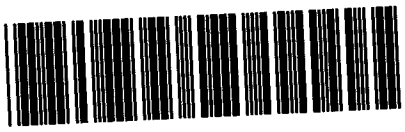

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SOAH DOCKET NO. 582-03-2282
TCEQ DOCKET NO. 2003-0033-UCR

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 RESPONSE TO ORDERS NOS. 9 and 11

TO THE HONORABLE JAMES NORMAN, ADMINISTRATIVE LAW JUDGE:

COMES NOW, Denton County Fresh Water Supply District No. 10 (District) files its response to Order No 11 in this cause regarding the Motions to Submit Certified Questions and Abated the Proceedings filed by the District in this cause the morning of September 24, 2003. In Order No. 11, Presiding Judge James Norman questioned whether the District's Motions for Certified Questions and Abatement were filed in response to the TCEQ Executive Director's outstanding motion to dismiss this application for failure to prosecute or were filed in response to Judge Norman's Order No. 9.

The District also files its response to Order No. 9.

Clarification for Order No. 11 ——

The District's Motions for Certified Questions and Abatement were filed the morning of September 24th before the undersigned counsel for the District and aligned parties had any personal knowledge of Order No. 9. This is not surprising since, under SOAH's procedural rules, Order No. 9 was premature and should not have been issued. SOAH Rule 155.29(d) provides that respondents to all motions shall have five (5) days to file their answers after receipt. Staff Counsel Lara Nehman filed the ED's motion to dismiss and served it on the undersigned by fax on the afternoon of Friday, September 19, 2003. Under SOAH Rule 155.29(d), the District and the other affected parties were not required to file answers until 5:00 pm, Friday, September 26, 2003 (intervening weekend days do not count under SOAH Rule 155.19). Order No. 9 was apparently issued sometime Wednesday morning, September 24 — two days early.

In Order No. 11, Judge Norman questions the District's understanding of SOAH Rule 155.35 and TCEQ Rule 80.131 and the ALJ sole authority to abate a proceeding. At no time in the course of this docket has any party ever been confused about this. However, it is also any party's right at any time during the proceeding under SOAH Rule 155.35 to seek this relief. That was the parties' intent as clearly explained by the undersigned in his status report in response to Order No. 7 on September 3rd. Quoting from that response, the undersigned

stated, "For this reason, the District plans to submit the issue of Mahard's and PISD's standing to the TCEQ Commissioners on a motion for certified questions pursuant to SOAH Rule 155.35." (Emphasis added) Then and now, the administrative law judge is the gatekeeper to the TCEQ commissioners prior to the issuance of the proposal for decision and the potentially needless waste of trial time and money. Perhaps counsel for the parties erred in believing the presiding judge would welcome their efforts to resolve this case by negotiation outside the full hearing process. Most SOAH judges do. The TCEQ Commissioners have an announced policy of promoting negotiation and, in permitting cases, require the use of the TCEQ's ADR Office. [The District readily admits the parties erred in not filing a more timely notice with the court advising the ALJ of their negotiations and plans, but they were working around various parties' summer vacations and foolishly failed to do so.] This is not grounds are arbitrarily assuming that motions for certified questions must be denied and, when filed, the proceedings should not be abated while the TCEQ Commissioners act on them. Such an assumption would constitute prejudging a question of law before it is presented to the court, which is a denial of due process.

The District is also aware that there currently exists a sworn hearing record in this case documenting the fact that this application is uncontested except for the intervention of two intervenors whose standing the District challenges as a matter of law. Resolve these legal standing issues and the docket is over. These are

the very type of issues SOAH Rule 155.35 was designed to address. This right to file a Rule 155.35 motion is still available to the District since the TCEQ Commissioners have not ruled on this case. Of course, it is within Judge Norman's preview to grant or deny that motion. His grounds may not be arbitrary and capricious. If sound TCEQ or other legal precedent exists on the presented questions, then District admits there are good grounds to deny the motions. However, the District respectfully submits that there are no such authorities. There are only Judge Norman's prior rulings in which he admitted there is no on-point prior guidance from the agency, its rules, the courts or the statutes. It is important that not just any one be allowed to jump into certification cases and abuse the system to promote private agendas not related to retail public utility service. This is why the TCEQ Commissioners need to decide this matter. It has nothing to do with SOAH or this fine judge.

ED Motion to Dismiss —

The District filed its motion for certified questions and motion for abatement because it had an agreement with the intervening parties to do so and because the District firmly believes that this is the correct manner in which to resolve critical policy and legal issues governing this case. It does not serve anyone to spend a great deal of money trying a case when the intervenors truly lack standing only to have this confirmed on appeal a year and many thousands of dollars from now. While Ms. Nehman may now have second thoughts, she also

felt the same way in mid-August during a telephone call with the undersigned before he left on vacation. As did counsel for the other parties, the undersigned also had a conversation with Staff Attorney Sheridan Gilkerson and advised her on what the parties were doing. The District agreed with both staff attorneys that the ED witnesses could have as long as needed to file their case after the other parties. No one was to be prejudiced by working together to avoid the cost of litigation.

The District's pending motions were also filed in response to the ED's motion to dismiss given Ms. Nehman's change of attitude. [Rather than discuss the case with the other parties and work with us, she chose to bail out and seek dismissal.] As stated in the District's formal response to the ED's motion, the appropriate resolution to this case at this time is abatement for clarification of critical legal and policy issues. If the application must then be tried, the resetting of a prefiled testimony and hearing schedule would follow in due course.

Response to Order No. 9 —

Order No. 9 is defective as a matter of law because it violates the due process rights of the parties as noted above. For whatever reason, it was issued before affected parties were given the opportunity to respond to the ED's motion under SOAH's rules. No emergency was shown. No consent by other parties was given.

If, however, the ALJ intends to proceed with disposing of this docket in the manner indicated in Order No. 9, the District must be awarded water and sewer CCN's for it's amended service areas. This is because the record in this case consists of:

1. A sworn application containing supporting technical data demonstrating the District's financial, managerial and technical resources to serve the core service area

2. Amendment to the application reducing the requested service area to the core service area demonstrated in the application.

3. The sworn testimony of developer Phillip Huffines on the need for service, the timing of the need, the wholesale water and sewer services being provided by Upper Trinity Regional Water District, the developers assisting in the financing of the utilities with the District's bonding power and the District's successful water and sewer utility operation in another part of Denton County.

4. The service area settlement agreement with the City of Prosper, which demonstrates that there is no other alternate water and sewer utility service available in the region.

5. Stipulations that Prosper Independent School District and Mahard Egg Farm, Inc. neither own land nor options to purchase land in the District's proposed service area.

6. Stipulations that Prosper Independent School District and Mahard Egg Farm, Inc. are not water or sewer customers of the District.

7. Stipulation that Mahard Egg Farm, Inc. will never be a water or sewer customer of the District.

8. Uncontroverted testimony that Prosper Independent School District has not identified any property within the service area to purchase for a school site.

9. Uncontroverted testimony from Phillip Huffines that the developers will neither give nor sell the Prosper Independent School District a school site within the proposed service area.

10. Uncontroverted testimony that Prosper Independent School District has never condemned a school site even though it has the legal authority to do so.

11. Uncontroverted testimony that Prosper Independent School District has no plans to condemn a school site in the proposed service area at this time.

12. Uncontroverted testimony that neither Prosper Independent School District nor Mahard Egg Farm, Inc. is a retail public water or sewer utilities and is capable of or planning to providing alternate water or sewer utility service to the District's proposed service area.

13. Uncontroverted sworn testimony of TCEQ Staff Attorney Lara Nehman that the District has met its burden of proof to be entitled to CCN amendments and that the TCEQ ED does not oppose the issuance of the requested CCNs.

In opposition to this body of evidence, the record only contains lay witness opinions that representatives of Prosper Independent School District and Mahard Egg Farm, Inc. may not be able to provide adequate utility service in the future. None of the witnesses ever articulated a basis for their concerns. None ever articulated what adequate service was. No showing of expertise was made. In fact, all testimony adduced was really targeted at land use controls or the school district's desire to obtain free school sites. [A water district cannot give away school sites. Neither can the TCEQ.]

Conclusion ——

The District respectfully submits that Order No. 9 should be withdrawn. The District's motion for certified questions and abatement should be granted so the TCEQ commissioners may address the precedential issues of standing raised in this docket. This is no reflection on the ALJ, but this case has much wider impact than the parties to this immediate case. Failing this, if the ALJ proceeds as stated under Order No. 9, the District submits that the ALJ must find that the record evidence at this time supports granting the amended application.

Respectfully submitted,

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ATTORNEY FOR DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10

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 1st day of October 2003:

Mark H. Zeppa

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FACSIMILE TRANSMITTAL SHEET

DATE: 10-01-03

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PAGES: __10___ HARD COPY FOLLOWS: yes __x___ no _____

Re: SOAH DOCKET NO. 582-03- 2282; TCEQ DOCKET NO. 2003-0033-UCR
DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10's RESPONSE TO ORDERS 9 AND 11

SENDER: Mark Zeppa