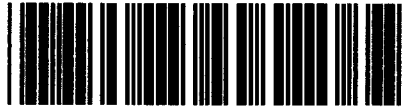




Control Number: 43965



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

APPLICATION OF DENTON COUNTY § BEFORE THE TEXAS
FRESH WATER SUPPLY DISTRICT §
NO. 10 TO AMEND WATER AND § COMMISSION ON
SEWER CCNS IN DENTON COUNTY §
(APPLICATION NOS. 34068-C/34069-C) § ENVIRONMENTAL QUALITY

**DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10's MOTION TO
SUBMIT CERTIFIED QUESTIONS AND MOTION TO ABATE HEARING
SCHEDULE**

On June 3, 2003, Denton County Fresh Water Supply District No. 10 (District) filed a motion to dismiss the remaining intervenors in this case, Mahard Egg Farm, Inc. (Mahard) and Prosper Independent School District (PISD). On August 1, 2003, in Order No. 6, Presiding Judge James Norman denied that motion finding that, while neither Mahard nor PISD were landowners in the District's proposed service area nor service applicants at this time, each was an affected party and thus had standing. The District respectfully submits that Order No. 6 is contrary to the express language of Texas Water Code §13.002(1) which controls all applications filed under Water Code Chapter 13 and all prior case law of the TCEQ and its predecessor agencies as testified to in this record by Staff Attorney Lara Nehman and admitted by PISD Counsel Maria Sanchez. For these reasons, the District moves to submit the following questions for interpretation to the TCEQ commissioners pursuant to SOAH Rule 155.35.

Texas Water Code §13.002(1) states, "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."

30 T A C § 80.109. Designation of Parties, which controls in Chapter 13 cases, provides in relevant part:

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no other person will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed. At the discretion of the judge, persons who are not parties may be permitted to make or file statements.

(b) Parties.

(1) The executive director and public interest counsel of the commission are parties to all commission proceedings.

(2) The applicant is a party in a hearing on its application.

(3) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 of this title (relating to Determination of Affected Person).

(4) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.

The TCEQ's standards of affected interest in §55.29 are:

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 contemplated by the application may be considered affected persons.

(c) All relevant 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, safety, and 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 would note however that while the TCEQ has adopted its own rules on determining "affected party" status in most cases arising under the Texas Water Code, in Chapter 13 cases, the Legislature has imposed a precise definition, which must control over any rule definition. Order No. 6 attempts to expand beyond even the rules to follow a concept of "broadest scope" of admission of parties in reliance on appellate court doctrine while ignoring the literal language of the controlling statute.

CERTIFIED QUESTION AS TO MAHARD —

Does an adjacent property owner have standing to be named a party in a CCN amendment under following stipulated facts:

1. Mahard does not own property within the proposed service area

2. Mahard will not be receiving water or sewer service from the District

3. The only impact the District's utility service will have on Mahard will be the condemnation of a utility pipeline easement across Mahard's property, which was stipulated to be outside of the TCEQ's regulatory jurisdiction

CERTIFIED QUESTION AS TO PISD —

Does a school district in which the proposed amended service area is located have standing to be named a party in a CCN amendment under following stipulated facts or uncontested:

1. The PISD does not own any property or have an option to purchase any property within the proposed service area.

2. The PISD wants the developers to give the school district sites for the two elementary schools it estimates it will need to serve the proposed development.

3. The developers refuse to give or sell PISD to sites within the development / proposed service area.

4. PISD has the power to condemn school sites.

5. PISD has a need for 4 to 5 additional schools in the PISD area of responsibility.

6. PISD has approximately \$2,000,000 in reserves to acquire school sites at approximately \$500,000 each.

7. PISD has never condemned a school site.

8. PISD has no definite plans to condemn a school site at this time, even within the District.

9. PISD has no plans for where it would site a school within the District's proposed service area.

10. PISD does not know when it would build a school within the District's proposed service area.

11. While it is the PISD's preference and policy to build schools within the developments they are to serve, there is no technical reason known at this time why the school(s) cannot be located outside/across from the District's service area.

MOTION TO ABATE —

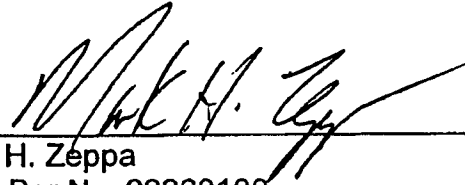
As the District noted response to Order No. 7, the parties have been trying to resolve this docket in good faith. One avenue is the instant one of resolving the dispute over the standing of Mahard and PISD. Notwithstanding Order Nos. 6 and 8, there is a legitimate, sincere and professional disagreement with the presiding judge's determination on the standing issue, which has long-term precedential effects in other certification cases. Never before has just any neighboring landowner been allowed to intervene in a CCN case and drag it through a hearing "just to participate in the process." This is the type of land use control that utility certification was never meant to be used for.

Another reason to abate the proceedings at this time is because the parties have been meeting to resolve the matter through negotiation and are scheduled to continue to do so. The developer interest intervenors have meet in person and by phone with both Mahard and PISD. PISD has made a settlement offer to the District, which will be heard at the District's next public board meeting October 16th.

PRAYER --

The District requests that this docket be abated for as long as need to allow the TCEQ Commissioners to address these certified questions. As the applicant, only the District is harmed by any delay.

Respectfully submitted,

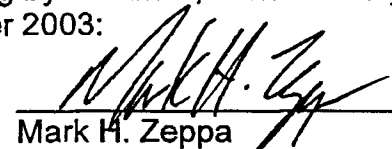


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WATER SUPPLY DISTRICT NO. 10

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 24th day of September 2003:


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