

TCEQ DOCKET NO. 2009-1573-DIS

PETITION FOR CREATION OF § BEFORE THE TEXAS
COLLIN COUNTY WATER CONTROL §
AND IMPROVEMENT DISTRICT NO. 3 § COMMISSION ON
IN COLLIN COUNTY, TEXAS § ENVIRONMENTAL QUALITY

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 JAN 15 AM 8:20
CHIEF CLERK'S OFFICE

**PROTESTANT'S, THE CITY OF WYLIE,
REPLY TO OFFICE OF PUBLIC INTEREST COUNSEL'S, THE EXECUTIVE
DIRECTOR'S, AND THE APPLICANT'S RESPONSE TO HEARING REQUEST**

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

COMES NOW Protestant, the City of Wylie (the "City" or "Wylie"), and hereby submits this, its *Reply to the Office of Public Interest Counsel's, the Executive Director's, and the Applicant's Response Hearing Request* to address issues raised in the one request for contested case hearing that has been received by the Texas Commission on Environmental Quality (the "Commission") in the above-referenced proceeding, and would respectfully show the Honorable Commissioners as follows:

I. BACKGROUND

On November 3, 2008, Collin County Water Control and Improvement District No. 3 ("Applicant") filed its application (the "Application") for the creation of a water district. As identified in the *Executive Director's Response to Hearing Requests*,¹ the Application was declared administratively complete on November 11, 2008.

The Notice of District Petition was published in the *McKinney Courier-Gazette* on June 28, 2009 and July 5, 2009. The last day to request a contested case hearing was August 5, 2009.

¹ Texas Comm'n on Environmental Quality, *Executive Director's Response to Hearing Request, Petition for Creation of Collin County Water Control and Improvement District No. 3 in Collin County, Texas* (Dec. 30, 2009) [hereinafter ED's Response to Hearing Request].

II. ARGUMENT AND AUTHORITIES

The request for contested case hearing filed by the City is a relevant Protest and adequately shows that the City is an affected person.

For an issue to be relevant in a proceeding before the Commission, it (1) must involve a disputed question of fact; and (2) must be relevant and material to the decision on the application.² The Commission has relied on *Sunshine Gas Co. v. U.S. Department of Energy*³ to define relevance. In *Sunshine Gas*, the Court stated: “Relevance simply cannot be determined in the absence of defined purpose In all situations, purpose in some degree must be defined . . . and relevance thereafter may be assessed.”⁴ In addition, the Commission simply has looked at the common definitions of the terms “relevant” and “material,” noting that the term “relevant” is defined as “bearing upon or properly applying to the matter at hand” and the term “material” is defined as “being of real importance or great consequence . . . substantial . . . essential.”⁵ Therefore, in determining the relevancy of an issue, the Commission considers the following: “[I]f the information concerning an issue raised by a requestor, if shown to be true, would have some effect upon the Commission’s decision on the application, it is relevant.”⁶ Material issues are those that, if shown to be true, “would have a significant, consequential, or substantial bearing upon the Commission’s decision on the application.”⁷ The City will respond to the

² See 30 TEX. ADMIN. CODE § 50.115(c) (2004); see also TEX. WATER CODE § 5.556(d)(3) (West 2000).

³ 524 F. Supp. 834 (N.D. Tex. 1981).

⁴ *Id.* at 838.

⁵ Texas Natural Res. Conservation Comm’n, *Executive Director’s Response to Hearing Request, Application by Lower Colo. River Auth. for Permit No. 14303-001*, TNRCC Docket No. 2002-0755-MWD at 7 (June 17, 2002) (quoting Webster’s Third New International Dictionary (1968)).

⁶ *Id.*

⁷ *Id.*

Response to Hearing Request filed by the Applicant and will show that there are relevant facts to be considered and decided upon at a contested case hearing.⁸

Each of the issues raised by Applicant will be addressed in turn.

A. Wylie's Hearing Request was Untimely.

On July 27, 2009, the City of Wylie (the "City" or "Wylie") filed its protest of the petition and its request for a contested case hearing ("Protest"). The City's legal counsel placed the Protest in the U.S. Mail on July 27, 2009.⁹ The City did not receive an acknowledgement of receipt from the Office of Public Assistance. The City also did not receive a letter indicating that its Protest was untimely filed. The City was contacted by the ED attorney assigned to this Petition and was informed that the City's Protest was alleged to be untimely filed. A review of the records on file at the Chief Clerk's office confirms a postmark of July 27, 2009, on the actual envelope for mailing.¹⁰ Additionally, the date on the Protest letter was dated July 27, 2009. The undersigned's legal assistant can provide a sworn affidavit that the letter was actually placed in the U.S. Mail on July 27, 2009.

The letter was erroneously addressed to the wrong post office box for the Commission. Based on the undersigned's historical dealing with the Commission, it is clear that the wrong address to the Commission was merely a typographical error and not intended to raise an unnecessary issue regarding the City's timeliness for filing. The undersigned and the City attempted to erase any timeliness issues by mailing the protest letter well in advance of the hearing request deadline. The undersigned mailed the letter to the Commission nine days before the protest period ended. The City requests and supports the Executive Director's

⁸ It should be noted that both the ED and OPIC recommend granting a contested case hearing and therefore the City supports their responses and will not be addressing their Responses.

⁹ See Attachment B to the ED's Response to Hearing Requests.

¹⁰ See Attachment C to the ED's Response to Hearing Requests.

recommendation that the Commission exercise its authority to consider the City's hearing request pursuant to 30 Tex. Admin. Code § 55.251(f)(2).

B. Wylie has not shown that is an affected person.

Applicant attempts to convince the Commissioners that Wylie is not an affected person because it is not a "person" but is instead a local government entity. Commission rule 30 Tex. Admin. Code § 55.256 provides that a governmental agency may be considered an affected person. Specifically, §55.256 (c)(6) provides that a relevant factor to be considered for a governmental entity is its statutory authority over or interest in the issues relevant to the application.¹¹ Wylie is clearly an affected person as it has interest in the issues relevant to the application. Applicant seeks to create a district within a portion of the City's extraterritorial jurisdiction ("ETJ"). Wylie provides similar services as those proposed by the district. Whether Wylie is currently providing those services is not the issue. Likewise, neither is whether Wylie has sought negotiations with the Applicant over the provision of service to a portion of this area. Applicant asserts that because Wylie did not contest an application filed by another entity it did not oppose that entity having the exclusive right to provide retail water and sewer service to the area in question.¹² Applicant has no information related to Wylie's opposition or lack of opposition to service by another entity as Applicant does not work for the City, does not sit on the City Council, nor is Applicant affiliated with the City in anyway. Therefore all statements made by Applicant related to Wylie's desire or lack of desire to serve any of the requested area is purely speculative and assumptive in nature and should be disregarded.

¹¹ See 30 TEX. ADMIN. CODE § 55.256(c)(6).

¹² Texas Comm'n on Environmental Quality, *Applicant's Response to Hearing Request, Petition for Creation of Collin County Water Control and Improvement District No. 3 in Collin County, Texas* (Dec. 28, 2009) at 5 [hereinafter Applicant's Response to Hearing Request].

Wylie has demonstrated that it clearly meets the criteria of an affected person with justiciable interest related to this Application and the proposed district's boundaries and should be granted a right to a contested case hearing on this Application.¹³ The City supports the analysis regarding this issue provided by the Executive Director and the Office of Public Interest Counsel.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Wylie respectfully requests that the Honorable Commissioners of the Texas Commission on Environmental Quality grant its request for a contested case hearing.

Respectfully submitted,

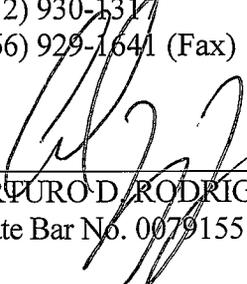
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**ATTORNEY FOR THE CITY OF WYLIE,
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CHIEF CLERKS OFFICE

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¹³ See 30 TEX. ADMIN. CODE § 55.256(c)(6).

CERTIFICATE OF SERVICE

I hereby certify that on this the 15th day of January 2010, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, Federal Express overnight delivery, or hand delivery to the following:

<p>Mr. Les Trobman General Counsel (MC-101) Texas Commission on General Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-5525 (Phone) (512) 239-5533 (Fax)</p>	<p>Representing the Office of General Counsel of the Texas Commission on Environmental Quality</p>
<p>Ms. Shana Horton Environmental Law Division (MC-173) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-0600 (Phone) (512) 239-0606 (Fax)</p>	<p>Representing the Executive Director of the Texas Commission on Environmental Quality</p>
<p>Mr. Scott Humphrey Office of Public Interest Counsel (MC-103) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-6383 (Phone) (512) 239-6377 (Fax)</p>	<p>Representing the Office of Public Interest Counsel of the Texas Commission on Environmental Quality</p>
<p>Ms. Bridget Bohac Office of Public Assistance (MC-108) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-4000 (Phone) (512) 239-4007 (Fax)</p>	<p>Representing the Office of Public Assistance of the Texas Commission on Environmental Quality</p>

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<p>Mr. Kyle Lucas Alternative Dispute Resolution (MC-222) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-4010 (Phone) (512) 239-4015 (Fax)</p>	<p>Representing the Office of Alternative Dispute Resolution of the Texas Commission on Environmental Quality</p>
<p>Docket Clerk Office of the Chief Clerk (MC-105) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711 (512) 239-3300 (Phone) (512) 239-3311 (Fax)</p>	<p>For the Office of the Chief Clerk of the Texas Commission on Environmental Quality</p>
<p>Ms. Angela Stepherson Coats Rose Yale Ryman & Lee 5420 LBJ Freeway, Suite 1300 Dallas, Texas 75240 (972) 982-8450 (Phone) (972) 982-8451 (Fax)</p>	<p>Representing the Applicant, Collin County Water Control and Improvement District No. 3</p>

By: 
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