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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, TEXAS

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PUBLIC UTILITY COMMISSION
BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S RESPONSE TO THE ADMINISTRATIVE LAW
JUDGE'S REQUEST TO CERTIFY QUESTION TO THE COMMISSION**

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and files her response to the Administrative Law Judge's ("ALJ's") Request to Certify Question to the Commission. The Executive Director asserts that the Commission should not consider the question of whether Prosper Independent School District ("Prosper ISD") should be a party to this proceeding. If the Commission does consider this question, the Executive Director asserts that Prosper ISD should not be a party to this proceeding.

Should the Commission Consider the ALJ's Certified Question?

As set forth in the ALJ's pleading, on September 24, 2003, Denton County Fresh Water Supply District No. 10 ("District") requested that the ALJ submit certified questions to the Commission concerning the ALJ's ruling allowing Prosper ISD and Mahard Egg Farm, Inc. to be parties to this matter. Subsequently, Mahard Egg Farm, Inc. withdrew as a party. The ALJ has therefore requested that the Commission consider as a certified question whether Prosper ISD is properly a party to this proceeding. 30 Texas Administrative Code (TAC) §80.131(a) prohibits interlocutory appeals to the commission by a party to a proceeding. The District's request is an interlocutory appeal of the ALJ's decision to grant Prosper ISD's party status. Allowing requests for certified questions to be used in this manner would set a bad precedent for other cases when a party receives an unfavorable ruling on party status.

In the alternative, this issue does not merit consideration as a certified question. 30 TAC §80.131(b) provides that certified questions may pertain to commission policy, jurisdiction, or the imposition of sanctions by the judge which would substantially impair a party's ability to present its case. The types of policy questions that merit review by the commission include issues pertaining to the commission's interpretations of its rules and applicable statutes, which rules or statutes are applicable to a proceeding, or whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

30 TAC §80.131(b)(1)-(3). As further discussed below, the law pertaining to who is an affected person in a proceeding regarding an application for a certificate of convenience and necessity is straight forward and does not require commission interpretation. The issue of determining whether a particular person should be a party to a case is a decision to be made by the ALJ based upon the facts of the case and is not a legal issue of significance to warrant consideration as a certified question.

Should Prosper ISD Remain a Party to this Proceeding?

If the Commission decides to consider the issue of whether Prosper ISD should be allowed to participate as a party in this proceeding, the Executive Director asserts that Prosper ISD should not be a party. Judge Norman's analysis for ruling that Prosper ISD be a party to this proceeding is based upon his application of the definitions of "affected person" as set forth in Texas Water Code §5.115 and 30 TAC §55.29(a). The law that should have been applied to this issue is Texas Water Code §13.002(1) and 30 TAC §291.3(3), which contain the definition of "affected person" that apply to applications filed under these chapters, which includes applications for certificates of convenience and necessity.

It is an established principal of statutory construction that when there is a conflict in statutes, the more specific statute controls over the more general. Horizon/CMS Healthcare Corporation v. AULD, 34 S.W.#D. 887, 901(Tex. 2000), In re Dotson, 76 S.W.3d 393, 395 (Tex.Crim.App. 2002). Furthermore, a general statute should not even be applied if a more specific one governs the case. See F.D.I.C. v. EnventureV, 77 F.3d 123, 125 (5th Cir. 1996), *rehearing denied*, 91 F.3d 142 (1996). This application was filed under Chapter 13 of the Water Code and Chapter 291 of the Commission's rules. Both Chapter 13 and Chapter 291 define "affected person" for purposes of cases filed under these chapters. Because these definitions are specific to an application for a certificate of convenience and necessity, the more general definitions in Chapter 5 of the Water Code and Chapter 55 of the Commission's rules should not be applied to this case. The ALJ asserts that the definition of "affected person" in Chapter 5 should be applied because it was enacted after the definition of "affected person" in Chapter 13. However, absent some clear intention to the contrary, a specific statute will not be controlled by a general one regardless of the priority of enactment. MCORP Financial v. Board of Governors, 900 F.2d 852 (5th Cir. 1990), *rehearing denied*, 911 F.2d 730 (1990).

Texas Water Code Section 13.002(1) and 30 TAC §291.3(3) define "affected person" as follows:

"any retail public utility affected by an action of the regulatory authority, or any person or corporation whose utility service or rates are affected by any proceeding before the

regulatory authority, or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition."

Prosper ISD does not come within the definition of "affected person." Prosper ISD is not a retail public utility, is not a person or corporation whose utility service or rates will be affected by this proceeding, and is not a competitor of the District that desires to enter into competition with the District. Furthermore, Prosper ISD does not even own property within the District's proposed service area. Prosper ISD asserts that it will eventually build a school within the proposed service area. This is a speculative claim and should not be the basis for Prosper ISD to remain a party to this proceeding.

Conclusion

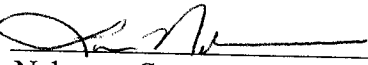
The Executive Director respectfully recommends that the Commission not consider the ALJ's certified question because this would set a bad precedent for parties to be able to sidestep the prohibition of interlocutory appeals when they receive unfavorable rulings on party status. In the alternative, the Executive Director asserts that this is not the type of certified question that warrants Commission consideration. If the Commission does consider the certified question, the Executive Director respectfully recommends that the Commission find that Prosper ISD is not properly a party to this proceeding.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Margaret Hoffman
Executive Director

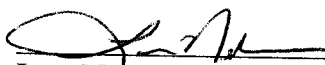
Stephanie Bergeron, Director
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By: 
Lara Nehman, State Bar Number 00794358
Staff Attorney, Environmental Law Division

Mailing List
Denton County Fresh Water Supply District No. 10
to Amend Water and Sewer CCNs in Denton County
Applications Nos. 34068-C/34069-C

Certificate of Service

I hereby certify that on this 7th day of November, 2003, a copy of the attached document was sent by facsimile, First Class Mail, and or intra-agency/inter-agency mail to the persons on this mailing list.



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Mailing List

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to Amend Water and Sewer CCNs in Denton County
Applications Nos. 34068-C/34069-C**

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Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 7, 2003

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
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CHIEF CLERK
11-7-03
12100 PARK 35 CIRCLE
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RE: 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; SOAH Docket No. 582-03-2282; TCEQ Docket No. 2003-0033-UCR; Request to Certify Question to the Commission

Dear Ms. Castañuela:

Enclosed please find the Executive Director's Response to the Administrative Law Judge's Request to Certify Question to the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Lara Nehman".

Lara Nehman
Staff Attorney
Environmental Law Division

cc: Mailing List

Enclosure