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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 CCNS IN DENTON COUNTY (APPLICATION NOS. 34068-C/34069-C)	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10's BRIEF ON CERTIFIED QUESTIONS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

COMES NOW, Denton County Fresh Water Supply District No. 10 (the District), and files its Brief on the issue of the standing of the Prosper Independent School District (PISD) presented in the submitted Certified Question in this docket.

The issue in this docket is whether a school district that does not own property within a proposed utility service area and is not a customer of the utility have standing to be a party to the utility's CCN amendment applications. Administrative Law Judge (ALJ) James Norman, in a well-researched order, found that PISD does have standing. PISD believes its does. Both the ALJ and PISD look to the TCEQ's general rules on parties and affected interest. They then rely on court decisions to read them "in their broadest" to find that a future possibility that PISD might have a school in the proposed service area grants the school district standing.

The District disagrees. Further, both the ALJ and PISD ignore the most fundamental rule of statutory interpretation. First look at the statute governing

the case in controversy. See if the Legislature has provided any special definitions. If so, those definitions control.

PISD claims that it is an "affected person" and, thus, entitled to party status under 30 TAC §80.109(b)(3), §55.203 and §55.256. PISD is wrong. This is a water and sewer utility certification case being tried under Chapter 13 of the Texas Water Code. We need look no farther than that governing statute for the Legislature's mandates controlling this case. The express language of the Water Code always controls over the TCEQ's rules. The TCEQ Commissioners acknowledged this on the public record during their rulemaking Final Orders Agenda of August 7, 2002.

PISD does not fit the Texas Water Code definition of "affected person" in utility certification and rate cases.

> Texas Water Code §13.002
>
> (1) "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, 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. (emphasis added)

Note that the statute is stated in the present tense.

During the course of the July 21, 2003 prehearing conference, PISD stipulated that it did not own property or options to purchase property within the proposed

amended service area of the District. PISD stipulated that it does not receive utility service from the District at this time. It was stipulated by all parties that the 475-acre proposed District service area is completely within the PISD.

PISD claims that with the expected population that the developers projected in the proposed service area, it will need at least 2 elementary schools to serve future school children. The location of these schools is a contested issue. Whether these schools will be inside or outside the District's proposed service area is a contested issue. The date of these schools will be built is a contested issue. No demonstrative evidence was presented at trial to show that a school had to be located in any particular location. The only evidence with PISD Superintendent Drew Watkins' testimony of a desired practice on siting near the children's homes in a development and District witness Developer Phillip Huffines' testimony on the practice of siting schools on main thorough fares for ingress/egress purposes. These gentlemen's testimonies tended to off set each other.

The certification proceeding before Judge Norman does not affect PISD's rates or service because PISD is not a customer and currently has no foreseeable means of becoming a customer. PISD, through its counsel Maria Sanchez, admitted in argument that the school district's only apparent means of acquiring a school site within the proposed service area was through condemnation of a school site. While the District acknowledges that PISD, like the District, has the

power of condemnation, PISD admitted that it has never used that power for a school site. Neither of PISD's witnesses had any idea where the school(s) would be located. Neither of PISD's witnesses had any idea when or if any power of condemnation would be exercised.

30 TAC §55.203. Determination of Affected Person.

(a) 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.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The District does not dispute that under the TCEQ rule provisions cited above, PISD would have a unique justiciable interest in this docket if the school district had a school within the District's service area today. That is because PISD would be a customer. PISD would fall within the present tense affected interest standing requirement of Chapter 13. As a school district, PISD has no legal authority over a water or sewer utility under the Texas Water Code, the Texas Education Code or any other statute. [The District excludes discussion of a utility using a school district's land for easement purposes and other rights of a landowner.] However, under the present tense definition of "affected person" of Texas Water Code §13.002(1) and the PISD lack of any tie to real estate within the proposed service area with any degree of certainty as to location or date, PISD is not affected by the District's amended CCN applications. The statute requires the tie to the justiciable interest to exist today, not in some unknown indefinite future. This is distinguishable from an "option to purchase" or a "contract for deed", which are recognized interests in Texas real property law.

How certain is the school district's threat of condemnation? PISD Board Member Don Tollison testified the district had a reserve fund of $2,000,000 for the purpose of school site acquisitions. PISD Superintendent Drew Watkins testified that PISD currently projected a need for six school sites. He also testified that school sites had an average cost of $500,000. Mathematically, all six sites will not be condemned and paid for so what are the real probabilities that a school site will be involuntarily condemned in this utility service area? Quite frankly,

there is no certainty. There is no greater likelihood based upon the instant record that a school will be build in the District's service area and any other portion of the PISD's area of responsibility, including across the street from the 475-acres as suggested in the testimony of District witness Philip Huffines, the landowner/developer who was the only witness who knows the development plan for the area and was not making up his story as he was questioned.

This leads to the Pandora's Box policy issue the TCEQ must face in this Certified Question,

> "Does the Commission want to automatically grant standing to all politically subdivisions having the power of eminent domain over any portion of a proposed retail public utility's service area at any future date because that political subdivision's future utility rates and services may be impacted by a certification/licensing/rate/permitting hearing today?"

This issue is presented today in the context of a Chapter 13 certification docket. Granting PISD standing opens the door to every other governmental body or public utility in the state (electric, telephone, gas, water and sewer that hold condemnation powers that wants to get around the restrictions of Rule §55.203(c)(6). "Don't have regulatory jurisdiction to be afforded standing under the rules? No problem! Just threaten the Applicant with condemnation. Instant standing." The threat can be anywhere in the recognized jurisdictional zone. It does not even have to be viable property that is really affected, i. e, a 10 x 10 ft. marshy creek bottom in the 1/2-mile zone in an air emissions permitting case for a cement plant threatened for condemnation by a County Fire Control District.

The District respectfully submits that the answer to this policy question is "No." An affirmative answer runs contrary to the express definition of "affected person" in Chapter 13 of the Water Code as shown above. It would gut the Commission's standing rule as applied to entities with condemnation powers.

For the reasons state above, the District respectfully submits that the TCEQ must find that standing in Chapter 13 proceeding is dependent upon a present interest in the service area. The exception would be the recognized holder of a current real property interest that is exercisable in the future: the holder of an option to purchase and the holder of beneficial title under a contract for deed. These latter two parties are distinguishable from PISD because they currently hold a legally recognized real property interest in the service area while a political subdivision like PISD with merely the hope of gaining one through eminent domain at a future date has only speculative dream.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark H. Zeppa, attorney for DCFWSD #10, certify that true and correct copies of the foregoing pleading were served on the following by facsimile, hand delivery or first class USPS mail on the 7th day of November 2003:

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SENDER: Mark Zeppa

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