



RAILROAD COMMISSION OF TEXAS

HEARINGS DIVISION

PROPOSAL FOR DECISION

OIL AND GAS DOCKET NO. 03-0309636

COMPLAINT REGARDING FAIRWAY ENERGY PARTNERS, LLC (259770), FOR THE
PIERCE JUNCTION FACILITY, REDDY BRINE POND (P012443), HARRIS CO, TEXAS

APPEARANCES

**SOUTH HOUSTON CONCERNED
CITIZENS COALITION**

Amy Catherine Dinn
Bryan French
Lone Star Legal Aid

FAIRWAY ENERGY PARTNERS, LLC

John Arnold
Nicholas Moore
Locke Lord LLP

PROCEDURAL HISTORY:

Complaint Filed:	February 26, 2018
Pre Hearing Conference:	June 19, 2018
Notice of Hearing:	June 27, 2018
Hearing on the Merits:	July 30, 2018
Proposal for Decision:	September 24, 2018
Heard by:	Clayton J. Hoover, <i>Administrative Law Judge</i> Robert Musick, P.G. <i>Technical Examiner</i>

SUMMARY

In Docket No. 03-0309636, the Complainant, South Houston Concerned Citizens Coalition ("SHCCC"), filed with the Commission a complaint ("Complaint") regarding the permit obtained by Fairway Energy Partners, LLC ("Fairway") for the Reddy Brine Pit, which is to be constructed approximately two (2) miles south of the Astrodome in Houston, Harris County, Texas ("Permit"). Construction of such brine pond has not commenced.

Specifically, SHCCC requested modification, suspension or termination of Fairway's Permit pursuant to Statewide Rule 8(6)(E); in support of its request, SHCCC alleged that the permitted facility constitutes a health and safety risk, that the application should be reconsidered de novo and further alleged that Fairway did not comply with the requirement in Statewide Rule 8(6)(C) to notify the City of Houston by certified mail addressed to the "city clerk or other appropriate official."¹

Fairway filed a Response and a Motion for Summary Judgment to dismiss all claims for lack of jurisdiction. SHCCC filed a Motion to Transfer Venue.

A prehearing conference was held on June 19, 2018 to consider outstanding motions. It was subsequently ruled that all of SHCCC's allegations and complaints should be dismissed except for the allegation that Fairway did not comply with the notice requirements of Statewide Rule 8. The Motion to Transfer Venue was dismissed.

The primary issue before the Commission is whether Fairway complied with the notice requirements with respect to the City of Houston as set out in Statewide Rule 8(6)(C).

SHCCC

At the hearing on the merits, SHCCC presented the testimony of four witnesses and introduced 23 Exhibits² to show that Fairway did not comply with the express notice requirements of Statewide Rule 8(6)(C) because notice was not sent by certified mail "to the city clerk or other appropriate official."³ Fairway's application was submitted on April 13, 2016; it was administratively denied on July 21, 2016, subsequently amended and ultimately approved in 2017.⁴ Notice was sent by certified mail to "HTC Utility Analysis/Stormwater Availability, Attn: Jasmine Zambrano," who is not a city clerk or other appropriate official, but who was the recipient of notice for Fairway's two (2) prior applications for brine ponds.⁵

Vivian Harris is a long time resident of District K in south Houston, which is where the Reddy Brine Pond is to be located. She testified that she has worked for various community organizations in District K, that she stays in close contact with the City Council Member for District K and that she had no actual notice of Fairway's application through her work or otherwise.

Gerrit Leeftink, a member of the family owning land just south of the proposed Reddy Brine Pond, testified that he found out about the approved Permit through conversations with a surveyor who had worked on Fairway's application, that he was shocked and

¹ *Texas Administrative Code, Section 3.8(6)(C).*

² *SHCCC Exhibits 1-23.*

³ *Texas Administrative Code, Section 3.8(6)(C).*

⁴ *Fairway Exhibit 10.*

⁵ *Id.*

amazed that he did not receive notice or information on the application and that he immediately requested and reviewed information from the Commission relevant to the application. He brought the matter to the attention of Larry Green, the former Council Member for District K.

Council Member Martha Castex-Tatum, who now represents District K on the City Council, testified that neither she nor her predecessor had any knowledge or notice of Fairway's application. She further testified that when her predecessor found out about the Permit after it had been approved by the Commission, he strenuously opposed it and sought to challenge the permit by reaching out to other government officials. The City Charter of Houston and the City Code of Houston were placed into evidence as exhibits to show, through Ms. Tatum's testimony, that the City Secretary is clearly defined as an official of the City of Houston. Ms. Tatum also testified about the Reddy Brine Pond being antithetical to what she and the citizens of District K are trying to accomplish in terms of urban development and renewal along the Buffalo Speedway corridor and the \$50 million infrastructure redevelopment plan for such area.⁶

Fairway

Fairway introduced the testimony of Amy Owens, the Director of Land and Real Estate of Respondent, to show that she had attempted to satisfy the notice requirements in connection with the application. However, she admitted that a notice was never sent by certified mail to the City Secretary of Houston. Instead, notice was sent to HTC Utility Analysis/Stormwater Availability, Attn: Jasmine Zambrano. Ms. Owens testified that she is a lawyer, that she was aware that Houston did not have a City Clerk, but that in determining the identity of "other appropriate official," she did not consult the City of Houston City Charter, the City of Houston City Code, the Statewide Rulemaking history of Statewide Rule 8 or the case law. She further stated that her opinion concerning compliance was not a legal opinion, that she was not employed as an attorney and that she did not attend the meeting with outside counsel, Jay Stewart, on August 12, 2016, which was before the last attempt to serve the City of Houston and before approval of the Permit.

The record evidence clearly demonstrates that Fairway did not comply with the notice requirements set out in Statewide Rule 8(6)(C) and that, accordingly, good cause exists for termination of the Permit.

EVIDENCE PRESENTED

SHCCC

Vivian Harris is a resident of District K, the city district in which the subject brine pit is to be located. She described the creation of SHCCC and its relationship with the District K City Council members for the district, previously Larry Green and now City Council

⁶ Transcript, Page 14, Line 8-14.

Member Martha Castex-Tatum. Vivian Harris works for District K, has a close relationship with SHCCC and the council member for District K. She stated that she did not receive notice about the subject brine pond until after the permit was issued and that she learned the news from Larry Green, the City Council Member for District K at the time.⁷

Gerrit Leeftink is a petroleum engineer with over 20 years of experience who owns roughly 19 acres adjacent to the Reddy property on which the subject brine pond is to be located. Mr. Leeftink learned of the permit for the brine pond from a conversation with a surveyor. Once he established that the location was near his land, he began investigating and obtaining documents regarding the permit from the Commission.⁸

With respect to the notice requirements, Mr. Leeftink described the original H-11 application filed with the Commission, the comments and requirements in connection therewith and ultimately, a copy of the letter dated October 5, 2016, from Amy Owens to "HTC Utility Analysis/Stormwater Availability, Attention Jasmin Zambrano," sent by certified mail. He also reviewed the notice requirement on the H-11 to the effect that if the proposed pit is within corporate limits, that notice must be sent by certified mail to the "city clerk or other appropriate official."⁹ He also identified SHCCC Exhibit 17 as a copy of the approved H-11 permit dated January 6, 2017, signed by Grant Chambless.¹⁰

Mr. Leeftink identified an email chain regarding the subject permit, admitted as Exhibit 18, showing an inquiry regarding notice from Jared Craighead, Chief of Staff for Commissioner Ryan Sitton, and a response from Grant Chambless that "notification to the city clerk and surface landowner was performed and verified as a supplemental response received on October 27, 2016."¹¹ Mr. Leeftink disputes this statement and representation by Mr. Chambless; he further testified that the City of Houston has a City Secretary, not a city clerk.¹²

Martha Castex-Tatum is the current member of the City Council representing District K. At the time of the hearing, she had been in office for 75 days. She replaced Larry Green. Referring to an organizational chart for the City of Houston,¹³ she confirmed that Houston does not have a city clerk, but has a City Secretary named Anna Russell who has been in the position for some 64 years and is the "keeper of records."¹⁴ She also testified that the District K staff relies on information disseminated by Anna Russell. The Houston Code of Ordinances was also admitted and discussed by Council Member Castex-Tatum to further demonstrate that the notice given by Fairway was not sent to the "city clerk or

⁷ Transcript, Page 22, Line 23 to Page 30, Line 18.

⁸ Transcript, Page 31, Line 4 to Page 40, Line 5.

⁹ See SHCCC Exhibit 16.

¹⁰ See SHCCC Exhibit 17.

¹¹ See SHCCC Exhibit 18.

¹² See SHCCC Exhibit 16.

¹³ SHCCC Exhibit 2.

¹⁴ Transcript, pg 79, Line 1.

other appropriate official" in accordance with Statewide Rule 8(6)(C) and the Form H-11 instructions.¹⁵This was most poignantly illustrated in the line of questions as follows:¹⁶

Q And if we turn to what's already been admitted as South Houston Concerned Citizens Coalition Exhibit 16 there is a copy of that letter there dated October 5, 2016. Do you see that?

A Yes.

Q Okay. And what's the date -- who's the letter addressed to?

A HTC Utility Analysis Stormwater Availability, attention Jasmin Zambrano.

Q And do you know Ms. Zambrano is?

A I don't.

Q In October 2016 was Ms. Zambrano an elected official for the City of Houston?

A No.

Q Was she the mayor in 2016?

A No.

Q Was she a city council member?

A No.

Q Was she the city controller?

A No.

Q Was she the assistant city attorney?

A No.

Q Was she any appointed official for the city?

A No.

Q Was she a department head of any department for the City of Houston?

A No.

Q Was she an executive level employee based on the definition we reviewed earlier?

A No.

Q And was she the City Secretary'?

A No.

Q Does this letter identify what title or any position that Ms. Zambrano held with the city in October of 2016?

A No.

Castex-Tatum further testified that the statement made by Grant Chambless in his email to Jared Craighead was not true and was wholly inaccurate.¹⁷

¹⁵ SHCCC Exhibit 5.

¹⁶ Transcript, pg 103, Line 23 to Page 15, Line 8.

¹⁷ Transcript, pg 107, Line 14 to pg 108, Line 4.

The fact that notice was not given in the proper manner so that the information on the subject permit application was not disseminated in the usual manner was the cause for Former Council member Larry Green, Council Member Castex-Tatum and the District K staff, as well as SHCCC, not finding out about the matter until after the permit had been approved. Hence, the notice given by Fairway was wholly ineffective and illegal because it had not been given by certified mail to Anna Russell, the City Secretary.¹⁸

In addition, Castex-Tatum testified that the brine pond is located in an area of District K in which some \$50 million of expenditures were planned to attract business and single family homes as part of a revitalization program, and that the brine pond constituted a “slap in the face” and would be counterproductive in this regard.¹⁹

FAIRWAY ENERGY PARTNERS LLC

Amy Owens, the Director of Land and Real Estate of Respondent testified that she is the Director of Land and Real Estate for Fairway Energy, that she participated in responding to the staff communications regarding the subject application and that she sent the notice to Ms. Zambrano in an attempt to comply with the notice requirements of Statewide Rule 8(6)(C) and the Form H-11 instructions.²⁰ She also testified that while she is a licensed attorney in the State of Texas, she was not rendering a legal opinion on sufficiency of the notice and that she did not consult the City Charter, the Code of Ordinances, the Statewide Rulemaking history of Statewide Rule 8(6)(C) or the case law in determining whether the required notice was sent to the “city clerk or other appropriate official.”²¹ She also testified that she did not attend the meeting on August 12, 2016, with outside counsel Jay Stewart to discuss the application with the Commission.²²

Dirk Peterson testified about his work on the brine pond project and the permitting process in connection with construction based permits with the city of Houston, as to which Jasmin Zambrano was the “funnel” to the various departments.²³ He expressed no opinion on whether she was a “city clerk or other appropriate official” for purposes of Commission regulatory compliance.

OPINION

The primary issue before the Commission is whether Fairway properly notified the City of Houston as required by Statewide Rule 8(6)(C) which provides:

¹⁸ *Id.*

¹⁹ *Transcript. pg 111, Line 9-25.*

²⁰ *Transcript. pg 124, Line 17 to pg. 163, Line 5.*

²¹ *Transcript. pg 184, Line 9 to pg. 186, Line 4.*

²² *Transcript. pg 165, Line 24 to pg. 167, Line 2 and pg 173, Line 12-20.*

²³ *Transcript. pg 204, Line 16 to pg 207, Line 23.*

(C) Notice. The applicant shall give notice of the permit application to the surface owners of the tract upon which the pit will be located or upon which the disposal will take place. **When the tract upon which the pit will be located or upon which the disposal will take place lies within the corporate limits of an incorporated city, town, or village, the applicant shall also give notice to the city clerk or other appropriate official.** Where disposal is to be by discharge into a watercourse other than the Gulf of Mexico or a bay, the applicant shall also give notice to the surface owners of each waterfront tract between the discharge point and 1/2 mile downstream of the discharge point except for those waterfront tracts within the corporate limits of an incorporated city, town, or village. When one or more waterfront tracts within 1/2 mile of the discharge point lie within the corporate limits of an incorporated city, town, or village, the applicant shall give notice to the city clerk or other appropriate official. Notice of the permit application shall consist of a copy of the application together with a statement that any protest to the application should be filed with the commission within 15 days of the date the application is filed with the commission. **The applicant shall mail or deliver the required notice to the surface owners and the city clerk or other appropriate official on or before the date the application is mailed or delivered to the commission in Austin.** ²⁴

The Commission's authority to determine revocation, suspension or termination of the Permit is set out in Statewide Rule 8(E)(i-vi):

(E) Modification, suspension, and termination. A permit granted pursuant to this subsection, may be modified, suspended, or terminated by the commission for good cause after notice and opportunity for hearing. A finding of any of the following facts shall constitute good cause:

- (i) pollution of surface or subsurface water is occurring or is likely to occur as a result of the permitted operations;
- (ii) waste of oil, gas, or geothermal resources is occurring or is likely to occur as a result of the permitted operations;
- (iii) the permittee has violated the terms and conditions of the permit or commission Statewide Rules;**
- (iv) the permittee misrepresented any material fact during the permit issuance process;
- (v) the permittee failed to give the notice required by the commission during the permit issuance process;**
- (vi) a material change of conditions has occurred in the permitted operations, or the information provided in the application has changed materially. ²⁵

The requirement and consequences of noncompliance are explicit and clear. Failure to give proper notice may result in suspension or termination of the Permit. In this case, failure to properly give notice resulted in the District K Council Members and staff not learning of Fairway's application until after it had been approved. This is a clear violation and clearly frustrates the intent of the notice requirements in Statewide Rule 8(6)(C) and the H-11 instructions. Opinions or communications from Commission staff cannot change this.

²⁴ *Texas Administrative Code, Section 3.8(6)(C).*

²⁵ *Texas Administrative Code, Section 3.8(6)(E).*

If Fairway failed to comply with the above-cited notice requirements, the Permit is void or voidable because the Commission lacks jurisdiction to issue it in absence of proper notice. ²⁶

Zambrano is not a city official and is certainly not authorized to accept notice of the Application.²⁷ Methods of giving notice in Fairway's prior applications are irrelevant; compliance with the Statewide Rules for notice is a jurisdictional prerequisite for the subject Application.²⁸ Furthermore, Fairway made no investigation to identify who would be an "other appropriate official" under the Statewide Rules, as Amy Owens, Fairway's own witness, admitted under oath. ²⁹ As a direct result of Fairway's failure to give proper notice, the District K Council Member, and others depending on dissemination of such information by the City Secretary, did not receive notice from the City Secretary of the Application for the proposed brine pond to be constructed in District K.

The evidence presented establishes that Fairway did not comply with the notice requirements set out in Statewide Rule 8(6)(C), that proper notice is a jurisdictional requirement and that good cause therefore exists for termination of the Permit pursuant to Statewide Rule 8(E)(v).

CONCLUSION

The Administrative Law Judge and Technical Examiner recommend the Commission find that Fairway did not comply with the notice requirements set out in Statewide Rule 8(6)(C) and that good cause exists for termination of the Permit pursuant to Statewide Rule 8(E)(v):

FINDINGS OF FACT

1. SHCCC filed its Complaint for modification, suspension or termination of the Permit on February 27, 2018.
2. By letter mailed February 28, 2018, Fairway was notified of the Complaint.
3. Fairway requested a hearing on the merits.
4. A Notice of Hearing was issued June 27, 2018.

²⁶ *Anadarko E&P Co., L.P. v. R.r. Comm'n of Tex.*, No. 03-04-0027-CV, 2009 WL 47112 at *6,7 (Tex. App.—Austin, Jan. 7, 2009, no pet.) (citing *Magnolia Petroleum Co v. new Process Prod. Co.*, 129 Tex. 617, 104 S.W.2d 1106, 1110-11 (Tex. 1937) (holding Commission order entered without proper motion, notice, and hearing was "void."); see also *Railroad Comm'n v. McKnight*, 619 S.W. 3d 255, 258 (Tex. 1981) (finding Commission without jurisdiction to enter order without proper motion, notice and hearing)).

²⁷ See *SHCCC's Objections to Fairway's Proposed Findings of Fact and Conclusions of Law and appendiz to Brief on the Merits*, p. 5, 6, Paragraphs 12 and 13.

²⁸ *Id.* At page 4, Paragraphs 9 and 10.

²⁹ *Id.* At page 3, Paragraphs 7 and 8.

5. A Hearing on the merits of the Complaint was held on July 30, 2018.
6. Fairway sent a letter of notice of its Application for the Permit by certified mail to "HTC Utility Analysis/Stormwater Availability, Attn: Jasmine Zambrano."
7. Jasmin Zambrano was not the "city clerk or other appropriate official" under Statewide Rule 8(6)(C).
8. Because the notice requirement of Statewide Rule 8(6)(C) was not met, good cause exists for terminating Fairway's permit because the jurisdictional requirement of proper notice was not met.

CONCLUSIONS OF LAW

1. Proper notice of SHCCC's Complaint was timely issued to all persons entitled to notice.
2. All things necessary to the Commission attaining jurisdiction of SHCCC's Complaint have occurred.
3. Fairway did not comply with the notice requirements set out in Statewide Rule 8(6)(C) for its Application and good cause exists for termination of the Permit pursuant to Statewide Rule 8(E)(v).
4. Because Fairway failed to comply with the above-cited notice requirements, the Permit is voidable because the Commission lacks jurisdiction to issue it in absence of proper notice.
5. Therefore, the Permit should be terminated pursuant to Statewide Rule 8(E)(v).

RECOMMENDATION

The Administrative Law Judge and Technical Examiner recommend the Commission find that Fairway did not comply with the notice requirements set out in Statewide Rule 8(6)(C) and that good cause exists for termination of the Permit pursuant to Statewide Rule 8(E)(v) because the jurisdictional requirement of proper notice was not met.

RESPECTFULLY SUBMITTED,


CLAYTON J. HOOVER
Administrative Law Judge