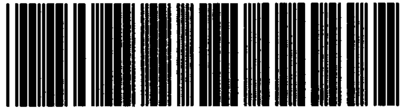

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SOAH DOCKET NO. 582-03-2282
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APPLICATION OF DENTON COUNTY FRESH WATER SUPPLY DISTRICT NO. 10 TO AMEND WATER AND SEWER CERTIFICATES OF CONVENIENCE AND NECESSITY NOS. 13021 AND 20923 IN DENTON COUNTY, TEXAS	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

SUPPLEMENTAL BRIEF IN SUPPORT OF MAHARD EGG FARM, INC.'S MOTION TO DISMISS AND RESPONSE TO APPLICANT'S MOTION TO AMEND APPLICATION AND DISMISS INTERVENORS

I. Standing

A. Mahard has standing because its property interests are affected.

It is undisputed that the amendment requested by the District involves the construction of a wastewater transmission line across a substantial portion of property owned by Mahard. Such construction clearly affects a property interest sufficient to confer standing to appeal agency action to Travis County District Court. *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.); *Board of Insurance Commissioners v. Title Insurance Association of Texas* 272 S.W. 2d 95 (Tex. 1954). (Agency decision impacting property rights confers right of judicial review). Since the right of judicial review exists, it would be hopelessly inconsistent to preclude participation at the agency level, where standing is conferred more liberally. (*Fort Bend County v. Texas Parks and Wildlife Commission* 818 S.W. 2d 898, 899 (Tex. App.- Austin 1991 no writ). (Right to participate in administrative proceedings construed more liberally at administrative level). The applicant has argued that this admittedly significant impact cannot confer standing because issues directly associated with

construction of the line are outside the scope of this proceeding. This argument incorrectly confuses standing with the merits of the application. Even assuming installation of the line as such is outside the scope of this proceeding, its presence remains a feature of the application that gives impacted landowners standing to contest the application based on regulatory requirements that *do* apply.

B. The initial admission of Mahard as a party to the proceeding cannot now be reversed.

The applicant concedes that Mahard was properly admitted as a party at the preliminary hearing on May 13, 2003. "To start the judicial machinery in motion, a plaintiff should be required to assert an interest of his own, but once the judicial machinery is in motion, any party should be allowed to argue for what he asserts to be desirable including the interest of other private parties and the interest of the public." *City of Frisco v Texas Water Rights Commission* 579 S.W. 2d 66, 69 (Tex. App.-Austin 1979, writ refused n.r.e.). (Loss of justiciable interest on appeal did not eliminate standing to contest award of water rights to others). Thus, even assuming that the only justification for Mahard's standing initially was its inclusion in the proposed service area, since it was properly admitted as a party, "the judicial machinery is in motion" and all parties are entitled to address the applicable legal and regulatory issues.

C. Mahard is within the protected class of persons under Tex. Water Code § 13.002.

The applicant has argued that Mahard lacks standing in this proceeding because it is not an affected person as defined in § 13.002 of the Texas Water Code. That section defines affected person as

> "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, 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]

It is undisputed that this proceeding began with an application that included Mahard property in the proposed service area, and addressed service for the school district. It is also undisputed that the proposed amendment to the application attempts to alter this proceeding to exclude property of Mahard and others from the proposed service area, and to prevent service to the school district. Finally, the applicant's motion to dismiss Mahard and the school district as parties rests on an agreement that must be approved in this proceeding. Thus, even under the narrow approach argued by the applicant, this proceeding affects whether or how utilities services may be provided to the Mahard property and to the school district. The applicant argues that it can manipulate the standing of existing parties by changing its application. However, that manipulation itself affects the parties rights to service as a result of this proceeding, bringing those parties clearly within the scope of the statutory definition. It is fundamentally inconsistent to argue that status can be changed by actions in a proceeding and say at the same time that the same proceeding does not affect utility service to those parties.

II. Notice.

TCEQ rules clearly require re-notice of an application as a result of a significant change in a limiting parameter of the authorization. 30 TAC § 281.23 (a); 30 TAC § 305.62 (c)(1). The applicant has suggested that this requirement should be discretionary with the Executive Director. However, there is nothing in 30 TAC § 281.23 (a) that confers such discretion, while 30 TAC § 281.23 (b) by its terms does confer such discretion. There is no theory of statutory

construction which would allow the discretion expressly provided for under Section 281.23 (b) to be simply read into Section 281.23 (a), which lacks any supporting language for that construction.

It is also instructive that Section 281.23 (a) expressly states that the transfer of an application constitutes a major amendment requiring new notice. Clearly such a transfer does not implicate new or different landowners, which has been emphasized by the applicant as essential to require new notice under the rule. Accordingly, if such a transfer constitutes a major amendment, it is difficult to understand why a substantial change in the authorized service area should not.

Further, the requested amendment would exclude from the restricted service area various land owners other than Mahard who, under the previous notice, were shown to be included within that service area. (*See* Brief In Support of Mahard Egg Farm, Inc.'s Motion to Dismiss and Response to Applicant's Motion to Amend Application and Dismiss Intervenors, APPENDIX D). Such exclusion represents a change in the status of such landowners as a result of this proceeding, so as to render those landowners affected persons under § 13.002 of Texas Water Code. Put another way, there is no way of knowing whether any of those landowners chose not to intervene because they approved of the boundaries as originally proposed and, had they intervened, would have opposed the requested amendment excluding their property. Further, at least some of those additional landowners, like Mahard, would also be crossed by the wastewater transmission line proposed under the application. As indicated above, such landowners clearly have standing to intervene in this proceeding. Such landowners are therefore entitled to notice of the major amendment to the application.

Finally, the applicant has suggested that the Administrative Law Judge lacks the authority to address this notice requirement of the agency. To the contrary, an Administrative Law Judge clearly has the authority to address the notice requirements associated with any application pending in a contested case, and to remand that application to the agency for compliance with such requirements where necessary. Moreover, since proper notice is jurisdictional, failure to comply with such requirements requires a remand. The only alternative to such action would be denial of the application for lack of compliance with the notice requirements.

Conclusion

Based on the foregoing, Mahard has demonstrated that it continues to have standing in this proceeding, and that the major amendment to the application requested by the applicant requires public notice in accordance with agency rules.

Respectfully submitted,

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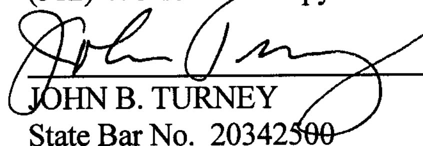

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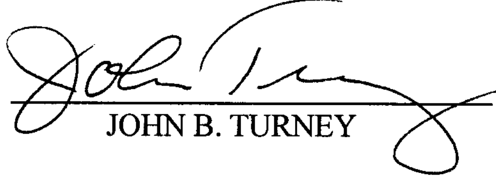
ATTORNEYS FOR MAHARD EGG FARM, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via facsimile and U.S. Mail to all parties of record on this the 25th day of July, 2003.



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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

Comments: Supplemental Brief In Support of Mahard Egg Farm, Inc.'s Motion to Dismiss and Response to Applicant's Motion to Amend Application and Dismiss Intervenors.

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