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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 NOV 12 PM 4:52
CHIEF CLERK'S OFFICE

November 12, 2007

Ms. Ladonna Castenuela
Office of the Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA FACSIMILE AND FED-EX

Re: Response to Contested Case Hearing Request of Ms. Lin Neese on the
Application of Gray Utility Service, LLC for TPDES Permit No.
WQ0014728001, Docket Number 2007-2723-MWD

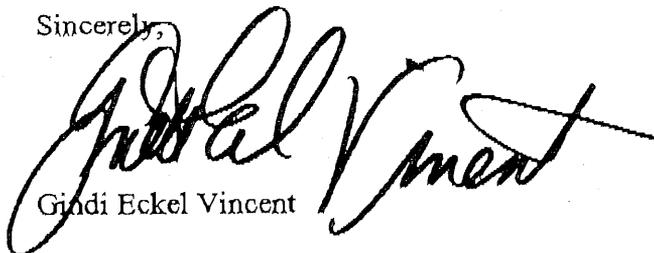
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Dear Ms. Castenuela:

Enclosed please find an original and eleven (11) copies of the Applicant's Response to Ms. Lin Neese's Request for a Contested Case Hearing for TPDES Permit No. WQ0014728001.

Should you have any questions, feel free to contact me at (713) 276-7678.

Sincerely,


Gindi Eckel Vincent

cc: Mailing List

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TCEQ DOCKET NO. 2007-2723-MWD

IN THE MATTER OF THE APPLICATION OF GRAY UTILITY SERVICE, LLC FOR TPDES PERMIT NO. WQ0014728001

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BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2007 NOV 12 PM 4:52 CHIEF CLERK'S OFFICE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUEST FOR HEARING

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

COMES NOW, Gray Utility Service, LLC ("Applicant") and files this Response to Request for Hearing in the above-referenced matter, and would respectfully show the following:

I. INTRODUCTION

Applicant applied to the Texas Commission on Environmental Quality ("TCEQ") for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014728001 to authorize the discharge of treated domestic wastewater at the daily average flow of 99,000 gallons per day. The TCEQ received this application, conducted its technical review, and a draft permit was prepared and submitted on November 9, 2006 (the "Permit"). The TCEQ Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater for the Permit was published on January 25, 2007. At this time, the 30-day public comment period for the Permit began. Mary Carter, on behalf of Ms. Lin Neese ("Protestant"), timely submitted comments and a request for hearing in a letter dated February 22, 2007. The 30-day comment period closed February 26, 2007, and the TCEQ Office of the Chief Clerk mailed the Executive Director's Response to Final Comment on July 23, 2007 ("Executive Director's Response"). Protestant filed a timely request for a contested case hearing on August 22, 2007.

II. REQUIREMENTS OF APPLICABLE LAW

Under applicable statutory and regulatory requirements, a person or entity requesting a hearing must file the request in writing with the chief clerk no later than 30 days after the chief clerk's transmittal of the executive director's response to comments.¹ The request must (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; (2) identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affect by the proposed facility or activity in a manner not common to members of the general public; (3) request a contested case hearing; (4) list all relevant and material disputed issues of act that were raised during the comment period that are the basis of the hearing request; and (5) provide any other information specified in the public notice of application.²

Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest." This section also provides six, non-exclusive factors that will be considered when determining whether a person is affected. These include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.³

¹ 30 Texas Administrative Code ("TAC") § 55.201(a), (c) (2006).

² See 30 TAC § 55.201(d).

³ See 30 TAC § 55.203(c).

The Commission will grant an affected person's timely hearing request if: (1) the request is made pursuant to a right to a hearing authorized by law; and (2) *the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application.*⁴

Responses to hearing requests must, under 30 TAC § 55.209(e), specifically address:

- (1) whether the Requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether this issue were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter to the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. RESPONSE TO PROTESTANT'S REQUEST

A. Protestant Is Not an Affected Person.

Protestant makes a few references to her connection to the wastewater treatment facility proposed in the Permit in order to be classified as "affected." Protestant argues her connection to the Permit activity is that some of the discharge will cross her property and no permission has been given.⁵ However, whether or not permission has been granted for certain access routes is not a fact that supports a finding one way or the other of affected person status (and as discussed more fully below, not a fact that can be taken into consideration here). Rather, there must be particular facts raised to support a finding of "affected person." Specifically, there must be information provided in the Request that there will be adverse effects to health, safety, or use of

⁴ See 30 TAC § 55.211(c).

⁵ See Protestant's Request for Contested Case Hearing; note, the TCEQ does not address issues of property rights.

the property or person as required by 30 TAC 55.203 (c).⁶ As noted above, there must be some showing of harm to person or property. Protestant has not presented a personal justiciable interest as required and therefore can not be classified as an affected person.

B. Issues Raised by Protestant in the Hearing Request.

1. No permission has been granted to access the discharge route on Protestant's property.

The Protestant raises concerns regarding the discharge route and whether Applicant has access to that proposed route. The proposed discharge route is not a relevant and material issue that Protestant can raise in a contested case hearing request. The Applicant may, at its discretion, and subject to meeting TPDES legal requirements, choose any discharge route. Further, the TCEQ may, and frequently does, issue permits subject to any other required authorization and subject to obtaining any property interests that may be required.⁷ It is the burden of the Applicant to obtain any property authorizations needed, and TCEQ does not handle issues of property rights nor does the Permit vest any such rights (as noted in the Executive Director's Response). As such, the issue of the proposed discharge route is one of law and policy, not fact, and is not relevant and material to the Commission's decision on this application.

2. It is unclear whether the point of discharge will be on the Applicant's or Protestant's property.

The Protestant mentions briefly that even though the Permit says the point of discharge will be on the Applicant's property, she is unclear of its whereabouts. First and foremost, the Applicant is bound by its certification that the information provided in its permit application is true and correct. The permit application clearly shows the point of discharge is on the

⁶ There is one assertion on p. 2 of the Request which says Applicant did not demonstrate it would ensure the water quality of Icet Gully and Old River, yet that is exactly what has been done in the permit application and the Permit contains limits to ensure protection of the receiving waters. Thus, there is no showing of harm.

⁷ See 30 TAC § 305.122(b), (c).

Applicant's property and that is the point of discharge that has been authorized by the Permit. The Applicant has the duty to comply with those permit provisions.⁸ Furthermore, as noted above, the Permit does not grant any rights of access or property rights. Any access needed would have to be obtained in an unrelated proceeding. Protestant has not advanced any legitimate argument to counter the TCEQ's findings that this point of discharge is appropriate, other than to state she is unclear about where Icet Gully runs. Therefore, the issue of the proposed point of discharge is one of law and policy, not fact, is not relevant and material and can not be the basis for referral for a contested case hearing.

3. State policy encourages use of other wastewater treatment facilities.

The Protestant submits that the State policy set forth in Texas Water Code §26.081 regarding regionalization is not completely satisfied. First, this is clearly an issue of law, not fact, and as such is not appropriate to refer for a contested case hearing. Second, as addressed in more detail in the Executive Director's Response, there was no facility with the capacity to accept the volume from the Applicant. In addition to the two facilities that explicitly stated they would not have capacity, the third facility has permit limits which would not allow it to accept Applicant's volume.⁹ This is undisputed. Further, Applicant obtained a Certificate of Convenience and Necessity to serve the area proposed in the Permit as required to address the State's policy in 30 TAC Chapter 291. As such, the issue of the State's policy under Texas Water Code §26.081 is one of law, not fact, and is not relevant and material to the Commission's decision on this application.

⁸ See e.g., 30 TAC § 305.125.

⁹ See e.g., Executive Director's Response at p. 3.

4. The discharge may adversely impact water quality.

The Protestant makes a cursory statement that water quality might be adversely impacted by the discharge. This statement is not only unsupported by any facts or allegations, it is directly contradicted by the record. The TCEQ is required to look at discharge routes and their impact on the receiving waters.¹⁰ Furthermore, issues of existing use and surrounding ground and surface water contamination were already considered by the TCEQ as required by 30 TAC § 309.12 when granting the Permit.¹¹ As noted more specifically in the Executive Director's Response, these permits are issued in accordance with the Texas Surface Water Quality Standards which are designed to protect the water quality.¹² Further, Applicant is proposing a very small wastewater treatment facility. The discharge stream has been appropriately controlled in the Permit, and there is no assertion that the limits provided for in the Permit are inadequate to protect the water quality. Protestant's argument provides no support for its general allegation and raises no material disputed issue for hearing.

C. The Disputed Issues Involve Questions of Law and Are Not Relevant.

Under 30 TAC §55.211, if the request raises only disputed issues of law or policy, the Commission has the option of making a decision on the issues and acting on the application. Protestant has asked the TCEQ to opine on the discharge route and whether permission has been obtained. TCEQ's determination of discharge routes is a matter of law and policy, not a question of fact. Additionally, the other two issues raised by the Protestant, the State policy of

¹⁰ See e.g., 30 TAC Chapter 307.

¹¹ In addition to Chapter 307, many other chapters, including Chapter 309 address the issues of protecting water quality. 30 TAC 309.10 states, in relevant part, "The purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities ... on selection of a site that minimizes possible contamination of ground and surface waters; to define the characteristics that make an area unsuitable or inappropriate for a wastewater treatment facility; to minimize the possibility of exposing the public to nuisance conditions; and to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate."

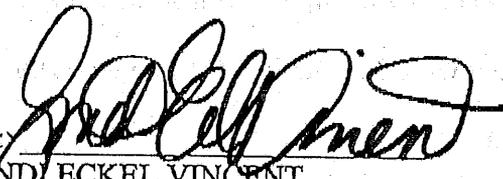
¹² See Executive Director's Response at p. 4.

development and water quality, are also issues of law, not of fact. Because Protestant raises only issues of law or policy, rather than fact, these issues are not appropriate for referral to hearing.¹³

As has been shown above, nearly all of the disputed issues raised by Protestant are inaccurate, incorrect, or are questions of law. Outside of these obvious deficiencies, the issues raised by the Protestant are completely inconsequential or have already been examined by the TCEQ when making a decision to grant the Permit. In other words, Protestant has not introduced any new relevant or material issue not already considered when deciding whether to grant this application. Since the Applicant is requesting the Commission deny the request for a contested case hearing, Applicant is not submitting an expected maximum duration for the hearing. Should the request be granted, Applicant will submit an estimated duration.

IV. CONCLUSION

For these reasons, the Applicant respectfully requests that the Commission deny Lin Neese's request for a contested case hearing. The issues raised by the Protestant are incorrect and are questions of law. Even if valid, the issues raised by Protestant are not relevant and material to the Commission's decision on the application. In addition, Protestant has not established she is an affected person.

By: 
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¹³ See 30 TAC § 55.211(b)(3)(A) and (B).

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2007, the original and eleven true and correct copies of the Applicant's Response to Request for Hearing were 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, and/or U.S. Postal Mail.



Gindi Eckel Vincent

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DOCKET NO. 2007-1713-MWD; PERMIT NO. WQ0014728001

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