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Larry R. Soward, *Commissioner*
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Glenn Shankle, *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2006 NOV 17 PM 2:15

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

November 17, 2006

To: Persons on the Attached Mailing List (by mail and facsimile as indicated)

Re: City of Lindsay's Motion for Judgment Nunc Pro Tunc under Texas Rule of Civil Procedure 316; TCEQ Docket No. 2006-1778-UCR; related SOAH Docket No. 582-02-0431 and TNRCC/TCEQ Docket Nos. 2001-1045-UCR and 2001-1046-UCR.

By letter dated November 17, 2006, the City of Lindsay has requested an extension of time to file a reply brief. The City's attorney, Kerry E. Russell, explains that due to a family emergency, he rather than Mr. Rodriguez, Jr. will be filing the reply brief. He also states that neither the Executive Director nor the Office of Public Interest Counsel have any objection to an extension of time to file the reply brief. According, the deadline for the filing of the reply brief is extended to **5:00 P.M. on Wednesday, December 13, 2006.**

To be considered timely, an original and eleven copies of the reply brief must be received in the Office of Chief Clerk on or before the deadline and mailed to all persons on the attached mailing list. Any reply should be addressed to the Attention of the Office of Chief Clerk Agenda Docket Clerk and be marked with the 2006 TCEQ Docket number provided above as well as the other docket numbers. By subsequent letter, our office will notify all persons on the attached mailing list of the public meeting during which the Commissioners will consider the Motion and response and reply briefs.

If you have any questions about the briefing schedule or related matters, please contact Celeste A. Baker, Assistant General Counsel, at 512/239-5527.

Respectfully,

A handwritten signature in cursive script that reads "Derek Seal".

Derek Seal
General Counsel

Mailing List

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Mailing List

City of Lindsay's Motion for Judgment Nunc Pro Tunc
TCEQ Docket No. 2006-1778-UCR; SOAH Docket No. 582-02-0431
TNRCC/TCEQ Docket Nos. 2001-1045-UCR and 2001-1046-UCR

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November 17, 2006

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Texas Commission on Environmental Quality
P.O. Box 13087
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CHIEF CLERKS OFFICE

2006 NOV 17 AM 11:05

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: *City of Lindsay Motion for Nunc Pro Tunc*; SOAH DOCKET NO. 582-02-0431;
TNRCC/TCEQ Docket Nos. 2001-1045-UCR and 2001-1046-UCR

Dear Derek:

As my legal assistant, Faith Wright, discussed with Celeste Baker, my law partner, Mr. Arturo D. Rodriguez, Jr., has had a family emergency arise which is requiring Art to be gone for an as yet unknown period of time. It is my understanding that there is a deadline for the City of Lindsay to reply to all responses filed in its *Motion for Nunc Pro Tunc* action on Wednesday, November 22, 2006. I am requesting that this response deadline be postponed until December 13, 2006, to allow me adequate time to rearrange my schedule and get up to speed on this case. Faith Wright conferred with the attorney for the Executive Director, Mr. Ross Henderson, as well as counsel from the Office of Public Interest Counsel, Ms. Mary Alice Boehm, and both are in agreement for a continuance.

Thank you for your attention to this matter. If you have any questions please feel free to call me at the number listed above.

Sincerely,

Kerry E. Russell

RUSSELL & RODRIGUEZ, L.L.P.

Attorneys at Law

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FACSIMILE COVER PAGE

Date: Friday, November 17, 2006

Please Deliver the Following pages to:

- Mr. Derek Scal/Ms. Celeste Baker Fax: (512) 239-5533
- Ms. Mary Alice Boehm Fax: (512) 239-6377
- Docket Clerk, TCEQ Fax: (512) 239-3311
- Ms. Jody Henneke Fax: (512) 239-4007
- Mr. Ross Henderson Fax: (512) 239-0606
- Mr. John Carlton Fax: (512) 435-2360
- Ms. Tammy Benter Fax: (512) 239-6972
- Mr. Pat Dillon Fax: (972) 680-0003
- Mr. Walter Lutkenhaus Via U.S. Mail

Client Number: 1140-00

From: Kerry E. Russell

Direct Phone: (512) 930-1317

Pages: (Including Cover Sheet)

Comments: *City of Lindsay's Motion for Judgment Nunc Pro Tunc Under Texas Rule of Civil Procedure 316*

Request for Continuance of Deadlines

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
 NOV 17 AM 11:00
 CHIEF CLERKS OFFICE

CHIEF CLERK'S OFFICE
DEC 13 PM 2:55
COMMISSION ON ENVIRONMENTAL QUALITY
TEXAS

**SOAH DOCKET NO. 582-02-0431
TNRCC/TCEQ DOCKET NOS. 2001-1045-UCR and 2001-1046-UCR**

APPLICATIONS BY THE TOWN OF LINDSAY TO OBTAIN WATER AND SEWER CERTIFICATES OF CONVENIENCE AND NECESSITY IN COOKE COUNTY, TEXAS § **BEFORE THE STATE OFFICE**
§ **OF**
§ **ADMINISTRATIVE HEARINGS**
§

CITY OF LINDSAY'S REPLY TO THE EXECUTIVE DIRECTOR AND THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSES TO LINDSAY'S MOTION FOR JUDGMENT NUNC PRO TUNC UNDER TEXAS RULE OF CIVIL PROCEDURE 316

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Lindsay ("City") and files its reply to the Executive Director's ("ED") and the Office of Public Interest Counsel's ("OPIC) response to Lindsay's Motion for Judgment *Nunc Pro Tunc* ("Motion").

I. BACKGROUND

On January 31, 2001, the City filed an application to obtain water and sewer certificates of convenience and necessity ("CCN") to provide water and sewer services in Cooke County, Texas. Sufficient notice to affected persons was provided pursuant to the notice requirements of 30 Tex. Admin. Code § 291.106. There was no opposition to the sewer application and it was granted on May 16, 2003.

The application for a water CCN was protested. A preliminary hearing on the matter was held on November 27, 2001. At this hearing, jurisdiction was established, a procedural schedule was set, and the following parties were designated: the City, as Applicant; the Executive Director of the Commission; the Public Interest Counsel; Lindsay Pure Water Company; and Walter Lutkenhaus. On April 1, 2002, a settlement agreement was reached between these parties and the case was dismissed.

In 2003, TCEQ granted both the sewer and water CCNs for the City; water CCN No. 13025 and sewer CCN No. 20927. The water map, however, was incorrectly drawn. The water CCN was granted for the area designated for the sewer CCN, and not the agreed upon area according to the settlement agreement.

On September 1, 2006, the City filed its Motion. On October 31, 2006, and November 1, 2006, the ED and OPIC filed their responses to the City's Motion. The City hereby incorporates all arguments made in its Motion and continues to assert such arguments.

II. ARGUMENT & AUTHORITIES

Texas Rules of Civil Procedure ("TRCP") 316 grants the Commission the authority to correct clerical mistakes made in the judgment. TRCP 316 states, "Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case...." Thus, the Commission can correct a clerical error in the judgment at any time. A clerical error is a discrepancy between the entry of a judgment in the official record and the judgment as actually rendered. *See Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986).

In this matter, the error in the judgment is a clerical error, which can be corrected by a judgment *nunc pro tunc* because the error was in a written judgment that did not reflect the settlement agreement made between the parties. *See Delaup v. Delaup*, 917 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1996, no writ). The settlement agreement between the parties depicted a much larger area in which the City would be granted a CCN for water retail service. The judgment, however, did not grant the water CCN as agreed upon but rather only granted a water CCN for the area coterminous for the sewer CCN.

The ED and OPIC both assert that there is no evidence that demonstrates that the ED agreed to the settlement and requested service territory. The ED further states that the "package

before the [ED] included the map that was attached to the Final Order." This assertion cannot be confirmed. We have attempted to obtain a copy of the "package", but discovered that the "package" is no longer in the Commission's files. The ED now assumes that the "package" existed.

The only evidence that has been presented to the Commission is that the CCN was mistakenly drawn. The City admits that the error was likely a clerical error that the Commission should be able to correct. There is no evidence that the ED was provided with a map that should be drawn in a manner different than was contained in the settlement agreement. If the ED found the settlement map inappropriate for issuance, the Commission files appear to be devoid of information that demonstrates such a fact. The only evidence that the undersigned has been able to find in the Commission files is the settlement agreement. Based on this, mistake in mapping was undoubtedly made. The City merely asks that a correction be made to a clerical error.

Alternatively, the ED cites to 30 Tex. Admin. Code § 50.145 as the remedy that the City should have sought to have accomplished. The City agrees and believes that under § 50.145(a) the executive director, on his own motion or at the request of the permittee, may make a nonsubstantive correction to a permit either by reissuing the permit or by issuing an endorsement without observing formal amendment or public notice procedures. Section 50.145(b) further provides that the executive director may issue nonsubstantive permit corrections under this section to describe more accurately the location of the area certificated under a certificate of convenience and necessity or to update or redraw maps that have been incorporated by reference in a certificate of convenience and necessity.¹ There is no time limit specified under these rules for such action. The CCN order specifically states "the applications by the Town of Lindsay for water and sewer Certificates of Convenience and Necessity as reflected in the attached copies of

¹ 30 TEX. ADMIN. CODE § 50.145(B)(4)(5).

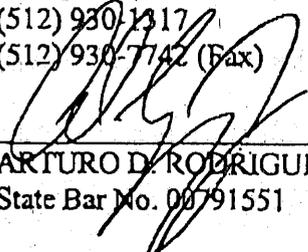
the official water and sewer service area maps for Cooke County, Texas..." In this instance the ED can redraw the map that has been incorporated by reference in the CCN. There is no time limit to assert such correction.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Lindsay requests the Commission to sign a judgment *nunc pro tunc* correcting the clerical error made in CCN No. 13025 regarding the service area for water retail service.

Respectfully submitted,

Russell & Rodriguez, L.L.P.
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ARTURO D. RODRIGUEZ, JR.
State Bar No. 00791551

**ATTORNEY FOR THE CITY OF LINDSAY,
TEXAS**

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2006, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel of record:

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