

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 2, 2024

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

**RE: IN THE MATTER OF THE PETITION FOR CREATION OF DUCK
CREEK MUNICIPAL UTILITY DISTRICT OF DENTON COUNTY;
SOAH DOCKET NO. 582-23-13330; TCEQ DOCKET NO.
2022-1631-DIS**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions
to the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Service List

SOAH DOCKET NO. 582-23-13330
TCEQ DOCKET NO. 2022-1631-DIS

PETITION FOR THE	§	BEFORE THE STATE OFFICE
CREATION OF DUCK CREEK	§	
MUNICIPAL UTILITY	§	OF
DISTRICT	§	
OF DENTON COUNTY	§	ADMINISTRATIVE HEARINGS

**OFFICE OF PUBLIC INTEREST COUNSEL'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) submits these exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) and proposed order in the above-captioned matter.

OPIC respectfully requests that the Commission issue the Order for Creation of Duck Creek Municipal Utility District of Denton County with changes as discussed below.

I. Introduction and Background

On June 12, 2024 the Honorable ALJ Pemberton issued his PFD recommending that the Petition for Creation of Duck Creek Municipal Utility District of Denton County be granted. The PFD further recommends a division of reporting and transcript costs as 50 percent to Applicants, 25 percent to Protestant Party the Rushings, and 25 percent to the remaining Protestants as a group.

While not taking a position on the proposed overall fifty-fifty split between

Applicants and Protestants, OPIC has concerns that the specific allocation of 25 percent to Protestant party the Rushings is inequitable and may have an unintended chilling effect on public participation in future permitting processes. Furthermore, it could be interpreted as (or at least have the appearance of) functioning as a punitive measure that effectively punishes the Rushings for their conduct at the hearing on the merits, which does not appear to be the intent of the assessment of transcript costs. Therefore, OPIC respectfully requests that the Commission reconsider the allocation of transcript costs.

II. Applicable Law

The assessment and division of reporting and transcript costs are governed by Commission rule 80.23, which provides in pertinent part that "...the commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding." 30 TAC § 80.23(d)(1) The rule further provides that the Commission shall consider the factors listed at 30 TAC § 80.23(d)(1)(A)-(G) in assessing these costs:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and

(G) any other factor which is relevant to a just and reasonable assessment of costs.

Of these, only subsections A-D and G are applicable and relevant to this proceeding.

III. Discussion

The PFD recommends that the Rushings, one of the seven Protestant parties, bear 25 percent of the costs associated with court reporting and transcription of the hearing. In its discussion of transcript costs, the PFD considers the factors of 80.23(d)(1) as applicable to this matter. It explains that relevant to factor (A), the ALJ directed that a transcript be prepared. Relevant to factor (B), that the Applicant can easily absorb the cost of a one-day hearing and that under the 50-50 Applicant-Protestant split, the cost would not be exorbitant for the Protestants. Relevant to factor (C), that all parties participated in the hearing, however, a majority of the hearing time (and transcript) was devoted to Applicant's direct case and Protestants' cross-examination. Relevant to factor (D), that the parties to benefit most directly from the transcript are Applicants, OPIC, and the ED, as demonstrated by its use in their closing arguments.

Finally, Relevant to factor (G), the ALJ found that the Protestants' opposition to the District has caused months-if-not-years-long delay and increased costs for the Applicants. Moreover, the PFD takes specific issue with the conduct of the Rushings at the hearing on the merits, which it found crossed the line from a good faith attempt to participate in the legal process and veered into misuse of the SOAH proceeding. It states that the Rushings engaged in name-

calling, highlighting their characterization of the Zollingers as greedy and arrogant. While OPIC does not discount the importance of proper courtroom decorum, OPIC respectfully submits that this allocation—which, in effect singles out the Rushings for misusing the SOAH process by airing their personal grievances—is not warranted under the specific circumstances of this hearing.

First, OPIC observes that the hearing on the merits was both convened and concluded the same day. Thus, while the Protestants' participation in the creation process inarguably extended the timeline for the ultimate TCEQ decision of whether to create this District, it did not result in any significant extension of the duration of the hearing on the merits or transcript costs. OPIC submits that delay caused by mere participation in the legal process generally, as opposed to causing significant delay during the actual hearing, lies outside the scope of the inquiry when deciding how to assess reporting and transcript costs. To be clear, delay is not a required consideration under the relevant factors. To the extent that it is utilized as a basis for cost allocation, delay is a concept that is more properly—narrowly—focused on the length and delay of the hearing on the merits where the actual cost of the transcript is generated rather than the irrelevant factor of project delay, which is an inevitable side effect of protestants exercising their due process rights through the administrative process.

Secondly, the PFD recognizes in Finding of Fact No. 44, that Protestants, as a group of laypersons unfamiliar with the district creation process, including the specific rules and procedures applicable to it, made a good faith attempt to participate in the hearing process. OPIC submits that a number of the lines of

inquiry the ALJ references could be viewed as inexact, or inelegant, attempts to discover relevant information. For example, while not condoning any specific line of questioning, an inquiry regarding greed on the part of the developer might be viewed as tangentially relating to the necessity of the district—relevant to the consideration of need under Texas Water Code § 53.021.

Relatedly, the Protestants' efforts at the hearing on the merits, including the Rushings, may have had some tangible benefit. Indeed, some of the Protestants' assertions regarding whether one of Applicants' nominees for temporary director of the District meets necessary qualifications were recognized by the ALJ as possibly having merit.

Thirdly, OPIC maintains concerns that an unequal allocation amongst the Protestants, all of whom participated at the hearing on the merits to varying degrees, may act as an informal imposition of sanctions, or have the appearance of such. OPIC respectfully submits that had the overall District creation proceeding been found to have been unnecessarily delayed, the imposition of non-monetary sanctions under Commission Rule 30 TAC § 80.107 could have been ordered. If inappropriate conduct occurred at the hearing on the merits, it may have been addressed under Commission Rule 30 TAC § 80.11, governing conduct and decorum, and violations thereof, at contested case hearings.

Finally, OPIC is supportive of the public's exercise of its right to participate in Commission processes to the fullest extent possible authorized by applicable state law and Commission rule. To that end, OPIC is concerned that this consideration of conduct at the hearing on the merits when allocating costs, if it


were to become commonplace, could have an unintended chilling effect on public participation. Frequently, both sophisticated attorneys and less sophisticated laypersons participate in what are quite often complicated and technically dense Commission matters that are governed by, at times, equally complicated statutes and rules. Given this confusing landscape, inexactness and occasional forays into topics of dubious relevancy are inevitable.

IV. Conclusion

Having participated in the hearing and witnessed its exchanges, OPIC finds the cost allocation recommended in the PFD to be unnecessarily punitive. For the reasons set forth above, OPIC excepts to the allocation of transcript costs and recommends amendment of Findings of Fact nos. 43, 46, and 47; Conclusion of Law no. 18; and Ordering Provision no. 2 consistent with these filed Exceptions.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2024, this Office of Public Interest Counsel's Exceptions to the Proposal for Decision was filed with the State Office of Administrative Hearings, the Chief Clerk of the TCEQ, and a true and correct copy was served to all persons listed below via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Sheldon P. Wayne

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SOAH Docket No. 582-23-13330; TCEQ Docket No. 2022-1631-DIS

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