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SOAH DOCKET NO. 473-18-2486.WS  
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APPLICATION OF THE CITY OF  
HUTTO TO AMEND A SEWER  
CERTIFICATE OF CONVENIENCE  
AND NECESSITY IN WILLIAMSON  
COUNTY

§ PUBLIC UTILITIES COMMISSION  
§ FILING CLERK  
§ OF TEXAS  
§

**CITY OF HUTTO'S  
BRIEF ON STANDING TO INTERVENE**

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<b>APPLICATION OF THE CITY OF</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>HUTTO TO AMEND A SEWER</b>	<b>§</b>	
<b>CERTIFICATE OF CONVENIENCE</b>	<b>§</b>	<b>OF TEXAS</b>
<b>AND NECESSITY IN WILLIAMSON</b>	<b>§</b>	
<b>COUNTY</b>	<b>§</b>	

**CITY OF HUTTO'S  
BRIEF ON STANDING TO INTERVENE**

**COMES NOW** the City of Hutto (“**Hutto**”), pursuant to SOAH Order No. 4, and files this Brief on Standing to Intervene in the above referenced proceeding and would show the ALJ as follows:

**I. BACKGROUND**

On November 21, 2017, Hutto filed an application with the Public Utility Commission of Texas (the “**Commission**”) to amend its certificate of convenience and necessity (“**CCN**”), number 20122, in Williamson County, Texas (the “**Application**”)<sup>1</sup> In the Application, Hutto requested to expand its current sewer CCN to include approximately 15,648 acres of land.<sup>2</sup> Pursuant to the Application’s instructions and forms attached thereto, Hutto began providing notice of its Application.<sup>3</sup>

On December 20, 2017, the Commission issued Order No. 2 deeming the Application administratively complete and requiring Hutto to file with the Commission affidavits swearing that proper notice, including accurate maps, had been sent to affected parties and published in a newspaper of general circulation.<sup>4</sup> Order No. 2 also prescribed a deadline by which Hutto was to have issued notice of the Application, as required by statute, rule, or Commission order.<sup>5</sup> At this

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<sup>1</sup> *Application of the City of Hutto to Amend a Sewer Certificate of Convenience and Necessity in Williamson County*, Docket No. 47795 (pending) (Application).

<sup>2</sup> See Application at 13.

<sup>3</sup> City of Hutto’s Motion for Extension of Time and Adoption of Revised Procedural Schedule at 2 (Feb. 5, 2018) (Motion for Extension).

<sup>4</sup> Order No. 2 at 1 (Dec. 20, 2017).

<sup>5</sup> *Id.*

point, Hutto realized that the notice published in the Texas Register on December 8, 2017<sup>6</sup> incorrectly identified the Application as amending Hutto's *water* CCN service area and notified Commission Staff. On January 12, 2018, the Commission published a corrected notice of the Application in the *Texas Register*.<sup>7</sup>

Once Hutto began sending out notices of the Application, landowners<sup>8</sup> began submitting filings in this proceeding.<sup>9</sup> The landowners' filings varied widely and included the following types of requests, some of which were contradictory: 1) opt-out requests; 2) requests to intervene; 3) opt-out requests *and* requests to intervene; 4) opt-out requests *and* requests to intervene *and* requests for hearing; or 5) requests to be notified if the Application was referred to a hearing on the merits.<sup>10</sup> In response to the filings and concerns raised by a number of people whose properties are located within the area commonly referred to as Norman's Crossing, Hutto conducted a public meeting. As a result of comments received, Hutto agreed to exclude from the Application nearly 1,350 acres of land.<sup>11</sup>

Thereafter, on February 5, 2018, Hutto filed a Motion for Extension of Time and Adoption of Revised Proposed Procedural Schedule, explaining that Hutto would be amending its Application to revise its requested service area and would need additional time to submit the required notices and file the affidavits of notice.<sup>12</sup> On February 7, 2018, the Commission Docket Management Director granted Hutto's motion, and provided Hutto with an extension of time to file affidavits of notice pursuant to Hutto's intent to revise its requested service area.<sup>13</sup>

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<sup>6</sup> Acknowledgement of Receipt (Dec. 5, 2017); Notice of Application to Amend a Water Certificate of Convenience and Necessity, 42 Tex. Reg. 6993, Docket No. 47795 (Dec. 8, 2017).

<sup>7</sup> Acknowledgement of Receipt (Jan. 17, 2018); Corrected Notice of Application to Amend a Sewer Certificate of Convenience and Necessity, 43 Tex. Reg. 488, Docket No. 47795 (Jan. 26, 2018).

<sup>8</sup> See Exhibit "A," identifying all landowners that filed a request to opt out, a request a formal hearing, a request for a public hearing, and/or a motion to intervene.

<sup>9</sup> See, e.g., Comments (Jan. 12, 2018); Letter to Opt Out (Jan. 19, 2018); Request to Intervene (Mar. 26, 2018); Request to be an Intervenor and Request for Formal Hearing (Apr. 20, 2018).

<sup>10</sup> See, e.g., Request to Intervene (Mar. 26, 2018); Request to Intervene (Mar. 26, 2018).

<sup>11</sup> See Revised Map Set for Application of the City of Hutto to Amend a Sewer Certificate (Feb. 7, 2018) (Revised Map Set).

<sup>12</sup> See Motion for Extension.

<sup>13</sup> See Order No. 3 (Feb. 7, 2018).

On February 7, 2018, Hutto filed with the Commission a revised service area map for the Application (the “**First Revised Map**”).<sup>14</sup> The First Revised Map removed multiple tracts of land, including several owned by landowners within Norman’s Crossing.<sup>15</sup> To be clear, *Hutto no longer seeks authorization to include the excluded properties in the requested service area.*

On February 21, 2018, the Commission Staff issued its Recommendation on Notice (“**Recommendation**”) and included a memorandum from the Commission’s Water Utility Regulation Division (“**Memorandum**”).<sup>16</sup> The Memorandum confirmed that Hutto’s First Revised Map conformed to Commission mapping criteria.<sup>17</sup> The Recommendation directed Hutto to use and publish notices provided by Commission Staff, “publish correct notice once each week for two consecutive weeks in a newspaper of general circulation in Williamson County,”<sup>18</sup> and, amongst other things, provide notice to “landowners who own a tract of land that is at least 25 acres and is wholly or partially located in the requested area to be certified” and other entities.<sup>19</sup>

On March 16, 2018, Hutto provided notice of the Application and revised map to all persons and entities identified in the Recommendation and Memorandum.<sup>20</sup> Hutto also published notice of the Application in a newspaper of general circulation.<sup>21</sup> These notices, consistent with the First Revised Map, indicate that Hutto seeks to include 14,306 acres of land within its requested service area.<sup>22</sup> Consequently, landowners whose property was excluded from the Application and did not fall within the parameters of the Recommendation and Memorandum did not receive new notice of the Application.

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<sup>14</sup> Revised Map Set at 1-18.

<sup>15</sup> *Id.*

<sup>16</sup> Commission Staff’s Recommendation on Notice, Memorandum from Gregory Charles in the Commission’s Water Utility Regulation Division (Feb. 21, 2017) (Order).

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> City of Hutto’s Proof of Notice at 1-2 (Apr. 6, 2018).

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Id.*

Subsequent to Hutto issuing a notice for the second time, several additional persons filed pleadings in this case.<sup>23</sup> Thus, at this point, numerous types of pleadings had been filed but no action had been taken on any of the submitted pleadings. All landowners with pending pleadings shall be collectively referred to herein as the “**Landowners.**” Furthermore, the new filings were consistent with those filed after Hutto sent out its first notice, *i.e.*, the filings and their requested relief were inconsistent and varied.<sup>24</sup> In some instances, Landowners merely elected to file requests to opt out of the requested service area.<sup>25</sup> In other instances, Landowners requested different types of relief, some of which were conflicting, such as a request to opt out and a motion to intervene.<sup>26</sup> Attached hereto as Exhibit “A” is a breakdown showing the category in which each landowner falls. It bears mentioning that while many of the Landowners’ pleadings remained pending, when Hutto filed its First Revised Map, Hutto removed the property of the Landowners that had pending filings from the requested service area.

The ALJ conducted a prehearing conference on this matter on May 22, 2018. On May 21, 2018, Dana R. Boehm, DVM, Emzy Boehm, Cynthia D. Krueger, Raymond Naivar, Diane Naivar, and Terry Dolan, through their attorneys of record, filed Amended Motions to Intervene.<sup>27</sup> Notably, these Landowners assert a “justiciable interest” in this matter because each “own[s] property that may be directly or indirectly impacted by the City of Hutto sewer line”—an alleged interest irrelevant to this proceeding and wholly distinct from the “affected person” standard prescribed by statute.<sup>28</sup> Furthermore, several Landowners that have filings pending in this proceeding appeared at the prehearing conference and argued that they should have standing to intervene.<sup>29</sup> Therefore, the ALJ directed the Commission Staff, Hutto, and any other person wishing to become a party to this proceeding to brief the following issues: (i) whether individuals

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<sup>23</sup> See, *e.g.*, Request to be an Intervenor for the City of Hutto CCN: 20122 (Mar. 20, 2018); Request to Intervene (Mar. 26, 2018); Request to Opt Out (Apr. 16, 2018).

<sup>24</sup> See, *e.g.*, Request to Intervene (Mar. 26, 2018); Request to Opt Out (Apr. 16, 2018); Request to be an Intervenor and Request for Formal Hearing (Apr. 20, 2018).

<sup>25</sup> See Request to Opt Out (Apr. 16, 2018).

<sup>26</sup> See Letter Regarding A Formal Request and to be an Intervenor and an “Opt Out” Notification (Mar. 23, 2018).

<sup>27</sup> Amended Motions to Intervene (May 21, 2018).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> See Order No. 4 at 3.

requesting party status as intervenors in the docket qualify as landowners “within an area” for which the Application is filed, as contemplated in TEX. WATER CODE § 13.002(1) and 16 TEX. ADMIN. CODE § 24.3(5); and (ii) whether individuals requesting party status as intervenors in this docket are “affected person[s],” as defined by TEX. WATER CODE § 13.002(1) and 16 TEX. ADMIN. CODE § 24.3(5).

On May 29, 2018, Hutto filed its Response to Amended Motions to Intervene. Hutto objected to the Amended Motions to Intervene because the landowners did not and cannot demonstrate any justiciable interest in the Application.

On June 15, 2018, Hutto filed a second revised map (“**Second Revised Map**”) which excluded all other parcels of land that had not been excluded by the First Revised Map and for which there were pending motions or requests.<sup>30</sup> Thus, as of June 19, 2018, Hutto’s requested service area is approximately 13,480.17 acres and does not include any parcel of land for which a motion to intervene, request to opt out, request for formal hearing or public hearing was made.<sup>31</sup>

## **II. ISSUES**

1. Whether individuals requesting party status as intervenors in this docket qualify as landowners “within an area” for which the Application is filed, as contemplated in TEX. WATER CODE § 13.002(1) and 16 TEX. ADMIN. CODE § 24.3(5).
2. Whether individuals requesting party status as intervenors in this docket are “affected person[s],” as defined by TEX. WATER CODE § 13.002(1) and 16 TEX. ADMIN. CODE § 24.3(5).
3. Whether individuals requesting party status as intervenors in this docket have a “justiciable interest” in the Application, as provided for in 16 TEX. ADMIN. CODE § 22.103(b)(2).

## **III. APPLICABLE STATUTORY AND REGULATORY AUTHORITY**

TEX. WATER CODE § 13.002(1):

“Affected person” means any landowner within an area for which a certificate of public convenience and necessity is filed, 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

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<sup>30</sup> See City of Hutto’s Amendment to the Application (June 15, 2018) (Amendment).

<sup>31</sup> Amendment at 1.

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.

TEX. WATER CODE § 13.246(a):

If an application for a certificate of public convenience and necessity or for an amendment to a certificate is filed, the utility commission shall cause notice of the application to be given to affected parties and to each county and groundwater conservation district that is wholly or partly included in the area proposed to be certified. If requested, the utility commission shall fix a time and place for a hearing and give notice of the hearing. Any person affected by the application may intervene at the hearing.

16 TEX. ADMIN. CODE § 24.3(5):

Affected person—Any landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed; any retail public utility affected by any action of the regulatory authority; any person or corporation whose utility service or rated 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.

16 TEX. ADMIN. CODE § 22.103(b)(2), in part:

A person has standing to intervene if that person: (1) has a right to participate which is expressly conferred by statute, commission rule or order or other law; or (2) has or represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding.

#### **IV. BRIEF ON ISSUE NO. 1**

Hutto's requested service area, as described on Exhibit "A" and depicted on the Second Revised Map, does not include any parcel of land owned by a person that has submitted a filing in this proceeding. Chapter 13 of the Texas Water Code ("**Chapter 13**") provides the statutory basis for the Commission to issue a sewer CCN or grant an amendment to a sewer CCN.<sup>32</sup> In 2005, the Texas Legislature amended Chapter 13 to provide landowners greater discretion "in deciding whether or not *their land will be included in a certificated area.*"<sup>33</sup> As then-Representative

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<sup>32</sup> TEX. WATER CODE §§ 13.241-.258.

<sup>33</sup> Nat. Res. Comm., Bill Analysis, Tex. H.B. 2876, 79th Leg. R.S. (2005) (emphasis added) (the "Bill").



Callegari observed, “A CCN is an encumbrance on land in as much as it dictates how, when, and by whom utilities will be provided to that land.”<sup>34</sup>

Generally, if an amendment is made to an existing statute, the legislature is presumed to have amended the statute to change the meaning of the statute rather than clarify the statute.<sup>35</sup> Therefore, courts consult the legislative history and purpose of an amendment to determine the intent of the legislature.<sup>36</sup> Courts also “construe the statute’s words according to their plain and common meaning, unless a contrary intention is apparent from the context, or unless such construction leads to absurd results.”<sup>37</sup> Courts “presume the Legislature intended a just and reasonable result by enacting the statute.”<sup>38</sup> Therefore, “[w]hen a statute’s language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language.”<sup>39</sup>

Prior to the legislative amendments made to Chapter 13, landowners retained “very little rights in the process of [the Commission]<sup>40</sup> granting a CCN *over their property*.”<sup>41</sup> In fact, landowners were “not given adequate notice or direct notice” because an applicant was only required to publish once in a newspaper of general circulation.<sup>42</sup> Significantly, landowners were “not required to consent to a CCN *over their property*.”<sup>43</sup>

In 2005, the Legislature amended Chapter 13 to rectify “abuses” of CCNs stemming from a landowner’s inability to participate in the Commission’s process of granting a CCN over their

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<sup>34</sup> *Id.*

<sup>35</sup> *Pub. Util. Comm’n v. City of Harlingen*, 311 S.W.3d 610, 620 n.7 (Tex. App.—Austin 2010, no pet.).

<sup>36</sup> *Jones v. Fowler*, 969 S.W.2d 429, 431-32 (Tex. 1999).

<sup>37</sup> *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008) (citing *Texas Department of Transportation v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004); *Taylor v. Firemen's and Policemen's Civil Service Commission of City of Lubbock*, 616 S.W.2d 187, 189 (Tex. 1981); *Univ. of Tex. S. W. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004) (internal citations omitted).

<sup>38</sup> *Id.* at 626 (citing TEX. GOV’T CODE § 311.021(3)).

<sup>39</sup> *Id.*

<sup>40</sup> Although the Bill references the Texas Commission on Environmental Quality, House Bill 1600 transferred responsibility the certificate and convenience and necessity program to the Commission in 2013.

<sup>41</sup> Bill Analysis, Tex. H.B. 2876, 79th Leg. R.S. (emphasis added).

<sup>42</sup> Bill Analysis, Tex. H.B. 2876, 79th Leg. R.S.

<sup>43</sup> *Id.* (emphasis added).

property.<sup>44</sup> Thus, the Legislature expanded the definition of an “affected person” to include not only those “whose utility service or rates are affected” but also *any* “landowner within an area for which a certificate of public convenience and necessity is filed.”<sup>45</sup> The expansion of the defined term “affected person” is important because it directly addressed the Legislature’s concerns for those landowners that were not receiving sufficient rights with regard to the CCN issuance process. With the amendment, landowners whose property is included in a proposed certificated area, but whose utility rates may not be affected, now have a voice to challenge the inclusion of their property within the boundary of the proposed certificated area. The Legislature, throughout the amendment process, focused only on landowners within the boundary of a proposed certificated area.

In 2014, the Commission codified, as part of its substantive rules,<sup>46</sup> Chapter 13 in response to the transfer of responsibility of the CCN program from the Texas Commission on Environmental Quality (“TCEQ”), and as required by the Commission’s Sunset legislation.<sup>47</sup> The Commission’s substantive rule provides that an “affected person” is “any landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed.”<sup>48</sup>

The definitions contained in Chapter 13 and the Commission’s substantive rules are nearly identical. The Merriam-Webster Dictionary defines “within” to mean “in or into the interior.”<sup>49</sup> “Area” is defined by Meriam-Webster as “a particular extent of space or surface or one serving a special function, such as a geographic region.”<sup>50</sup> Thus, the dictionary definition is the same as that used in Chapter 13; to wit: *in a particular* extent of a geographic region.

The statutory language of Chapter 13 and the Commission’s substantive rule is clear and unambiguous: to be affected, a person must own real property within the boundary of the proposed

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 16 TEX. ADMIN. CODE § 24.3(5).

<sup>47</sup> Tex. H.B. 1600, 83<sup>rd</sup> Leg. R.S. (2013).

<sup>48</sup> 16 TEX. ADMIN. CODE § 24.3(5).

<sup>49</sup> Meriam-Webster’s Online Dictionary, at <http://meriam-webster.com/dictionary/within> (last viewed June 8, 2018).

<sup>50</sup> *Id.* at <http://meriam-webster.com/dictionary/area> (last viewed June 8, 2018).

certificated area. This reading is just and reasonable and gives credence to the plain and common meaning of the words used in the statutes. For example, it is reasonable to allow the landowner, whose property is within the boundary of a proposed certificated area, to participate in the hearings process because the landowner has a present interest in whether his or her land will be included in the service area. Similarly, it is just to exclude the landowner, whose property is not within the boundary, because the landowner cannot be affected by any disposition of the application—either approved or denied. To find otherwise, would invite *any* member of the general public to intervene into *any* matter before the Commission even though their interests would not be any different than the public at large.

It simply is not possible to interpret these provisions any differently. If the Legislature had intended to include persons outside the boundary of a requested CCN service area, the Legislature would have used specific language to identify those individuals, but it did not. Instead, the Legislature carefully crafted language to identify those landowners “within an area *for which*” the CCN application is made. Through maps, plats, metes and bounds, a CCN applicant identifies the areas for which the CCN application is made. These areas are delineated by a boundary separating the areas for which the application is made from those for which the application is not made. Therefore, if a particular tract of land is within the boundary, then it is within an area for which the application is made. A tract of land adjacent to but outside of the boundary, is not within the area and, thus, unaffected by the CCN application.

Obviously, then, a landowner’s land that is not included in a proposed certificated area cannot be aggrieved by “how, when, and by whom utilities will be provided” *because the applicant is not proposing to include that landowner’s land in its service area*. For a landowner situated outside the requested service area’s boundary, the appropriate time to intervene into the Application is if, at some point in the future, he or she receives notice of a CCN application intending to include her or his land in a certificated area. However, that is not the case in this proceeding. As identified on Exhibit “A,” each Landowner who has submitted a filing in this proceeding is no longer within the requested service area and Hutto is not requesting to include such Landowners within its sewer CCN. Therefore, to allow the Landowners with pending filings to intervene in this matter would completely run afoul of Legislature’s intent.

## **V. BRIEF ON ISSUE NO. 2**

None of the Landowners are now affected persons entitled to intervene in this matter. Affected persons include:

1. landowners within an area for which an application for a new or amended certificate of public convenience and necessity is filed;
2. any person whose utility service or rates are affected by any proceeding before the Commission; or
3. any person 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.<sup>51</sup>

As discussed above, the Landowners do not own property within the area for which Hutto is requesting to be included in its sewer CCN. The Landowners, therefore, must meet some other affected person classification to intervene into the matter.

The Landowners are not retail public utilities, nor are the Landowners competitors of a retail public utility. To intervene into this matter, then, the Landowners must sufficiently demonstrate how their utility service or rates are affected by this Application.

Currently, the Landowners do not receive sewer service from Hutto (or any other municipality or utility). The Landowners do not pay for sewer service and, therefore, do not have sewer utility rates which can be affected. Similarly, Hutto has excluded the Landowners' properties from the requested service area and do not propose service to those locations. It is impossible for the Application to affect the Landowners' utility rates and service.

The Landowners are not affected persons entitled to intervene in this matter as defined by the Texas Water Code and the Texas Administrative Code.

## **VI. BRIEF ON ISSUE NO. 3**

In the Amended Motions to Intervene, the Landowners assert that they have "a justiciable interest which may be adversely affected by the outcome of the proceeding."<sup>52</sup> The Landowners cite to Commission Rule 22.103(b)(2), copied above, which provides that a person who "has or

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<sup>51</sup> TEX. WATER CODE § 13.002(1); 16 TEX. ADMIN. CODE § 24.3(5).

<sup>52</sup> Amended Motions to Intervene at 2 (May 21, 2018).

represents persons with a justiciable interest which may be adversely affected by the outcome of the proceeding” may intervene into a docket, even if the person does not have “a right to participate which is expressly conferred by statute, commission rule or order or other law.”<sup>53</sup> However, none of the Landowners have a justiciable interest which may be adversely affected by the outcome of this proceeding. Furthermore, the statutory foundation that controls the issuance or amendment of a CCN does not recognize the right of an individual to intervene into a sewer CCN application based on a justiciable interest.<sup>54</sup> Rather, the Water Code provides that affected persons may intervene,<sup>55</sup> and as we have thoroughly discussed, the Landowners, including those that filed the Amended Motions to Intervene, are not affected.

However, because the Landowners are not “affected persons,” as defined by statute, they argue in the Amended Motions to Intervene that they have “a justiciable interest which may be adversely affected by the outcome of the proceeding.”<sup>56</sup> But, a person may only argue that a justiciable interest exists if that person has a vested property interest that would be adversely affected by the Commission’s decision.

The United States and Texas Constitution only guarantee a right to participate in a contested case hearing to protect constitutionally protected property or liberty interests.<sup>57</sup> Thus, procedural due process is required and necessitates “notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>58</sup> However, “[b]efore considering what process is due . . . [the] first inquiry in a procedural due process claim is whether the plaintiff has been deprived of a property or liberty interest deserving protection under the federal or state constitutions.”<sup>59</sup> Therefore, any Landowner that argues it has a justiciable interest in Hutto’s Application “must demonstrate a vested property interest that will be deprived by the denial of its

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<sup>53</sup> 16 TEX. ADMIN. CODE § 22.103(b)(2).

<sup>54</sup> See TEX. WAT. CODE § 13.246(a), which provides that a “person affected by the [CCN] application may intervene at the hearing.”

<sup>55</sup> *Id.*

<sup>56</sup> Amended Motions to Intervene at 2 (May 21, 2018).

<sup>57</sup> See U.S. Const. amend. XIV, § 1; see also Tex. Const. art. I, § 19

<sup>58</sup> *Coastal Habitat Alliance v. Public Util. Comm’n of Tex.*, 294 S.W.3d 276, 285 (Tex. App.—Austin 2009, no pet.) (citing *University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) (internal quotes omitted).

<sup>59</sup> *Coastal*, 294 S.W.3d at 286.

intervention in the proceeding other than its interest or desire to intervene.”<sup>60</sup> Moreover, an individual “does not have a right to intervene as a matter of right” if the individual “does not fall under the Commission’s definition of directly affected person[.]”<sup>61</sup>

Generally, “the allowance or denial of petitions for intervention in administrative proceedings rests in the discretion of the agency.”<sup>62</sup> Therefore, “[b]ecause administrative agencies are given their statutory powers with a view to achieving legislative purposes *more fully and efficiently* through the agency’s specialized judgment, knowledge, and expertise, the methods chosen by the agency and its interpretation of the statute it is required to administer are entitled to due respect.”<sup>63</sup> Although, “even in the situation of a direct referral to SOAH for a contested-case hearing . . . a person seeking to be admitted as a party nevertheless has the burden of making a minimum jurisdictional showing of a justiciable interest.”<sup>64</sup>

In other cases, the Commission has previously found that persons without a real property interest affected by a CCN application do not have a justiciable interest to intervene into a matter.<sup>65</sup> In *Coastal Habitat Alliance v. Public Util. Comm’n of Tex.*, the Coastal Habitat Alliance (“CHA”) filed a motion to intervene in the Commission’s review of an application to amend an electric CCN so that the CCN holder could construct a double-circuit transmission line in Kenedy County, Texas.<sup>66</sup> CHA is an “association of landowners and environmental groups formed for the purpose of protecting their environmental interests in the coastal region on which the transmission line would be located.”<sup>67</sup> Similar to the Landowners, CHA’s property was located near the area of the proposed project, but not directly within the affected area.

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<sup>60</sup> *Id.*

<sup>61</sup> *McMaster v. Public Util. Comm’n*, No. 03-11-00571-CV, 2012 Tex. App. LEXIS 7502, at \*23 (Tex. App.—Austin Aug. 31, 2012, no pet.) (mem. op.).

<sup>62</sup> *Railroad Comm’n of Tex. v. Ennis Transportation Co.*, 695 S.W.2d 706, 710 (Tex. App.—Austin 1985, write ref’d n.r.e.).

<sup>63</sup> *Pub. Util. Comm’n of Tex. v. Tex. Tel. Ass’n.*, 163 S.W.3d 204, 213 (Tex. App.—Austin 2005, no pet.).

<sup>64</sup> *Tex. Comm’n on Envtl. Quality v. City of Aledo*, No. 03-13-00113-CV, 2015 Tex. App. LEXIS 6940 (Tex. App. Austin July 8, 2015).

<sup>65</sup> *Coastal*, 294 S.W.3d at 282.

<sup>66</sup> *Id.* at 279.

<sup>67</sup> *Id.*

The Commission denied CHA's motion, concluding that CHA "had not shown a justiciable interest in the proceeding."<sup>68</sup> CHA filed interlocutory appeals of the order, but the Commission denied the pleadings.<sup>69</sup> After exhausting its administrative remedies, CHA appealed to the courts for relief but failed to successfully plead its case.<sup>70</sup> The *Coastal* court concluded that the Commission appropriately denied CHA's motion to intervene.<sup>71</sup>

Similarly, in *McMaster*, an individual not affected by an electric CCN application and not otherwise entitled to notice attempted to intervene into an electric CCN amendment case.<sup>72</sup> The Commission, after determining that McMaster was not an affected person, denied the motion to intervene.<sup>73</sup> After exhausting all administrative remedies, McMaster appealed to the courts.<sup>74</sup> Observing that McMaster was not affected by the application and had also received due process, the district court dismissed the claim.<sup>75</sup> The court of appeals affirmed the district court's ruling.<sup>76</sup>

The Landowners are situated exactly like the individuals in *McMaster* and *Coastal*. The Landowners are not affected persons, as defined by statute, and cannot specifically articulate any interest in the Application.

In 2014, responsibility for the CCN program was transferred from TCEQ to the Commission. Since then, the Commission has reviewed nearly 80 sewer CCN applications or petitions. Of these, no person was granted party status if his or her land was outside the boundary of the proposed certificated area.

Further, in at least one Commission docket, an intervening landowner whose property was originally included within the proposed certificated area withdrew its request to intervene after the

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<sup>68</sup> *Id.* at 280.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 285.

<sup>72</sup> *See McMaster* at \*1-\*11.

<sup>73</sup> *Id.* at \*10.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at \*25.

applicant filed amended maps to exclude the landowner's property.<sup>77</sup> In this docket, the owners, Barbarosa Ranch, LLC ("**Barbarosa**"), had 817 acres of land that straddled the boundary of the proposed certificated area and filed a request to intervene after receiving notice of the application.<sup>78</sup> The presiding ALJ properly admitted Barbarosa as a party to the docket, noting that Barbarosa had a "justiciable interest" in the application because it was an owner of property within the area for which the application was filed.<sup>79</sup>

The applicant, in response, filed maps to completely exclude property owned by Barbarosa from the application.<sup>80</sup> Barbarosa thereafter withdrew its request to intervene because its property was excluded.<sup>81</sup> Hutto respectfully submits that the Barbarosa docket represents the legally accurate method by which to proceed through a contested sewer CCN application: if an applicant removes property from the requested service area that is owned by a person with a justiciable interest, the person naturally loses their justiciable interest in the proceeding and withdraws (or, in the instant docket, is dismissed) from the docket because he or she cannot be adversely affected by the outcome of the proceeding.

Allowing the Landowners to intervene does not achieve any end other than to frustrate the full and efficient disposition of the Application. The Landowners simply do not have any present interest in the Application. In fact, allowing the Landowners to intervene into this docket presents a host of "ripeness" issues. It is not hard to imagine a scenario where the Landowners are provided "two bites at the apple" to intervene—both in this Application and, perhaps at some point in the future, if Hutto then proposes to include their properties within a separate certificated area. Furthermore, if the ALJ finds that the Landowners are "affected" and/or have a "justiciable interest" in the Application, then what prevents any person in the public from making the same argument?

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<sup>77</sup> *Application of Guadalupe-Blanco River Authority to Amend a Sewer Certificate of Convenience and Necessity in Guadalupe County*, Docket No. 47730 (pending).

<sup>78</sup> *Application of Guadalupe-Blanco River Authority, Barbarosa Ranch, LLC Request to Intervene* (January 29, 2018).

<sup>79</sup> *Application of Guadalupe-Blanco River Authority*, Order No. 4 Granting Intervention (February 22, 2018).

<sup>80</sup> *Application of Guadalupe-Blanco River Authority*, Updated Map Files (March 1, 2018).

<sup>81</sup> *Application of Guadalupe-Blanco River Authority*, Notice to Withdraw Intervention (March 6, 2018).



**VII. PRAYER FOR RELIEF**

Pursuant to the reasons stated herein, Hutto respectfully requests an order finding that the Landowners do not have legal standing to intervene and dismissing them from this docket. Hutto also prays for any and all other relief to which it may be entitled.

Respectfully submitted,



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**ATTORNEYS FOR CITY OF HUTTO, TEXAS**

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served on all parties of record in accordance with the orders in this case on this the 19th day of June, 2018.



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Morgan J. Johnson

### **Exhibit “A”**

Individuals who have filed opt out requests and motions to intervene but were not in the original requested service area or either of the two revised service areas:

- Dana Boehm
- Raymond and Diane Naivar
- Terry Dolan

Individuals who have filed public hearing/formal hearing requests and motions to intervene but were not in the original requested service area or either of the two revised service areas:

- Troy and Jennifer Boehm
- Robert and Bonnie Kaderka
- Robert and Donne Rinehart
- Roselind Wieland

Individuals who have filed formal hearing requests and motions to intervene and were in the original requested service area, but are no longer within the revised requested service area:

- Michael and Patricia Daffin

Individuals who have filed opt out requests and motions to intervene and were in the original requested service area, but are no longer within the revised requested service area:

- Emzy Boehm
- Cynthia Krueger

Individuals who have filed opt out requests and public hearing requests and were in the original requested service area, but are no longer within the revised requested service area:

- Isaac Norman
- Wynette Lessner

Individuals who have filed opt out requests and were in the original requested service area, but are no longer within the revised requested service area:

- Juneva Randig
- Cynthia M. Cervenka
- Christy Noren
- The John W. Noren Family Trust
- Helmer W. Dahl
- Morgan and Teresa Wendland
- Charles and Patricia Gantt
- Sam McFarlin