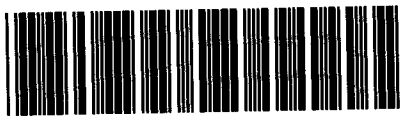

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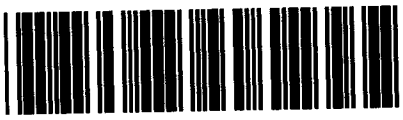

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SOAH DOCKET NO. 582-03-2282
TCEQ DOCKET NO. 2003-0033-UCR

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**

ORDER NO. 6

DENYING MOTIONS TO DISMISS BY DENTON COUNTY FRESH WATER SUPPLY DISTRICT No. 10 AND MAHARD EGG FARM, INC.

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 June 26, 2003, PISD filed its opposition to the District's motion to dismiss. On June 30, 2003, the District filed a reply to PISD's opposition. On July 16, 2003, PISD filed further response. On July 3, 2003, Mahard filed a motion to dismiss the District's application and its opposition to the District's motion to dismiss. On July 16, 2003, the Executive Director filed a response supporting the District's motion and opposing Mahard's motion.

A preliminary conference was held on these motions on July 21, 2003, at which time additional evidence was submitted. All parties appeared and presented evidence. All parties presented additional briefing on July 25, 2003. This order will deny the motions to dismiss.

A. The District's Motion to Dismiss

1. PISD

a. Parties

The parties stipulated that the District has amended its application to request a service area of approximately 475 acres (the requested service area) in lieu of the approximate 5100 acres originally

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.

[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.

In support of its argument against PISD's standing, the District cited the facts that PISD does not own or have an option to buy any site in the requested service area; has no current plan to condemn a school site: and does not know when or if it will ever have a school site in the requested service area. It argued PISD is not a present customer of the District and whether it will be in the future is speculative. It maintained the only evidence where an appropriate school site would be is immediately outside the requested service area. It argued because PISD is not a customer and has no foreseeable means of becoming a customer, it does not meet the present tense definition of "affected person" in § 13.002(1) of the Water Code [2] and thus does not qualify under that statute. It contended PISD also does not meet the definition of affected person under 80 TAC §§ 55.203 and 55.256.[3]

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[2]Section 13.002(1) says an 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."

[3]Section 80.109(b)(5) cites the standards in §§ 55.29 and 55.203 in determining whether a person is affected. The ALJ is not certain of the applicability of §§ 55.203 and 55.256 because other rules, §§ 55.200 and 55.250, indicate they do not apply to a CCN application under Chapter 13 of the Water Code. In any case, the definitions in all three sections–55.29, 55.203, and 55.256–are substantially the same. The following standard defines affected person in § 55.29:

> (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.
>
> . . .
>
> (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 the property of the person;
>
> (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
>
> (6) for government entities, their statutory authority over or interest in the issues relevant to the application.

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 § 113.002(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 80 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.)

defining the term "affected person," is a later enactment than the § 13.002(1)[5] definition, which was cited and relied on by the District and Executive Director as controlling authority. The Section 5.115(a) provision is a broader definition that expressly applies to "water programs." It says:

> **§ 5.115. Persons Affected in Commission Hearings; Notice of Application**
>
> (a) For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected an association is entitled to standing in contested case hearings.

As the latest legislative expression, § 5.115 and the rules adopted under it are of prime importance in determining this issue. In response to the § 5.115 mandate, the Commission adopted rules in 1996 to define an affected person.[6]

PISD stated a clear and **present** "economic interest" (a standard in both Water Code § 5.115 and 30 TAC § 55.29(a)) in the District's ability to provide adequate sewer and water service based on compelling evidence that PISD will **likely** have at least one and perhaps two schools within the requested service area. PISD will attempt to acquire school sites as close to the children it serves as feasible at an early stage in the development process. It is undisputed that PISD has authority to acquire sites through eminent domain proceedings. PISD's economic interest in the District's ability

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[5]The present version of § 13.002(1) was enacted in 1987. Act of June 1, 1987, 70th Leg., R.S., ch 539, 1987 Tex. Gen. Laws 2166.

[6]30 TAC § 55.29 was adopted at 21 Tex. Reg. 4772, 4773. The Commission adopted procedural rule § 80.109 at 21 Tex. Reg. 4742, 4751.

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.

Based on § 13.002(1) of the Water Code, the District argued that to be an intervenor, Mahard must be an entity receiving service, and cited the fact that Mahard does not receive service. It acknowledged that a proceeding to condemn Mahard's property for a transmission line would affect Mahard, but the Commission does not have authority over that proceeding–condemnation authority rests in the county courts. It maintained a sewer transmission line across Mahard's property has nothing to do with §§ 13.241 and 13.246 of the Water Code.

The Executive Director argued that the right to intervene is narrowly drawn in Chapter 13 cases to include only persons affected by the issues addressed in the case–she contended that neither of the interests Mahard claims–its status as a neighboring landowner or the fact that the District will need to obtain an easement across its property–is protected by the law under which the application will be tested. She pointed out that the Commission is not authorized to consider land use planning issues.

The Executive Director also maintained there is no relationship between the interests Mahard claims and the activity regulated–authorization of the District to provide retail water and utility service in the requested area. The Commission has no authority over whether the development will occur. Mahard will not receive water or sewer service from the District. Although development may impact Mahard's use of its property, future development is not a Commission-regulated activity.

Mahard argued it is ludicrous to say it is not affected by the application. It contended the transmission line itself confers standing to make sure all legal requirements are met. It cited case law holding that it has a constitutional right to appeal when its property rights are affected.[7] It cited case law holding that the right to participate in agency proceedings should be liberally construed.[8]

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[7] *Board of Insurance Commissioners v. Title Insurance Association of Texas*, 272 S.W. 2d 95 (Tex. 1954); *Civil Service Comm'n of El Paso v. Ledee*, 68 S.W.3d 702, 706 (Tex. App.-- El Paso 2001, pet dism'd w.o.j.).

[8] *Fort Bend County v. Texas Parks and Wildlife Commission*, 818 S.W. 2d 898, 899 (Tex. App.-- Austin 1991, no writ).

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

[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.).

to a legal right, duty, privilege, power, or economic interest affected by the application."[10] It is undisputed that the planned transmission line is a material part of the District's application–it is asking the Commission to consider the line in determining whether it will provide adequate service. The Commission's determination of that issue will certainly "affect" Mahard. Although, as argued by the Executive Director and the District, the Commission is not authorized to actually approve a condemnation of Mahard's property for purposes of a transmission-line easement, it is obvious that the Commission's determination of the District's application will have an effect on whether the transmission line eventually goes through the Mahard property. Mahard's economic interests are thus affected. Mahard also appears to qualify under a plain reading § 55.29(b)(4)–if approved, the regulated activity (disposal of sewage through a transmission line in Mahard's property) will have a likely impact on Mahard's use of its property.

The analysis of Mahard's status under Water Code § 5.115 is much the same as under 30 TAC § 55.29. The general descriptions of an affected person in those provisions are distinguished by the § 5.115 statement that the "administrative hearing" must affect a person and the § 55.29 statement that the "application" must cause the effect. There appears to be no material difference between the two terms in this context. The application is the document to be approved or disapproved. The administrative hearing is part of the process of reaching that determination.

As a final point on both Mahard's and PISD's standing, it is useful to address the approach appellate courts have taken to determine standing. Although the facts situations of the cases cited[11] are clearly not the same as the ones considered in this order. it is notable that the courts have not stood on fine legal or factual distinctions, but have appeared to take a broad, common sense approach

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[10]The Texas Supreme Court has analyzed "justiciable interest" in terms of whether a party is "affected." *Hooks v. Texas Department of Water Resources*, 611 S.W. 2d 417 (Tex. 1981); *City of San Antonio v. Texas Water Commission*, 407 S.W. 2d 752, 765 (Tex. 1966).

[11]*See Hooks; City of San Antonio*; *United Copper Industries v. Grissom*, 17 S.W. 3d 797, 802-804 (Tex. App.–Austin 2000, writ dism'd as moot); and *Lake Medina Conservation Society, Inc./Bexar-Medina-Atascosa Counties WCID No. 1 v. Texas Natural Resources Conservation Commission*, 980 S.W. 2d 511, 516 (Tex. App.–Austin 1998, writ den.).

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.).)*

Chapters 26, 27, and 28 of the Water Code and Chapters 361 and 401 of the Health and Safety Code rather than CCN applications under Chapter 13 of the Water Code.

The Executive Director argued that the broad language of § 281.2, saying "[T]hese sections are applicable to the processing of" 10 types of applications, including CCNs, does not mean that each rule in the chapter applies to each listed application because, by their own terms, different rules apply to different types of applications. The Executive Director and the District both contended the portions of Chapter 281 of the Commission's rules that apply to CCN applications are §§ 281.16 (what an application must contain) and 281.19 (starting the technical review process). The Executive Director indicated that § 281.17 (notice of receipt of application and declaration of administrative completeness) also applies.

The Executive Director and the District both said the notice requirements for a CCN are addressed in Chapter 291 of the Commission's rules, at § 291.106, rather than Chapter 281. They argued there are no special rules for CCN amendments in that section and no rules related to CCN notices in the Commission's general rules at Chapters 30, 50, 55, and 80.

The Executive Director said her policy has been to require new notice if additional area is requested in a CCN application, but not to require additional notice if the requested service area is reduced. Testimony from the Executive Director's attorney, Lara Nehman, supported the assertion.

The District argued that § 281.23(a) expressly applies to "draft permits," rather than CCNs. It contended this terminology was a reference to draft permits prepared under § 281.21 for applications under Chapters 26 and 27 of the Water Code. It maintained CCNs are never issued under the 801 program and never issued in draft form.

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.)

Water Supply District No. 10 is **denied** and the motion to dismiss by Mahard Egg Farm, Inc. is **denied.**

Signed this 1st Day of August, 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

JAMES W. NORMAN
Administrative Law Judge

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