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**SOAH DOCKET NO. 582-20-2569**  
**TCEQ DOCKET NO. 2019-1806-MSW**

**APPLICATION OF TEXAS § BEFORE THE STATE OFFICE**  
**REGIONAL LANDFILL §**  
**COMPANY, LP, FOR MSW § OF**  
**PERMIT NO. 1841B §**  
**ADMINISTRATIVE HEARINGS §**

**TWU LOCAL 556’S MOTION FOR RECONSIDERATION**  
**OF DENIAL OF PARTY STATUS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES BEHARA AND  
SUMMERHAYS:

Transport Workers Union of American Local 556 (“TWU Local 556” or “TWU”) submits this Motion for Reconsideration of the Honorable Administrative Law Judges’ ruling at the preliminary hearing convened on June 22, 2020, denying TWU’s request for party status in this matter. Based on the following facts and argument, TWU requests the ALJs reconsider their ruling and grant TWU’s request for party status.

**I. Summary of Relevant Facts**

Mr. Chad Kleibscheidel testified during the preliminary hearing regarding this matter that he was the vice-president and spokesperson authorized to represent the Transport Worker Union of America Local 556 and requested that TWU be named a party to the matter. According to Mr. Kleibscheidel, TWU 556 represents approximately 17,000 Southwest Airlines flight attendants, himself included, as all Southwest Airlines flight attendants are also TWU 556 members.

TWU’s concern is for their members’ occupational safety and for continued employment. As a part of its mission TWU Local 556 works to ensure safe working

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conditions of its members and to promote economic and social welfare of its Members. Mr. Kleibscheidel expressed that the locale and proximity of the landfill expansion to Austin's airport poses a risk to members' safety and ability to work, because bird strike incidents, even if not fatal, could result in injuries sustained by a flight attendant that could impair their ability to work or even lead to a complete involuntary separation of their career. Injuries could also lead to worker's compensation claims, unemployment burdens, and emotional and psychological harm. Because Southwest Airlines does not assign flight attendants to regular routes, employment as a flight attendant is predicated on their ability and willingness to fly into or out of any airport in which Southwest Airlines operates. As Mr. Kleibscheidel explained, the flight attendants "have no choice."

As employees of Southwest Airlines—the Austin airport's largest airline carrier—TWU's members have an economic interest in the proposed landfill expansion that is the subject of this proceeding, and their interests are different from those of the general public. Further, as Mr. Kleibscheidel testified during the hearing, the proposed landfill expansion poses a risk to the human life of flight attendants on the ground and in the air, and it poses a risk of airplane damage. The landfill attracts birds; even with the promise that the landfill will not accept decaying material, the landfill currently attracts birds and will continue to do so. The attraction of birds, coupled with the "dangerously close" proximity of the landfill to the airport runways, presents risks of injury and death to the flight crew. This is particularly true during the critical phases: take-off and landing.

## **II. Applicable Law**

An affected person is entitled to a hearing on a municipal solid waste permit application, and must be admitted as a party to a SOAH hearing on an application. Tex. Health & Safety Code § 361.088(c); 30 TAC § 80.109(b)(5).

***Associational Standing***

An organization may be admitted as a party, so long as the group meets the associational standing requirements outlined in Rule 55.205. The interests the group or association seeks to protect must be germane to the organization's purpose, and the group must identify one or more members of the group or association that would otherwise have standing to request a hearing in their own right. 30 TAC § 55.205(b)(2)-(3).

During the preliminary hearing, Mr. Kleibscheidel explained in depth that TWU Local 556 advocates strongly on its members behalf to ensure safe working conditions for its members. Questions directed at Mr. Kleibscheidel implied that a locally-based contact or member would be necessary for TWU Local 556 to proceed in the matter. However, this is a misstatement of the TCEQ's standing rule, which requires only that the request identify one or more members of the group or association that would otherwise have standing to request a hearing in their own right. *See* 30 TAC § 55.205(b).

Apparently led somewhat astray by the question, Mr. Kleibscheidel indicated he would be willing to produce the name of a local member, but he was not given the opportunity before TWU's request for party status was denied. Nevertheless, what appears to have been overlooked at the preliminary hearing, is that Mr. Kleibscheidel himself is a member of TWU Local 556, and would have standing to request a hearing in his own right.

Mr. Kleibscheidel has flown in and out of Austin’s airport “several hundred times” over the past 16 years, and plans to continue to use Austin’s airport at the same frequency in the future, if not more frequently, as a flight attendant employed by Southwest Airlines. Declaration of Chad Kleibscheidel at ¶ 7. Therefore, the landfill’s attraction of birds and the risks of a potential bird strikes present an adverse impact to Mr. Kleibscheidel’s justiciable interests, specifically his occupational and economic interests, in a manner that is different from members of the general public. Because Mr. Kleibscheidel is a member of TWU Local 556 who was present and identified at the preliminary hearing, TWU Local 556 has met the association standing test and should be admitted as a party.

#### ***Affected Person***

Under the TCEQ rules, the term “affected person” means someone “who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.” 30 TAC § 55.103. This standard reflects the “constitutionally minimal requirements for litigants to have standing to challenge governmental action in court,” and the underlying concern is “whether the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy that the judicial declaration sought would resolve.” *City of Waco v. Texas Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 801-02 (Tex. App.—Austin 2011), *rev’d on other grounds*, 413 S.W.3d 409 (Tex. 2013). These principles require that in order to qualify as an “affected person,” the requesting party must demonstrate an injury to a legally protected interest that is fairly traceable to the proposed issuance of the

permit, and which injury would likely be redressed by a decision on the permit application favorable to the affected party. *Waco*, 346 S.W.3d at 802 (citing *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001)).

During the preliminary hearing, counsel for Applicant implied that in a landfill hearing the question of whether a requester is an “affected person” is simply a matter of considering whether the requester owns property within one mile of the landfill. This limited view of “affected persons” disregards the governing law and is inconsistent with Commission precedent.

Of particular relevance in this case, the Commission has on multiple occasions found that a person’s demonstrated interest in use of the airspace above a landfill is a justiciable interest. For example, the State Office of Administrative Hearings, acting on behalf of the Texas Natural Resource Conservation Commission, granted party status to the United States Air Force with regard to an application by Adobe Eco-Systems, Ltd., seeking a permit to construct and operate a municipal solid waste landfill.<sup>1</sup> That matter involved an application for a landfill proposed to be located in proximity of the flight paths associated with a remote air field utilized by Kelly Air Force Base. The Air Force was granted party status based upon the potential impact of the landfill upon the safety of its pilots.<sup>2</sup>

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<sup>1</sup> *Texas Natural Resource Conservation Commission, An Order denying Permit No. MSW 2253 to Adobe Eco-Systems, Ltd.*; SOAH Docket No. 582-97-1547; TNRCC Docket No. 1997-0807-MSW (Final Order, Feb. 4, 2002), p. 3. (Attachment \*\* to this brief)

<sup>2</sup> The Commission’s final order in the *Adobe* matter did not note the particular reason why the Air Force was admitted as a party. In that matter, Henry, Lowerre & Frederick (a predecessor of Frederick, Perales, Allmon & Rockwell) represented Communities Against Ruined Environments (CARE). Counsel

Similarly, in the matter of *The Application of Blue Ridge Landfill TX, LP, for a Permit Amendment to Authorize a Vertical and Horizontal Expansion of the Existing Type I Municipal Solid Waste Landfill Facility in Fort Bend County Permit No. 1505A*, the Texas Commission on Environmental Quality found three television stations to be “affected persons” with regard to an application for a vertical expansion of a municipal solid waste landfill. In that case, the three television stations asserted that the proposed vertical expansion would potentially block the line of sight for their Doppler radar systems.<sup>3</sup> Two of these television stations, KHOU and KTRK, owned property within several miles of the site in association with Doppler radars operated by the television stations. An additional television station, KRIV, solely operated a Doppler radar approximately 2 to 3 miles from the landfill site, and asserted no ownership of any real property within this area of the landfill.<sup>4</sup>

KRIV, along with KTRK and KHOU, asserted that the vertical expansion of the Blue Ridge landfill would interfere with their ability to utilize Doppler radar to detect weather systems in the Gulf of Mexico, including the detection of hurricanes.<sup>5</sup> In essence, these television stations asserted an interest in use of the airspace above the landfill, and

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for TJFA provides the detail in the *Adobe* case to this tribunal in the Firm’s role as officers of the court in both the immediate case and the *Adobe* case.

<sup>3</sup> *Texas Commission on Environmental Quality, Application of Blue Ridge Landfill TX, LP for an amendment to a Type I MSW Permit; Permit No. 1505A; TCEQ Docket No. 2007-0614-MSW (Interim Order, August 2, 2007)(Finding that KTRK Television, Inc., Fox Television Stations, Inc., KRIV and KHOU-TV qualified as affected persons).*

<sup>4</sup> *Hearing Request of KTRK Television, Inc., Fos Television Stations, Inc., on behalf of its television station KRIV, and KHOU-TV, L.P. re: Application of Blue Ridge Landfill, TX, LP, for MSW Permit No. 1505A, April 13, 2007, TCEQ Docket No. 2007-0614-MSW (Attachment \*\* to this brief).*

<sup>5</sup> *Id.*

asked the Commission to deny the application in light of the impact they would suffer if the incompatible vertical expansion was permitted.<sup>6</sup> Neither KHOU nor KRIV met the one-mile “rule of thumb” regarding ownership of real property within one mile of the landfill. But, their interests in protecting their use of the airspace above the landfill was found to be sufficient to acknowledge their status as affected persons with regard to the landfill application under consideration.

Finally, it is worth considering a recent SOAH ruling from a preliminary hearing convened only last week regarding an application for a solid waste transfer station. *See Application of Lealco, Inc., for Permit No. 2398*, SOAH DOCKET NO. 582-20-2399. During that preliminary hearing, convened on June 18, the presiding Administrative Law Judges granted party status to Cross Country Estates, based on representations made by its representative Mr. Gordon Cragg regarding use of the airspace above the proposed transfer station location by airplanes operating out of a landfill that is located more than 1 mile from the site of the proposed transfer station. As Mr. Cragg explained it, airplanes operating out of the nearby airport would need to cross the airspace above the site of the proposed transfer station. The transfer station is likely to attract birds, and “birds and airplanes do not mix; there are no two ways about it.” Like TWU Local 556, Mr. Cragg was concerned about the risk of bird strikes, if the transfer station permit were granted.

### **III. TWU Local 556 Has Demonstrated Potential Adverse Impacts on a Protected Interest, Requiring TWU’s Admission as a Party**

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<sup>6</sup> *Id.* at 3-4.

As in the Lealco transfer station case, the proposed landfill expansion in this case presents a risk of bird strikes—a risk that cannot be dismissed. Indeed, in their comments to TCEQ regarding this proposed expansion, Travis County acknowledged that “the bird attraction issue warrants greater scrutiny to ensure that expansion of the landfill will not contribute to an aviation hazard associated with bird strikes.”

This risk of a potential bird strike is one that adversely impacts TWU’s members, as flight attendants employed by Southwest Airlines who must fly over the area of the proposed landfill as the flight assignments require.

**IV. Conclusion & Prayer**

For the reasons described above, TWU Local 556 respectfully requests that the Honorable ALJs reconsider their ruling denying TWU party status and issue a ruling that grants TWU Local 556 party status in this proceeding.

Respectfully submitted,

/s/ Chad Kleibscheidel

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