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NOV 12 2015

OPINION COMMITTEE



Texas House of Representatives
Energy Resources Committee

FILE # ML-47865-15
I.D. # 47865

November 12, 2015

RQ-0073-KP

The Honorable Ken Paxton
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

Re: Request for written opinion concerning Section 113.054 of the Natural Resources Code

Dear General Paxton:

As chair of the House Energy Resources Committee, I respectfully request a formal opinion from you regarding Section 113.054 of the Natural Resources Code. As explained below, this request is one of immediate and ongoing public interest.

The 82nd Legislature passed House Bill 2663 and enacted Section 113.054, which took effect on September 1, 2011. Section 113.054 provides that:

The rules and standards promulgated and adopted by the commission under Section 113.051 preempt and supersede any ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquefied petroleum gas industry. A political subdivision may petition the commission's executive director for permission to promulgate more restrictive rules and standards only if the political subdivision can prove that the more restrictive rules and standards enhance public safety.

The legislative history of House Bill 2663 illustrates the 82nd Legislature's intention. The original bill analysis states:

Currently, the Railroad Commission of Texas regulates liquefied petroleum gas (LPG). To that end, the commission adopts nationally recognized standards for the LPG industry in Texas and, if necessary, adjusts those standards to protect the health, welfare, and safety of the general public. Local political subdivisions also regulate the LPG industry within their respective jurisdictions. Interested parties contend that those local regulations are often inconsistent or conflict with the rules adopted by the railroad commission and nationally recognized LPG standards. HB 2663 seeks to ensure consistent statewide regulation of the LPG industry.

Subsequent analyses (e.g. engrossed version and the Senate committee report) state that Section 113.054 "... amends current law relating to the effect of rules and standards adopted by

the Railroad Commission of Texas relating to the liquefied petroleum industry on ordinances, orders, or rules adopted by political subdivisions relating to that industry.” Use of the word “*effect*” is illuminating because the effect of Section 113.054 is to grant the Railroad Commission’s rules and standards absolute supremacy (“... preempt and supersede ...”) over any ordinance, order, or rule adopted by another political subdivision relating to any aspect or phase of the LP-gas industry.

Further demonstrating the absolute supremacy of the Railroad Commission’s rules and standards, Section 113.054 makes clear that there is only one circumstance under which a more restrictive local rule can supplant the Railroad Commission’s rules and standards. Specifically, Section 113.054 allows a political subdivision to petition the Railroad Commission’s executive director for “... permission to promulgate more restrictive rules and standards only if the political subdivision can prove that the more restrictive rules and standards enhance public safety.” To date, no political subdivision has submitted any such petition to the Railroad Commission’s executive director or met the standard of proof established by Section 113.054. Further, the Railroad Commission’s executive director has not granted permission for any political subdivision(s) to adopt a more restrictive rule(s). Absent petition, proof, and permission under Section 113.054, the Railroad Commission’s rules and standards preempt and supersede all local rules.

The Texas Propane Gas Association has presented two city regulations, attached herein, contrary to the plain meaning of Section 113.054.

City of Houston. The first example is a letter dated September 10, 2015, from YuShan Chang, Senior Assistant City Attorney for the City of Houston (“Houston”). Ms. Chang’s letter is attached as Exhibit A. In her letter, Ms. Chang offers two (2) justifications Houston’s refusal to comply with Section 113.054. First, Ms. Chang states that Houston’s ordinance predates enactment of Section 113.054. Ms. Chang argues that neither Section 113.054 nor the Railroad Commission’s rules apply retroactively and, therefore, cannot impair Houston’s ordinance. In effect, Ms. Chang argues that Houston’s ordinance is “grandfathered” and immune from being legislatively preempted and superseded because it predated enactment of Section 113.054. That argument is clearly contrary to the purpose of Section 113.054 and the Legislature’s intent. House Bill 2663 and Section 113.054 addressed a specific problem: local rules that were inconsistent or in conflict with the Railroad Commission’s rules. “Grandfathering” would leave those local rules in place and defeat the principal goal of House Bill 2663 expressed throughout the legislative process: consistent statewide regulation of the LPG industry.

Second, Ms. Chang argues that Houston is free to regulate in the absence of Railroad Commission rules and standards. She wrote:

Section 29-123 of the City Code regulates LP-gas container sizes at manufactured home sites. There are no Commission standards or rules regulating LP-gas container sizes, so [Houston] will continue to enforce its ordinance.

Ms. Chang incorrectly states that Railroad Commission rules do not regulate container size. *See:* Texas Railroad Commission’s LP-Gas Safety Rules, Section 9.401 and corresponding National Fire Protection Association Code 58, Chapter 6. Section 113.054 provides that the Railroad

Commission's rules and standards "... preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of this state relating to *any* aspect or phase of the liquefied petroleum gas industry." (Emphasis added.) Houston can only adopt a local rule affecting the LP-gas industry if Houston petitions the Railroad Commission's executive director and meets the standard of proof established by Section 113.054. To date, this has not happened, but Ms. Chang states that Houston will continue to enforce *its* ordinance. (Emphasis added.)

City of Sherman. Like Houston, the City of Sherman ("Sherman") has acted in disregard of Section 113.054. On May 18, 2015, Sherman adopted Ordinance 5878 relating to "Liquefied Petroleum Gas" and amending Chapter 5, Article 5.04 of Sherman's Code of Ordinances. The Minutes of the Sherman City Council's meeting on May 18, 2015, are attached as Exhibit B. Article 5.04, as amended, substantially and materially differed from the Railroad Commission's rules and standards. Sherman took this action without first petitioning the Railroad Commission's executive director, meeting the standard of proof established by Section 113.054, and receiving permission to promulgate its local rules.

On May 19, 2015, counsel for the Texas Propane Gas Association ("TPGA") notified Sherman's deputy city manager and city attorney of the requirements of Section 113.054. The letter from TPGA's counsel is attached as Exhibit C. To date, it is my understanding that neither official has responded.

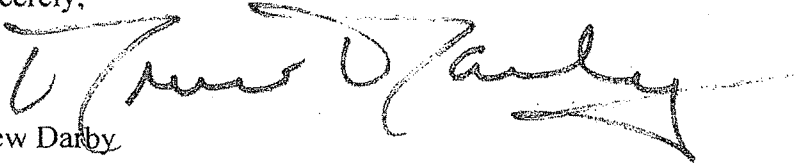
Questions of Public Interest. To guide the House Energy Resources Committee regarding these issues, I request your written opinion thereon:

1. What is the meaning and effect of the words "... preempt and supersede ..." in Section 113.054?
2. Under Section 113.054, do the rules and standards promulgated and adopted by the Railroad Commission preempt and supersede all ordinances, orders, or rules adopted by a political subdivision of this state (including, but not limited to, all home rule cities and all general law cities) relating to any aspect or phase of the liquefied petroleum gas industry?
3. Does Section 113.054 "grandfather" all ordinances, orders, or rules adopted by a political subdivision of this state (including a home rule city or a general law city) before September 1, 2011? If so, can a political subdivision (including a home rule city or a general law city) amend, revise, or alter a "grandfathered" ordinance, order, or rule without first petitioning the Railroad Commission's executive director and meeting the standard of proof established by Section 113.054?
4. Does a political subdivision of this state (including a home rule city or a general law city) have the power to adopt an ordinance, order, or rule relating to any aspect or phase of the liquefied petroleum gas industry without first petitioning the Railroad Commission's executive director and meeting the standard of proof established by Section 113.054?
5. Does a political subdivision of this state (including a home rule city or a general law city) have the power to adopt an ordinance, order, or rule relating to an aspect or phase of the liquefied petroleum gas industry on which the Railroad Commission has not adopted a

rule or standard? If so, can a political subdivision (including a home rule city or a general law city) do so without first petitioning the Railroad Commission's executive director and meeting the standard of proof established by Section 113.054?

Thank you for your assistance. The House Energy Resources Committee looks forward to the issuance of your written opinion on these questions of public interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Drew Darby", with a long horizontal flourish extending to the right.

Drew Darby

Exhibits:

- A Letter dated September 10, 2015, from YuShan Chang, Senior Assistant City Attorney for the City of Houston
- B Minutes of the Sherman City Council's meeting on May 18, 2015
- C Letter dated May 19, 2015, from Leonard B. Smith to City of Sherman

Cc: House Energy Resources Committee