the law under which the application is filed. There is a reasonable relationship between the interest claimed and the activity regulated (provision of water/sewer service). There is a likely impact of the regulated activity on PISD because a school is likely in the requested service area.

2. Mahard

a. **Parties**

The parties stipulated that Mahard does not own or have an option to buy land in the requested service area; it owns property immediately adjacent to the area separated by a road; and the requested service area is surrounded by the service area requested by the City of Prosper.

Testimony from property owners of the 475-acre requested service area showed there would be a server plant for sewage treatment outside the area and that a transmission line to the plant is planned to go through Mahard's property. However, the line will serve the proposed service area only. The District will not provide retail service to Mahard.

It argued that even if installing the transmission line is outside the scope of the hearing, it is still a feature of the application that gives impacted landowners standing.

Mahard cited the fact that it was properly admitted as a party, as a potential District customer, before the District amended its application. It cited case law for the proposition that once judicial machinery is in motion, a party should be able to argue the interests of other parties once it is admitted as a party.[9] It argued that even the loss of justiciable interest, after it has been admitted as a party, does not preclude it from arguing the rights of others.

Mahard cited the following language in § 13.002(1) of the Water Code definition of affected person in support of its contention: ". . . any retail public utility affected by any action of the regulatory authority, any person or corporation whose utilities service or rates are affected by *any proceeding* before the regulatory authority . . . ." It asserted that the instant proceeding, in which the agreement reducing the service area of the District's application must receive approval, is itself a proceeding that affects Mahard's interests because it affects whether or how utility service will be provided to Mahard. It asserted it is inconsistent to say both that Mahard's status may be changed in this proceeding and that Mahard is not affected by the proceeding.

b. Analysis

The ALJ concludes that Mahard is an affected person and the District's motion to dismiss Mahard should be denied.

Based on evidence that the planned transmission line will go through Mahard's property, the ALJ concludes that Mahard is an affected person under a plain reading of Water Code § 5.115 and 30 TAC § 55.29. As required by 30 TAC § 55.29, Mahard has "a personal justiciable interest related

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[9] *City of Frisco v. Texas Water Rights Commission*, 579 S.W. 2d 66, 69 (Tex. App.–Austin 1979, writ ref'd n.r.e.).

finding standing when real-world facts show a party is materially affected in a particular way different from the general public.[12]

B. Mahard's Motion to Dismiss

1. Parties

Mahard contended the Commission's rules clearly require re-notice of the amended application (whereby the size of the requested service area is reduced from about 5100 acres to about 475 acres). It cited 30 TAC § 281.23(a), providing "[N]o amendments to an application which would constitute a major amendment under the terms of § 305.62 . . . can be made by the applicant after the chief clerk has issued notice of the application and draft permit, unless new notice is issued which includes a description of the proposed amendments to the application." It pointed out the rule is not discretionary. It argued that landowners with land in the original but not current requested service area will be affected because the District no longer wishes to serve them. It asserted it is possible that some landowners that did not intervene might now object because they will not be served. It pointed out that the land of some of the landowners would be crossed by the planned transmission line. It maintained the ALJ has authority to address notice requirements and that failure to comply with notice requirements is a jurisdictional defect that necessitates a remand.

PISD maintained it would not be unduly burdensome for the District to re-notice the application and would ensure due process.

The Executive Director and the District both opposed the motion to dismiss. Both argued that 30 TAC § 305.62(c), to which the above-quoted § 281.23(a) refers, does not apply to CCN applications. Both cited 30 TAC § 305.1, stating Chapter 305 of the Commission's rules applies to

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[12]In *Hooks*, the court found a protesting party had standing even though it did not present evidence to prove its case. (The Court of Appeals found Hooks did not present any evidence to prove standing. *Hooks v. Texas Department of Water Resources, 602 S.w. 2d 389, 393 (Tex. App. –Austin 1980, rev'd.).)*

2. Analysis

The ALJ concludes that Mahard's motion should be denied. By its own terms § 281.23(a) does not apply to Chapter 13 applications because it applies to "draft permits." Section 281.21 provides for draft permits for waste disposal activities conducted under authority of Chapters 26 and 27 of the Water Code, the Texas Solid Waste Disposal Act and the Texas Radiation Control Act. The notice requirements for § 281.21 matters, including draft permits, are different from CCN notice requirements under 30 TAC § 291.106, which do not include draft permits. This understanding is supported by the reference in § 281.23 to § 305.62–as argued by the Executive Director and the District, Chapter 305 does not apply to Chapter 13 applications.[13] [14]

The construction is also supported by Ms. Nehman's testimony that the Commission's policy is not to re-notice when the requested service area for a CCN application.[15]

C. Order

Based on the considerations addressed above, the motion to dismiss by Denton County Fresh

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[13] 30 TAC § 305.1.

[14] This construction is also confirmed in the original language of § 281.23 shown in the January 14, 1986, rule proposal at 11 TexReg 194. At that time, § 281.23(a) said, "[N]o amendments to the application which would constitute a major amendment under § 305.62 . . . can be made by the applicant after the chief clerk has issued notice of the application and draft permit pursuant to §§ 305.91-305.105 of this title . . . unless a new notice is issued . . . ." The scope and applicability of Chapter 305 is shown in original § 305.1 in the June 6, 1986, Texas Register adoption at 11 TexReg 2591. Original § 305.1, entitled "Scope and Applicability," said "[T]he provisions of this chapter set the standards and requirements for applications, permits, and actions by the commission to carry out the responsibilities for management of waste disposal activities under the Texas Water Code, Chapters 26, 27, and 28, and the Texas Waste Disposal Act, Texas Civil Statutes, Article 4477-7."

[15] An agency's interpretation of its own rules or the statutes it is charged with administering is entitled to weight and judicial respect. *Board of Trustees of Employees Retirement System of Texas v. Benge*, 942 S.W. 2d 742, 744 (Tex. App.–Austin 1997, writ den.); *Scurry v. Texas Air Control Board*, 622 S.W. 2d 155, 157 (Tex. Civ. App.–Austin 1981, writ ref'd. n.r.e.)

Mailing List

SOAH Docket No. 582-03-2282
TCEQ Docket No.2003-0033-UCR

Mark Zeppa
4833 Spicewood Springs Rd, #202
Austin, Texas 78759-8436
Tel. 512/346-4011
Fax: 512/346-6847

Representing Denton County Water Supply

Lara K.Nehman, Sheridan Gilkerson, Staff Attorneys
Texas Commission on Environmental Quality
Commission - MC 175
PO Box 13087
Austin, Texas 78711-3087
Tel. (512) 239-2223
Fax (512) 239-0606

Representing the Executive Director of the Texas Commission on Environmental Quality

Blas Coy
Office of the Public Interest Counsel
Texas Commission on Environmental Quality - MC 103
PO Box 13087
Austin, Texas 78711-3087
Tel. (512) 239-6363
Fax (512) 239-6377

Kerry E. Russell
102 West Morrow, Suite 103
Georgetown, Texas 78628
Tel. 512/930-1317
Fax. 512/864-7744

Representing the City of Prosper

John Turney
823 Congress Ave, Suite 706
Austin, Texas 78757
Tel. 512/476-0005
Fax. 512/476-1513

Representing Mahard Egg Farm, Inc.

Maria Sanchez
Tel. 512/469-6006
Fax: 512/473-2159

Representing Prosper ISD

James W. Norman , Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Tel. (512) 475-4993
Fax (512) 475-4994

✦Docket Clerk
Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Tel. (512) 239-3300
Fax (512) 239-3311

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

November 3, 2003

To: Duncan Norton, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA FACSIMILE 512/239-0606

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.

Pursuant to Procedural Rule Section 80.131, enclosed for consideration of the Commission is a certified question in regard to the above referenced matter, now pending before the State Office of Administrative Hearings (SOAH).

If you should have any questions, please call my assistant, Tracy-Lynne Lewis, at 475-4693.

Sincerely,

James W. Norman
Administrative Law Judge

Enc.
cc: Service List