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Ms. Crump's Direct Line: (512) 322-5832  
Email: gcrump@lglawfirm.com

October 8, 2009

**VIA HAND DELIVERY**

Ms. LaDonna Castañuela  
Office of Chief Clerk  
Texas Commission on Environmental Quality  
12015 Park 35 Circle, MC 105  
Building F, 1st Floor  
Austin, Texas 78753

State Office of Administrative Hearings  
Attn: Docket Services  
William P. Clements Building  
300 West 15th Street, Room 504  
Austin, Texas 78701

Re: SOAH Docket No. 582-09-4286, TCEQ Docket No. 2009-0445-UCR;  
*Petition by Tara Partners, Ltd. for Review of City of South Houston  
Water and Sewer Service Rates*

Dear Clerks:

Enclosed is the City of South Houston's Reply to Exceptions. Please file stamp the copies provided and return via our messenger.

By copy of this letter and according to the certificate of service, all parties of record have been served.

Sincerely,

Georgia N. Crump  
Attorney for the City of South Houston

GNC/jmc  
2824\01\ltr091008

Enclosures

cc: Judge Richard R. Wilfong  
Blas J. Coy, Jr.  
Ross W. Henderson  
Matthew Nickson

CHIEF CLERKS OFFICE

2009 OCT -8 PM 12: 53

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SOAH DOCKET NO. 582-09-4286  
TCEQ DOCKET NO. 2009-0445-UCR

2009 OCT -8 PM 12: 53

PETITION BY PETITIONER  
PARTNERS LTD.  
FOR REVIEW OF CITY OF SOUTH  
HOUSTON WATER AND SEWER  
SERVICE RATES

§  
§  
§  
§

BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS  
CHIEF CLERKS OFFICE

**CITY OF SOUTH HOUSTON'S  
REPLY TO EXCEPTIONS**

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SOAH DOCKET NO. 582-09-4286  
TCEQ DOCKET NO. 2009-0445-UCR

2009 OCT -8 PM 12: 53

PETITION BY TARA PARTNERS LTD.  
FOR REVIEW OF CITY OF SOUTH  
HOUSTON WATER AND SEWER  
SERVICE RATES

§  
§  
§  
§

BEFORE THE STATE CHIEF CLERKS OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**CITY OF SOUTH HOUSTON'S  
REPLY TO EXCEPTIONS**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY:

COMES NOW, the City of South Houston ("City") and files this Reply to the Exceptions filed by Tara Partners, Ltd. ("Petitioner") and the Executive Director. The City respectfully shows as follows:

**I. INTRODUCTION**

The issue that is before the Commission is simply whether the Petitioner has fulfilled the jurisdictional requirements provided for in the Texas Water Code and in the rules of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") regarding the water rates portion of its Petition. The Commission's determination of this issue will hinge on whether the Commission (i) agrees with the Executive Director ("ED") and Petitioner that signatures of only 5.56% of the utility's customers eligible to appeal fulfill the statutory requirement that 10% of eligible ratepayers sign a rate appeal petition in order for the Commission to have jurisdiction of the appeal, or (ii) agrees with the Administrative Law Judge ("ALJ") and the City that signatures of only 5.56% of the customers does not fulfill the 10% statutory requirement. As will be detailed below, 5.56% does not equal 10% and thus the Petitioner has failed to meet the statutory requirements for conferring Commission jurisdiction over the rate appeal.

The City urges the Commission to adopt the ALJ's Proposal for Decision ("PFD") and rule that Petitioner has not fulfilled the jurisdictional requirements under § 13.043(b)(3) of the

Texas Water Code, and thus, the Commission does not have jurisdiction over the water rate appeal. The clear and unambiguous language of § 13.043(b)(3) requires that all ratepayers whose rates have been changed be grouped together for the purposes of determining jurisdiction. An agency does not have the authority to interpret the clear and unambiguous language of a statute, and thus, the Commission should not distinguish by class of ratepayer for the purposes of jurisdiction.

The term "ten percent" is also clear and unambiguous, and therefore is not subject to interpretation. The statutory requirement for conferring jurisdiction on the Commission is for 10% of ratepayers whose rates have been changed and who are eligible to appeal to sign a petition appealing such rates. *Any* percentage that is less than 10% fails to meet the requirement; similarly, *any* percentage that is equal to or greater than 10% meets the requirement. The Petition in this proceeding is signed by one ratepayer. There are 18 outside-city water ratepayers whose rates were changed and who were eligible to appeal. A simple mathematical calculation shows that the Petition was signed by only 5.56% of those ratepayers. It almost seems too obvious to state, but 5.56% is not 10%, and thus one signature does not meet the 10% jurisdictional requirement. In this case, two signatures are required to meet the 10% requirement, and because this Petition is only signed by one ratepayer, the Commission does not have jurisdiction to hear the water rate appeal.

## II. REPLY TO THE EXECUTIVE DIRECTOR

The ED has presented two exceptions to the PFD; the City will address each specifically below. However, the ED's statement of "interest" in the City's methodology for determining its minimum base charge is not relevant to a determination of whether Petitioner has met the statutory jurisdictional requirements. The ED cannot examine the City's rates independently of the filing of a valid petition by ratepayers. Thus, unless and until the threshold filing is made and determined to be valid, the ED is not able to pursue his interest.

**A. Finding of Fact No. 4 is Correct.**

The ED claims that Finding of Fact No. 4 erroneously states that the City's revised rates for water and sewer apply in the same manner to all of the City's outside-city customers.<sup>1</sup> The basis for the ED's argument is that the Petitioner is the only customer classified as an "Outside City Commercial Residential User." However, the ED ignores the fact that rates charged to *every* customer of the City, regardless of classification, and regardless of location inside or outside the City, were changed by Ordinance No. 2009-01. The City charges every water customer a volumetric usage charge and a customer charge. In that sense all outside-city customers are treated in the same manner.

Regardless, whether or not all outside-city customers are treated in the same manner is not relevant to a determination of the issues at hand, because that is not the criteria contained in the statute. The Commission has appellate jurisdiction over this proceeding only as provided in Texas Water Code § 13.043(b)(3) and (c). The Texas Water Code provides that the Commission has jurisdiction over the rates set by a municipally owned utility if the ratepayer resides outside of the corporate limits of the city and a petition is timely filed that has been signed by "...10 percent of those *ratepayers whose rates have been changed and who are eligible to appeal under Subsection (b).*"<sup>2</sup> The Commission's own rule exactly mimics the statute.<sup>3</sup>

Finding of Fact No. 4 appropriately applies the unambiguous language of the statute and the Commission's rule. The ALJ correctly understood that the Commission is bound by the clear language of its enabling statute. As a state agency, the Commission is a "creature of the legislature" and, therefore, "has no inherent authority" and may not adopt any policy that

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<sup>1</sup> Executive Director's Exceptions at 1.

<sup>2</sup> Tex. Water Code Ann. § 13.043(c) (Vernon 2008) (emphasis added).

<sup>3</sup> 30 Tex. Admin. Code § 291.41(b) (2008) (Tex. Comm'n on Environ. Qual., Appeal of Rate-Making) (emphasis added). Although Petitioner owns 95 apartment units outside the City, and receives two bills in total from the City, it is deemed to be one ratepayer under the Commission's rules. 30 Tex. Admin. Code § 291.3(37) (2008) (Tex. Comm'n on Environ. Qual., Definition of Terms).

contradicts a statute.<sup>4</sup> When interpreting a statute, a court must give effect to the legislature's intent by looking first to the plain meaning of the words in the statute.<sup>5</sup> If a statute is "clear and unambiguous" then it must be applied as written and according to the common meaning of the words without resort to rules of construction or extrinsic evidence.<sup>6</sup>

It must be presumed that any word left out of a statute was not intended to be in the statute and was excluded for a purpose.<sup>7</sup> An agency's interpretation of a statute that it is charged with enforcing must not contradict the statute's plain language.<sup>8</sup> Furthermore, an agency's interpretation of its own rules must not contradict the clear and unambiguous language of the rule.<sup>9</sup>

Therefore, the Commission must follow the clear language of the statute and its rule. The Commission must also presume that any word left out of the statute was left out intentionally.<sup>10</sup> Neither the statute nor the rule distinguish between classes of ratepayers, therefore, it must be presumed that the legislature did not intend to draw a distinction between classes of affected customers in this jurisdictional provision because the legislature could have easily chosen to include such language, but did not. It must also be presumed that the legislature intended the term 10% to mean not less than 10%, and therefore less than 10% does not meet the requirement.

The statute is not ambiguous. The Petitioner is only one of the 18 *ratepayers whose rates have been changed and who are eligible to appeal*. Ten percent of 18 is 1.8, therefore the Petition must be signed by at least two outside-city ratepayers whose rates have been changed in

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<sup>4</sup> Public Utility Commission of Texas v. GTE-Southwest Incorporated, 901 S.W.2d 401, 406 (Tex. 1995).

<sup>5</sup> *The State of Texas v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

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

<sup>7</sup> *Railroad Commission of Texas v. Coppock*, 215 S.W.3d 559, 563 (Tex. App.—Austin 2007, pet. denied).

<sup>8</sup> *Continental Casualty Company v. Downs*, 81 S.W.3d 803, 807 (Tex. 2002).

<sup>9</sup> *Public Utility Commission of Texas v. Gulf States Utilities Company*, 809 S.W.2d 201, 207 (Tex. 1991).

<sup>10</sup> *Coppock*, 215 S.W.3d at 563.

order for the Commission to have jurisdiction. As noted above, the Petitioner is the only signatory ratepayer, and thus the Commission does not have jurisdiction over this proceeding.

**B. Conclusion of Law No. 3 is Correct.**

The ED also claims that the ALJ incorrectly concluded that the Petitioner failed to meet the 10% requirement. The ED argues that the Petitioner is in a class of one, which is incorrect. First of all, as noted above, the Petitioner is properly classed together with all 18 outside-city ratepayers because all their rates were changed and they were all eligible to appeal. Secondly, also as noted above, the Commission should not view this jurisdictional issue on a class-by-class basis because to do so violates the Commission's own rules and the Water Code.

At the preliminary hearing before the ALJ, the ED claimed, with no supporting evidence, that the ED has a "policy" of determining jurisdiction regarding outside-city ratepayers on a class-by-class basis. However, the ED did not support that assertion with any evidence, nor did the ED even argue it in briefs filed with the ALJ. In its Exceptions, the ED again asserts the argument, and again fails to cite any authority for his position or any precedent in which the Commission has adopted this policy. The Commission should reject the ED's argument on this issue and adopt the PFD because, as detailed above, the ED's position is a violation of the clear and unambiguous language of the Texas Water Code and the Commission's rules.

**III. REPLY TO PETITIONER'S EXCEPTIONS**

In its Exceptions, the Petitioner has essentially re-briefed all of its arguments without presenting any specific exceptions to the PFD. Petitioner argues that the ALJ has endorsed a "rule which erects an unwarranted barrier" to the Commission's jurisdiction, the ALJ should apply the "Executive Director's 'rounding' rule," and numbers of ratepayers should be determined on a "per class" basis.

**A. The PFD does not impose an “unwarranted barrier” to the Commission’s jurisdiction.**

Petitioner is wrong in its argument that the ALJ has “endorsed a rule” and it is also wrong that the ALJ has erected a “barrier” to appeal.<sup>11</sup> To the contrary, the ALJ merely applies the statutory requirement that is a prerequisite to such appeal, as clearly set forth in the statute. But for the provisions of § 13.043(b)(3) and (c), the Commission would not have jurisdiction over rates charged by municipally owned utilities. Therefore, the statute does not impose a “barrier” to appeal, rather it establishes a threshold requirement in order to institute such an appeal. The 10% requirement is fundamentally a mechanism for bringing an appeal that is available if the statutory criteria are met. Without the filing of a petition, the Commission will not have appellate jurisdiction over these rates; the opportunity to file a petition granted by the statute is the granting of a remedy that otherwise would not exist.

**B. There is no “ED ‘rounding’ rule.”**

The Petitioner refers to a non-existent “rounding rule” (initially asserted but now abandoned by the ED), that 1 out of 18 affected ratepayers’ signatures meets the 10% statutory jurisdictional requirement.<sup>12</sup> This argument ignores basic and immutable mathematical facts; clearly, “1” is only 5.56% of “18.” Petitioner has apparently interpreted the statutory requirement of “10%” to mean *any* percentage that when applied to a base amount results in a whole number that does not exceed 10% of the base amount.<sup>13</sup> In other words, according to Petitioner, the 10% requirement in the statute and in the Commission’s rule does not actually mean 10% of the total number, but instead means any whole number that is *close* to 10%, so long as the resulting whole number is not *more than* 10% of the total number.

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<sup>11</sup> Petitioner’s Exceptions at 4.

<sup>12</sup> In his briefs to the ALJ, the ED had argued that “1.8” should be rounded down to “1.” However, the ED has not continued to assert this rather novel mathematical rule in his Exceptions.

<sup>13</sup> The City has struggled with how to summarize the Petitioner’s mathematical theory that 5.56% of a number equals 10% of the number, but believes that this summary accurately restates and summarizes this theory.

In applying this absurd and completely erroneous theory, Petitioner has apparently reasoned that: (i) 10% of 18 is 1.8, (ii) there cannot be 1.8 ratepayers, (iii) therefore only 1 signature, and not 2 signatures, is required to achieve 10% of 18. This reasoning runs directly contrary to elementary mathematics which, when applied to these same facts, shows that: (i) 10% of 18 is 1.8, (ii) there cannot be 1.8 ratepayers, (iii) therefore 1.8 is rounded up to 2, resulting in a requirement for 2 signatures in order to achieve 10% of 18. The Commission should not interpret a clear and unambiguous statutory term such as "10%" to mean something other than what it plainly means. Interpreting the statute in a manner that equates 5.56% with 10% would be clearly erroneous.

Petitioner's analysis is wrong and fundamentally flawed on multiple levels. First of all, the rules of simple mathematics dictate that when a fraction of an item that cannot be divided (such as a person) is needed, only the next highest whole number will suffice. In other words, 1.8 ratepayers is a number that cannot exist, therefore 2 ratepayers must sign in order to meet the jurisdictional requirement. A second applicable mathematical rule is that when rounding a fraction to a whole number, a fraction is rounded up if it is .5 or more and down if it is .4 or less. Thus, 1.5 is rounded up to 2 while 1.4 is rounded down to 1.

Petitioner's position that 5.56% equals 10% is so unprecedented and so clearly wrong that it is not surprising that the courts have not been called upon to review such a position. However, when courts have had to review situations in which a whole number is needed (such as the number of voting council members), the courts have rounded up to the next highest whole number. In *City of Alamo Heights v. Gerety*, 264 S.W.2d 778 (Tex. Civ. App. – San Antonio 1954, writ ref'd, n.r.e.) the court was called upon to determine whether a rezoning application had received the required three-fourths vote of all the members of the legislative body. Article 1011e, Vernon's Ann. Civ. Stats. (now § 211.006, Local Government Code), provided that because the rezoning request had been denied by the Planning and Zoning Commission, the applicant was required to appeal to the City Council and obtain a favorable vote of three-fourths

of all the members of the City Council in order for the rezoning to be approved. At the time of the hearing, all five aldermen were present, but one alderman disqualified himself because of an interest he had in the matter. Of the four remaining aldermen, three voted in favor of the rezoning, and one voted against. The mayor declared that the rezoning was denied because the matter failed to achieve the required three-fourths vote (*i.e.*, three-fourths of 5 was 3.75, therefore 4 favorable votes were required). The trial court and appellate courts disagreed, not on the basis that 3.75 should be rounded down to 3, but on the grounds that the disqualification of one alderman should be treated as though it were a vacancy. Thus, "all members of the legislative body" meant the same as the members in existence who were qualified to act.

If the *Alamo Heights* court had applied Petitioner's theory, it would have stated that 3 votes were sufficient to reach a three-fourths majority because three-fourths of 5 is 3.75, which is rounded down to 3 because you cannot have .75 of a council member. However, the court applied the proper mathematical rule which was to round up to the nearest whole number so that a three-fourths vote of 5 council members would have required 4 votes.

Votes of council members or citizens must be counted in whole numbers, therefore accepted protocols for determining whether measures have achieved a required vote are also instructive. The following question and answer appear on the website of Robert's Rules of Order:<sup>14</sup>

*Question 5:*

Can we round to the nearest number in computing the result of a vote? For example, since two thirds of 101 is 67.3333, will 67 affirmative votes out of 101 votes cast meet the requirement of a two-thirds vote?

*Answer:*

No. The requirement of a two-thirds vote means at least two thirds. As a consequence, nothing less will do. If 101 votes are cast, 67 affirmative

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<sup>14</sup> <http://www.robertsrules.com/faq.html>. Robert's Rules of Order is a manual in common and widespread usage by governing bodies for parliamentary procedure.

votes are not at least two thirds. It is less than two thirds, and will not suffice. [RONR (10th ed.), p. 388.]<sup>15</sup>

A hypothetical example may be useful to illustrate the absurdity of Petitioner's position. If, for example, there were only nine outside-city ratepayers, then under Petitioner's interpretation of the 10% requirement, *zero* ratepayers would have had to sign the Petition because 10% of nine is .9, which would have to be rounded down to zero because you cannot have .9 ratepayers, and requiring one signature would have been more than 10% of nine.

Petitioner argued that requiring two ratepayers to sign the Petition goes beyond the requirement in the statute because two would be 11% of the eligible ratepayers. In addition to poor mathematics (1.8 rounds *up* to two, not *down* to one) the argument does not have a legal leg to stand on. The statute requires 10%; one is not 10% of 18, but two is. It is irrelevant that two is slightly more than 10% because it is the lowest whole number that meets the 10% requirement.<sup>16</sup> Requiring two signatures does not change the statutory requirement as Petitioner claims; two is merely the lowest number of signatures that meets the requirement.

Petitioner has cited statutory and case law for the proposition that this statutory jurisdictional requirement should be liberally construed to allow Petitioner's convoluted position that the signatures of 5.56% of ratepayers whose rates had been changed meets the requirement of having the signatures of 10% of those ratepayers.<sup>17</sup> However, interpreting 5.56% as meeting a 10% requirement goes far beyond a "liberal" construction. Petitioner's interpretation instead completely rewrites the statute in violation of basic administrative law and common sense. There is simply no reasonable way to interpret 5.56% as meeting a 10% requirement.

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<sup>15</sup> "RONR" is the standard abbreviation parliamentarians use to cite Henry M. Robert III and others, *Robert's Rules of Order Newly Revised*, 10th ed. (Cambridge, Mass.: Perseus Publishing, 2000). The standard citation to particular pages and lines is "RONR (10th ed. [for 'edition'], p. [for 'page' or 'pages'], l. [for 'line' or 'lines']."

<sup>16</sup> Petitioner accurately points out, citing the Judgment of King Solomon, that you cannot have .8 of a ratepayer. Petitioner's Exceptions at 9.

<sup>17</sup> *Id.* at 7-8.

Petitioner has also attempted to use appellate deadlines as a parallel to support its position.<sup>18</sup> However, Petitioner has actually brought to light a parallel that supports the PFD and the City's position. Petitioner points out that when an appellate deadline falls on a weekend or holiday, the deadline is extended to the next business day.<sup>19</sup> That is a workable analogy to the issue at hand, only it does *not* support Petitioner's conclusion. The analogy would only support Petitioner's conclusion if, instead of extending the deadline to the next business day, the deadline was actually *shortened* to the closest business day prior to the deadline so that the deadline was not exceeded. The fact that the deadline *is extended* to the next business day is actually analogous to the position that the ALJ took in the PFD, to-wit: because you cannot have 0.8 of a ratepayer whose rates have been changed, then the number must be extended to two signatures in order to achieve jurisdiction.

**C. The ALJ did not fail to address the "per class" argument.**

Contrary to the Petitioner's claims, the ALJ properly addressed the ED's and Petitioner's argument that the sufficiency of the petition should be determined on a "per class" basis. The ALJ stated specifically that "[t]he ALJ reads Code § 13.043(c) as requiring that a minimum of 10,000 or 10 percent of the *affected ratepayers* must sign a petition."<sup>20</sup> The ALJ was not merely restating the Water Code, even though he quoted it nearly verbatim; he was stating his finding that the Water Code was intended to mean what it clearly and unambiguously states, namely that the ratepayers must be grouped only by whether they were affected by the rate change and were eligible to appeal. The ALJ clearly understood that the statute does not allow for division of ratepayers by class when determining jurisdiction.

The Petitioner's position is founded upon its allegation that it has been harmed more than other ratepayers by the City's rate changes, therefore this degree of alleged harm should weigh in

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<sup>18</sup> *Id.* at 8.

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

<sup>20</sup> Proposal for Decision at 3 (emphasis added).

favor of expanding the jurisdiction of the Commission in order to provide redress for its grievance against the City's rates. An interesting theory, but one wholly unsupported by the statute. Perhaps one reason why neither the statute nor the Commission's rules address the relativity of perceived harm caused by increased rates is the difficulty of determining what is essentially a very subjective measurement. Hence the reason for extending the opportunity to file an appeal to every ratepayer whose rates have been changed and who are eligible to appeal.

In its Exceptions, the Petitioner takes the opportunity to argue the merits of its complaint against the City's rates. As noted above, however, the merits or demerits of Petitioner's case are not the appropriate criteria for determining whether a valid petition has been filed.<sup>21</sup>

#### IV. CONCLUSION AND PRAYER

The City of South Houston respectfully requests that the Commission consider this Reply to Exceptions, reject the exceptions of the ED and Petitioner, and adopt the PFD. The statute and the Commission's rules are clear on the jurisdictional requirements for appeal of the City's water rates to the Commission, and Petitioner has failed to meet those requirements. The City of South Houston also requests any further relief to which it may be entitled.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE  
& TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900

Austin, Texas 78701

(512) 322-5800

Fax: (512) 472-0532



GEORGIA N. CRUMP  
State Bar No. 05185500

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<sup>21</sup> Petitioner is certainly also aware of its right to redress in the courts, as it currently is challenging in the courts the City's rates charged to Petitioner's inside-city apartment units.

PATRICK N. JACKSON  
State Bar No. 24055724

ATTORNEYS FOR THE  
CITY OF SOUTH HOUSTON

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 8th day of October, 2009, a true and correct copy of the *City of South Houston's Reply to Exceptions* has been served on all parties of record in this proceeding by hand delivery, First Class Mail, and/or facsimile transmission to the persons listed below:

Blas J. Coy, Jr.  
Texas Commission on Environmental Quality  
Office of Public Interest Counsel  
MC 103, P.O. Box 13087  
Austin, Texas 78711-3087  
Tel. (512) 239-6363  
Fax: (512) 239-6377  
bcoy@tceq.state.tx.us

Ross W. Henderson  
Staff Attorney  
Texas Commission on Environmental Quality  
MC 173, P.O. Box 13087  
Austin, Texas 78711-3087  
Tel. (512) 239-6257  
Fax: (512) 239-0626  
rhenders@tceq.state.tx.us

Matthew Nickson  
Attorney at Law  
12300 McGowen  
Houston, Texas 77004  
Tel. (713) 655-8880  
Fax: (713) 621-1449  
mpnickson@gmail.com

**Representing: Tara Partners, Ltd.**

  
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GEORGIA N. CRUMP

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CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY