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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 ADMINISTRATION  
BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S ADDITIONAL BRIEFING REGARDING  
DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10'S MOTION  
TO DISMISS THE REMAINING INTERVENERS AND MAHARD EGG  
FARM, INC.'S MOTION TO DISMISS THE DISTRICT'S APPLICATION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") respectfully files this additional brief regarding Denton County Fresh Water Supply District No. 10's (the "District's") Motion to Dismiss the Remaining Interveners and Mahard Egg Farm, Inc.'s ("Mahard's") Motion to Dismiss the District's Application. The Executive Director will address the issues of whether the District's application should be re-noticed and whether Mahard and Prosper Independent School District ("Prosper ISD") should be dismissed as parties as discussed in the parties' briefs and at the hearing held on July 21, 2003.

1. Should the Application be Re-Noticed?

Mahard asserts that because the District's application has been amended to reduce the requested service area from 5100 acres to 475 acres that new notice is required. Mahard bases its argument on Section 281.23 of the Texas Administrative Code.

Section 281.23 does not apply to applications for certificates of convenience and necessity. Section 281.23(a), specifically refers to amendments under §305.62 of the Commission's Rules.

Section 305.62 discusses what constitutes an amendment and distinguishes between major and minor amendments, however, Chapter 305 sets "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 Health and Safety Code, Chapters 361 and 401", only. See 30 TAC §305.1, pertaining to Scope and Applicability of Chapter 305. Section 281.23(b) specifies that it is applicable to Chapter 336 of the Texas Administrative Code, the Radioactive Substance Rules.

Despite these specific applicability references in Section 281.23, Mahard argues that Section 281.23 applies to applications for certificates of convenience and necessity due to the applicability language of Section 281.2 which includes applications for new or amended certificates of convenience and necessity.

Section 281.1 explains that the purpose of this Chapter is to establish a general processing policy including processing schedules for the types of applications listed in Section 281.2. There are different standards and procedures and timelines for each type of application regulated by the commission that are combined in this Chapter. Each section specifies to which types of application the section pertains. It can not follow that all sections of this chapter apply to all types of permit applications listed in Section 281.2, thereby overwriting the specific applicability language provided in each section. The only sections that are applicable to the processing of applications for certificates of convenience and necessity are Section 281.16, pertaining to what must be included in an application; Section 281.17, pertaining to the assignment of an application number and declaration of administrative completeness; and Section 281.19, pertaining to processing time for technical review. Chapter 281 does not address the notice requirements for an application for a certificate of

convenience and necessity, who must receive notice, or what must be contained in the notice. Chapter 291, Section 291.106, of the Texas Administrative Code addresses these issues.

Unfortunately, Section 291.106 does not address the issue of when new notice must be issued pursuant to an amendment of an application. Commission policy, however, has been that if a utility amends its application by reducing the area to which it initially intended to serve, new notice is not required because all those persons required to receive notice for the reduced area already received notice for the greater area and had an opportunity to request a hearing or provide public comment. If a utility amends its application to request additional area, the policy has been that new notice is required. Ms. Lara Nehman testified regarding this policy at the hearing. In this case, Mahard already has notice of this proceeding and therefore Mahard asserting that notice was improper is a moot issue.

## 2. Should Mahard and Prosper ISD be Dismissed as a Parties?

Section 80.109 of the Texas Administrative Code governs who should be designated as a party in contested case hearings before the commission. Section 80.109(a) provides that a person must have a justiciable interest in the matter being considered in order to be admitted as a party. Section 80.109(b)(5) provides that affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and 55.203 of the same title which set the standards for determining what is a justiciable interest. Section 55.203 is the relevant section because the District's application was filed on or after September 1, 1999. See 30 TAC §55.200, Applicability. Arguably, Section 55.203 does not pertain to applications filed under Chapter 13 of the Water Code. Also see 30 TAC §55.200, Applicability. However, Section 80.109 appears to make applicable Section 55.203 to all applications for the purposes of designating parties. In

determining whether a person is an affected person under Section 55.203, the following factors shall be considered:

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

Chapter 13 contains its own definition of "affected person" which the Executive Director cited at the hearing on July 21, 2003. This definition sets forth the types of interests that the legislature considered to be protected regarding applications filed under this Chapter. The definition set forth in Section 13.002(1) is as follows: "Affected person" means 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.

Mahard asserts that as a neighboring landowner, it is affected by this application due to the development that will commence if the application is granted and due to an easement that the District will have to obtain across its property in order to provide service to the proposed service area. Mahard is not an "affected person" under the definition in Chapter 13. Furthermore, the interests that Mahard asserts are not ones protected by the law governing applications for certificates of convenience and necessity. Neither of these claimed interests are factors that can be considered in determining whether to grant a certificate of convenience and necessity. See §13.246 (c) and 30 TAC Section 291.102. Furthermore, the commission does not have jurisdiction over issues pertaining to land use and development which is a local government issue. The District's ability to obtain an easement for the provision of water and sewer service is also outside the scope of this

proceeding and this commission's jurisdiction.

Prosper ISD asserts that it may own property within the next few years within the proposed service area. Prosper ISD also does not fall within the definition of "affected person" in Chapter 13. Prosper ISD has a speculative claim that may never be realized and therefore Prosper ISD should not be allowed to remain a party to this case.

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

This factor is not relevant to this type of proceeding.

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

The activity regulated by this application is the authorization of the District to provide retail water and sewer utility service to the requested area. The interest that Mahard claims is that it may be damaged by the land development adjacent to its property and by the sewer line that may be laid across its property. Mahard is not and will not be a utility customer of the District and does not lie within the proposed service area of the District. Although water and sewer service must be available in order for an area to be developed, the development itself may or may not occur and does not fall within this commission's jurisdiction to regulate or consider in the context of this application. Mahard's interests may only be addressed by the local government which would have land use and zoning authorities.

The Executive Director asserts the same argument as that set forth above pertaining to Prosper ISD's claim.

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

The regulated activity is the authorization to provide water and sewer utility service. Although future development may impact Mahard's use of their property, land development is not the regulated activity.

Prosper ISD's claim is not relevant to this factor.

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

The same arguments apply as in (4) above.

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

This factor is not applicable to Mahard or Prosper ISD. Although Prosper ISD is a governmental entity, it does not have any statutory authority over or interest in the issues relevant to the application. Prosper ISD's only claim is a speculative one in that it may be a future landowner in the proposed service area.

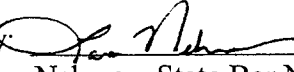
Based upon the foregoing discussion in this brief along with the Executive Director's assertions at the hearing held on July 21, 2003, the Executive Director respectfully recommends that the Administrative Law Judge grant the District's Motion and dismiss Mahard and Prosper ISD as parties in this proceeding. Furthermore, the Executive Director respectfully recommends that the Administrative Law Judge deny Mahard's Motion and rule that notice of the District's application was proper and that no further notice is required.

Respectfully submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

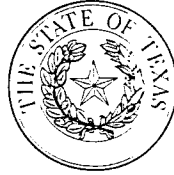
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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 25, 2003

Honorable James W. Norman  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

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.

Dear Judge Norman:

Enclosed please find the Executive Director's Additional Briefing Regarding Denton County Fresh Water Supply District No. 10's Motion to Dismiss the Remaining Interveners and Mahard Egg Farm, Inc.'s Motion to Dismiss the District's Application.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lara Nehman".

Lara Nehman  
Staff Attorney  
Environmental Law Division

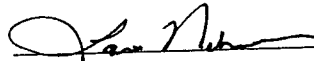
cc: Mailing List

Enclosure

**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 25<sup>th</sup> day of July, 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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