

TCEQ DOCKET NO. 2022-1733-DIS

PETITION FOR THE CREATION OF	§	BEFORE THE
DENTON COUNTY MUNICIPAL	§	TEXAS COMMISSION ON
UTILITY DISTRICT NO. 12	§	ENVIRONMENTAL QUALITY

THE CITY OF SANGER’S REPLY TO RESPONSES TO REQUESTS FOR HEARING

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

COMES NOW, the City of Sanger (City) and, pursuant to 30 Texas Administrative Code (TAC) § 55.254(f), hereby submits this Reply (Reply) to the Responses to Hearing Requests filed by the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or the Commission), Response to Request for Hearing filed by the Office of Public Interest Counsel (OPIC) of the TCEQ, and the Response to Request for Contested Case Hearing by Denton 1000 Land, LP (Petitioner) (each such filing is a Response, and such filings, collectively, are the Responses) in the above-referenced Docket concerning the application (Application) by Petitioner for the Creation of Denton County Municipal Utility District No. 12.

I. SUMMARY OF RESPONSES TO HEARING REQUESTS

The City timely filed its request for a contested case hearing on December 6, 2022 (Request), providing all of the information necessary to satisfy TCEQ criteria to receive a contested case hearing—both the procedural requirements set forth in 30 TAC § 55.251 and the substantive arguments demonstrating that it is an “affected person” under Texas Water Code (TWC) § 5.115 and 30 TAC § 55.256. The ED and OPIC’s Responses independently determined and recommended that the City is an affected person and should be granted a contested case hearing. However, the Petitioner filed two, identical responses to the City’s Request on December 28, 2022, and June 16, 2023, asserting that “[n]one of the elements of a hearing request have been met by Sanger” and “... the Commission should determine that the claims for denial of the application and a contested case hearing presented by Sanger are without merit.”

While the City agrees with and supports the Responses of the ED and OPIC, it disputes the arguments made in the Petitioner’s Response, as such arguments are either (i) not applicable to the

Petition or (ii) if applicable, go to the merits of the case, not the City's hearing request itself. For these reasons, the City's Reply only addresses the arguments of the Petitioner's Response.

II. REPLY

Contrary to the conclusion reached by the Petitioner in its Response to the City's Request, the Commission should grant the City's Request, as recommended by the ED and OPIC. Specifically, the applicable procedural regulations asserted by Petitioner in its Response do not apply to a contested case hearing request regarding an application for the creation of a municipal utility district; and, substantively, Petitioner's Response acknowledges the fact that the City possesses a sewer certificate of convenience and necessity (CCN) over the would-be jurisdictional boundaries of the proposed district, which provides support for the City to be an affected person with justiciable interests. Said another way, Petitioner does not credibly refute the City's arguments justifying its right to a contested case hearing in this Docket.

A. Applicable Regulations in Evaluating a Request for a Contested Case Hearing

Petitioner erroneously contends in its Response that none of the elements for a hearing request have been met by the City, wholly based upon the TCEQ's requirements established in 30 TAC §§ 50.115 and 55.203. However, such argument and cited regulations are inapplicable to this matter and do not pertain to deciding whether a contested case hearing request should be granted for a municipal utility district creation application. Specifically, such position mistakenly relies upon a district creation application being subject to the regulations established under the Senate Bill 709 (SB) contested case hearing process.¹ First, 30 TAC § 50.115, relied upon by Petitioner, pertains to the scope of contested case hearings on permit applications submitted to the TCEQ and the requirements of a Commission determination referring specific issues to the State Office of Administrative Hearings (SOAH). Second, Petitioner asserts that the City's Request should be evaluated under the TCEQ's regulations in 30 TAC, Chapter 55, Subchapter F, citing to authority in 30 TAC § 55.203. However, a municipal utility district creation application is not subject to such regulations or the SB 709 contested case hearing process. Rather, as stated by the City in its Request and the ED in its Response, a municipal utility district creation application, like

¹ S.B. 709, 84th Leg. Sess. (Tex. 2015).

the Application, is subject to the requirements of 30 TAC, Chapter 55, Subchapter G—namely, 30 TAC §§ 55.255(a) and 55.251(b-d).² Consequently, the City need only prove that it is an affected person with justiciable interests, which it accomplished with its Request.³ To that end, as mentioned above, both the ED and OPIC agree that the City’s Request has met such regulatory requirements. Last, given that Petitioner’s cited authority is not applicable, Petitioner has not refuted the City’s Request.

B. Ability to Provide Sewer Service to the Proposed District within the City’s Sewer CCN is a Justiciable Interest

Petitioner’s argument that a sewer CCN does not provide the City with the right to serve the jurisdictional boundaries of the proposed District goes to the merits of the claim and does not dispute that possessing a sewer CCN makes the City an affected person with a justiciable interest. In any event, to the extent that an analysis of the authority granted by a CCN, Texas law is clear that the holder of a sewer CCN is indeed the only provider of retail sewer services over such area.⁴ A sewer CCN provides its holder with the exclusive right to provide retail sewer service to the service area designated in such certificate. As such, Petitioner would not be able to provide such services, an issue relevant to the TCEQ’s consideration of the Application’s feasibility and practicability under TWC § 54.021(b)(1).

Petitioner attempts to refute this exclusive right in its Response by selectively quoting 16 TAC § 24.251. The full provision reads:

“Any certificate granted under this subchapter shall not be construed to vest exclusive service or property rights in and to the area certificated. The commission may grant, upon finding that the public convenience and necessity require additional certification to another retail public utility or utilities, additional certification to any other retail public utility or utilities to all or any part of the area previously certificated pursuant to this chapter.”

² Compare 30 TAC § 55.200 (providing the applicability of the contested case hearing analysis process for S.B. 709-based applications), with 30 TAC § 55.250 (providing the applicability of non-S.B. 709 applications, of which a district creation application is a non-S.B. 709-based application).

³ 30 TAC §§ 55.255(b), and 55.251(b-d).

⁴ Tex. Water Code § 13.242(a).

However, when considered in its entirety, this limitation imposed on the exclusiveness of CCN service rights by 16 TAC § 24.251 is in the context of the Public Utility Commission's (PUC) ability to amend and/or grant additional certifications. This is unrelated to the inability of a utility to provide retail service within the boundaries of another utility's CCN service area, which is prohibited by TWC § 13.242(a). Until such time the City's CCN is amended, it is the only authorized provider of retail sewer service within the current boundaries of its CCN service area.

Despite the PUC's jurisdiction over CCNs, as mentioned by the Petitioner in its Response, the ED, OPIC, and the Commission itself have found such issue to be relevant to the matter at hand, which was similarly the position of the ED, OPIC, and the Commission in their consideration of the Town of Ponder's Request for a Contested Case Hearing on the petition for the creation of Rockwood Municipal Utility District No. 1.⁵ Such request was granted at the May 31, 2023, TCEQ Commission Meeting and the petition has since been referred to SOAH by the Commission.

III. CONCLUSION

For the foregoing reasons, and as recommended by OPIC and the ED, the City of Sanger requests that the TCEQ find that the City is an affected person whose Request complies with the procedural prerequisites set forth in 30 TAC § 55.201 and grant it a contested case hearing on the relevant and material issues raised in its Request. In the alternative, the City requests that the Commission deny the Application. Further, in the event of a contested case hearing, the City reserves the right to raise and pursue any and all issues that may be relevant to its interest.

⁵ Interim Order Concerning the Petition for the creation of Rockwood Municipal Utility District No. 1 of Denton County; TCEQ Docket No.2023-0528-DIS (June 6, 2023).

Respectfully submitted,

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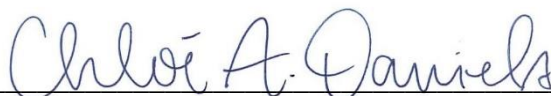
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CERTIFICATE OF SERVICE

I certify that on July 10, 2023, the foregoing Reply to Responses to Requests for Hearing was filed with the Commission's Office of the Chief Clerk, and a true and correct copy was served to the ED, OPIC, and the Petitioner via hand delivery, facsimile transmission, electronic submittal, or by deposit in the U.S. Mail pursuant to 30 TAC § 55.209(g).


Chloe A. Daniels

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DOCKET NO. 2022-1733-DIS; INTERNAL CONTROL NO. D-06242022-058

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