

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Martin A. Hubert, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 1, 2006

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2006 NOV - 1 PM 3:34
CHIEF CLERKS OFFICE

RE: CITY OF LINDSAY
SOAH DOCKET NO. 582-02-0431
TCEQ DOCKET NOS. 2001-1045-UCR & 2001-1046-UCR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Motion for Judgement Nunc Pro Tunc in the above-entitled matter.

Sincerely,


Mary Alice C. McKaughan
Public Interest Counsel
by jlc

cc: Mailing List

Enclosure



SOAH DOCKET NO. 582-032-0431
TCEQ DOCKET NO. 2001-1045 & 2001-1046-UCR

IN THE MATTER OF CITY OF
LINDSAY'S MOTION FOR
JUDGEMENT NUNC PRO TUNC
UNDER TRCP 316

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

2001 NOV - 1 PM 3:34

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO MOTION FOR JUDGMENT NUNC PRO TUNC

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

The Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality ("the Commission" or "TCEQ") files this Response to the Motion for Judgement Nunc Pro Tunc ("Motion") filed by the City of Lindsay ("Movant" or "City") to modify the Commission's 2003 Order granting the City's retail water service Certificate of Convenience and Necessity ("CCN") Number 13025 to enlarge the City's water service CCN to reflect the area allegedly agreed to by the parties in the settlement agreement. OPIC recommends that the Commission deny the Motion because the correction sought is a substantive change and not clerical in nature.

I. INTRODUCTION

The City applied to obtain a water and sewer CCN on January 31, 2001. The application for water CCN No. 13025 was protested by Lindsay Pure Water Company and Walter Lutkenhaus ("Protestants"). At the November 27, 2001 Preliminary Hearing the following parties were

designated: the City (Applicant); the TCEQ's Executive Director ("ED"); OPIC; and Protestants. On April 1, 2002 a settlement agreement was reached between the Protestants and the City ("Settlement Agreement"). On April 26, 2002, the City and the ED filed a Joint Motion To Abate Proceeding Pending Settlement and to Approve Withdrawal of Protestant. The Motion states, "that [the TCEQ Executive Director] would agree to the service area requested by Mayor Mages as set forth in testimony at the bottom of page 2 and Attachment 4 to [Mayor Mages'] prefiled testimony."¹ On May 16, 2003 the TCEQ granted both the City's water and sewer CCN ("ED 2003 Order").

Movant claims that the City's water service CCN map is incorrectly drawn. Movant alleges that the City's water service CCN map should include an additional area pursuant to the settlement agreement between the parties and requests that the Commission amend and correct the ED 2003 Order to add the additional area to the City's water CCN.

II. DISCUSSION

There is no provision for the use of the Nunc Pro Tunc procedural vehicle in either the TCEQ or the State Office of Administrative Hearings procedural rules. We believe that the more appropriate means to correct the ED 2003 Order would be to file either a Motion to Overturn ("MTO") the ED's decision to grant the City's CCN Application under Title 30 of the Texas Administrative Code ("TAC") §50.139 or to seek a correction or endorsement to the ED 2003 Order under 30 TAC § 50.45. The twenty-three (23) day deadline to file a MTO on the ED 2003 Order granting the City's Water Service CCN has long since passed therefore the other available option would be for Movant to seek a correction or an endorsement to its CCN permit. Regardless

¹ Joint Motion To Abate Filed by ED counsel Todd Galiga and City counsel Ronald J. Freeman.

of which procedural vehicle is chosen, Nunc Pro Tunc, or a correction pursuant to 30 TAC § 50.45, the main issue is whether changing the CCN map constitutes a “nonsubstantive correction”² or a correction of a “clerical error.”³

For the purposes of granting a Motion Nunc Pro Tunc, a clerical error is defined as, “a discrepancy between the entry of a judgement in the official record and the judgement as it was actually rendered.”⁴ Correction of a clerical error is not considered a substantive change in the judgement or order.⁵ Examples of clerical errors in an order or a judgment that are considered nonsubstantive are a mistake in party designations⁶ or in the spelling of a party’s name.⁷ In this case there is insufficient evidence that there is a discrepancy between the ED 2003 Order granting the water service CCN and the judgment rendered. Movant claims that a mistake has been made in entering the ED 2003 Order because the judgement rendered should reflect the Settlement Agreement between Movant and the Protestants. Movant alleges that since the ED 2003 Order does not accurately reflect the terms of the Settlement Agreement, the City’s current water service CCN map on file, and relied upon for over three years, is incorrect.

There is insufficient evidence that the ED’s 2003 Order should comport with the terms of the Settlement Agreement because Movant has not presented evidence that the ED endorsed the

²30 TAC § 50.45(a)

³ Texas Rule of Civil Procedure § 316

⁴*Universal Underwriters Ins. Co. V. Ferguson*, 471 S.W. 2d 28, 29-30 (Tex. 1971)

⁵*In re Ward*, 137 S.W 3rd 910, 913 (Tex. App.-Texarkana 2004, no pet.)

⁶ *Dickens v. Willis*, 957 S.W.2d 657, 659-660 (Tex. App.-Austin 1997, no pet)(“Respondent” should have been designated as the “Petitioner”)

⁷ *Gonzalez v. Doctors Hosp.*, 814 S.W. 2d 536, 537 (Tex.App.-Houston [1st Dist.] 1991, no writ)(A Judgment Nunc Pro Tunc was granted to correct the spelling of the Plaintiff’s name from John to Juan)

Settlement Agreement. The ED did indicate that it “would” agree to a settlement in the Joint Motion to Abate; however, there is no evidence presented that the ED actually did agree to the terms of the Settlement Agreement. Movant did not attach a copy of the Settlement Agreement signed by the ED to its Motion. There is also no evidence that the CCN water service map attached to the Settlement Agreement, that Movant seeks to be substituted for the current CCN map attached to the ED 2003 Order, was agreed to by the ED.

If the ED had agreed to the Settlement Agreement, Movant may have an argument that changing the water service CCN map to reflect the terms of the Settlement Agreement would be nonsubstantive correction of a clerical error. An analogous situation arose in a Houston district court case where the court held that the correction of a judgment to accurately reflect the terms of a settlement agreement was a correction of a clerical error and not a substantive change in the judgment.⁸ However in this case, unlike in the Houston case, we do not have evidence that there was a settlement agreement entered into between all the parties.

Without evidence that the ED actually agreed to the additional service area reflected in the Settlement Agreement, OPIC presumes that the ED intended to only certificate the water service area depicted on the CCN map attached to the ED’s 2003 Order. If the ED did not agree to the terms of the Settlement Agreement, Movant is essentially seeking an amendment of the ED’s judgement in granting the ED 2003 Order. This would constitute a substantive change that may not be granted through a Judgment Nunc Pro Tunc⁹ or a Motion under 30 TAC Section 50.45. Without the ED’s agreement, Movant in essence would be seeking to amend its water CCN which

⁸*Delaup v. Delaup*, 917 S.W.2d 411, 413 (Tex.App.-Houston [14th Dist.] 1996, no writ)

⁹*Andrews v. Knoch*, 702 SW 3d 584, 585 (Tex. 1986).

requires an application, notice and an opportunity for hearing.¹⁰ Therefore, we conclude that the Motion should be denied.

IV. CONCLUSION

For the reasons stated in the above discussion, OPIC recommends that the Commission deny Movant's motion.

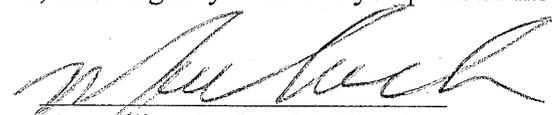
Respectfully submitted,

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Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2006, the original and twelve true and correct copies of the Office of the Public Counsel's Response to the Motion for Judgement Nunc Pro Tunc was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Mary Alice Boehm-McKaughan

¹⁰30 TAC §§ 291.106, 291.107(b) and 291.113(a).

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SOAH DOCKET NO. 582-02-0431
TCEQ DOCKET NOS. 2001-1045-UCR & 2001-1046-UCR

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THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
RESEARCH REPORT NO. 1000
1955

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