

Control Number: 43551



Item Number: 2

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014.

43551

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



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PUBLIC UTILITY COMMISSION
FILING CLERK

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 25, 2005

To: Persons on the attached Mailing List by mail and fax as indicated

Re: Motions to Overturn concerning the Executive Director's approval of Application Nos. 33562-C, 33563-C, 33738-C, 32800-C, 33988-C, 33989-C, and 34449-S; TCEQ Docket Nos. 2000-0112-UCR, 2002-0189-UCR, 2002-0756-UCR, 2002-1197-UCR, and 2004-2048-UCR.

This letter is to inform all persons on the attached mailing list that the Motions to Overturn (Motions) filed by Maria Sanchez and Patrick Lindner on behalf of Austin Estates Limited Partnership concerning the above-referenced applications were considered, as noticed, during the Commission's open meeting on February 23, 2005. After hearing oral argument, considering the written filings, and deliberating on the Motions, the Commission determined to deny the Motions.

If you have any questions about this matter, please contact Elaine M. Lucas at 512/239-6215.



Very truly yours,

Duncan C. Norton
General Counsel

Mailing List

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2

**Mailing List
City of Austin**

TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR,
2002-0756-UCR, 2002-1197-UCR, and 2004-2048-UCR
SOAH Docket No. 582-02-3056

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February 15, 2005

By Messenger

Ms. LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Application Nos. 33562-C and 33563-C; In the Matter of the City of Austin, CCN No. 20636 to Transfer a Portion of CCN No. 20650 From Hornsby Bend Utility Company, Inc. and to Amend CCN No. 20636 in Travis County, Texas

Dear Ms. Castañuela:

The City of Austin's Response to Austin Estates Limited Partnership's Motion to Overturn filed on January 31, 2005 included the affidavit of Bart Jennings as Attachment C. We have now discovered that the Affidavit contained some typographical errors. Enclosed is a corrected copy of the Affidavit. Nothing in this corrected version changes the facts that Mr. Jennings recited in his Affidavit.

Thank you for your time and attention to this matter. If you have any questions, please contact me, at (512) 494-3611.

Very truly yours,

Bracewell & Patterson, L.L.P.


Kenneth Ramirez

KR/mk
Enclosure

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FEB 16 2005
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY

AFFIDAVIT OF BART JENNINGS

THE STATE OF TEXAS

§

COUNTY OF TRAVIS

§

§

BEFORE ME, the undersigned notary public, on this day personally appeared BART JENNINGS who, being by me first duly sworn on his oath, deposed and stated as follows:

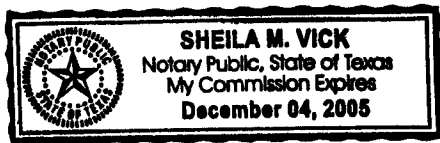
1. My name is Bart Jennings. I am over eighteen (18) years of age, and I have personal knowledge of the facts stated herein, and they are all true and correct. I am fully competent and duly authorized to make this affidavit.
2. I am employed by the City of Austin, Texas, Austin Water Utility.
3. During July and August of 2003, I was actively involved in a mediation between my employer, the City of Austin ("Austin") and Hornsby Bend Utilities, Inc. ("Hornsby Bend") regarding competing CCN applications both organizations had filed. During this general time period, I received phone calls from two individuals associated with Austin Estates Limited Partnership ("AELP") about the potential settlement between Austin and Hornsby Bend.
4. Larry Beard, who I understand was the local representative associated with the development for AELP, called me and asked about the City's settlement with Hornsby Bend and if Austin was planning to assume the contract between AELP and Hornsby Bend. I indicated that Austin was in settlement negotiations with Hornsby Bend and that Austin did want to provide wastewater services in the area where AELP's property was located. I also said that I believed Austin and Hornsby Bend would settle their differences regarding the competing CCN applications.
5. I also received a call from Wayne Levy, who I understood maintained ownership and management interests in AELP. Mr. Levy asked me about the settlement discussions between Austin and Hornsby Bend, and I gave Mr. Levy the same information I had earlier given to Mr. Beard. Mr. Levy called back one or two weeks later to check on the status of negotiations, and I gave him the same response.
6. After Austin and Hornsby Bend negotiated their settlement, I called Mr. Levy and left him a voicemail apprising him of that settlement and that Austin would assume the contract between AELP and Hornsby Bend. In January and February I called Mr. Levy requesting information about AELP's purchase of the property because Austin was evaluating the AELP contract it had assumed from Hornsby Bend.

THE STATE OF TEXAS

§
§
§

COUNTY OF TRAVIS

SUBSCRIBED AND SWORN TO BEFORE ME this 15th day of February, 2005, to certify which, witness by hand and official seal.



Sheila M. Vick

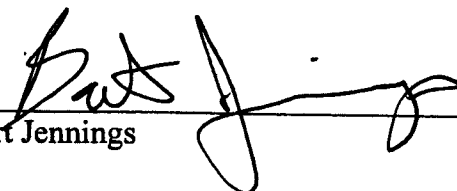
Notary Public in and for the State of TEXAS

Printed Name: SHEILA M. VICK

My Commission Expires: 12-04-05

7. Further affiant sayeth not.

SIGNED this 9th day of February, 2005


Bart Jennings



111 Congress Ave, Ste 2300
 Austin, Texas 78701-4061
 Phone: 512.472.7800
 Toll Free: 800.478.6271

Fax Cover Letter

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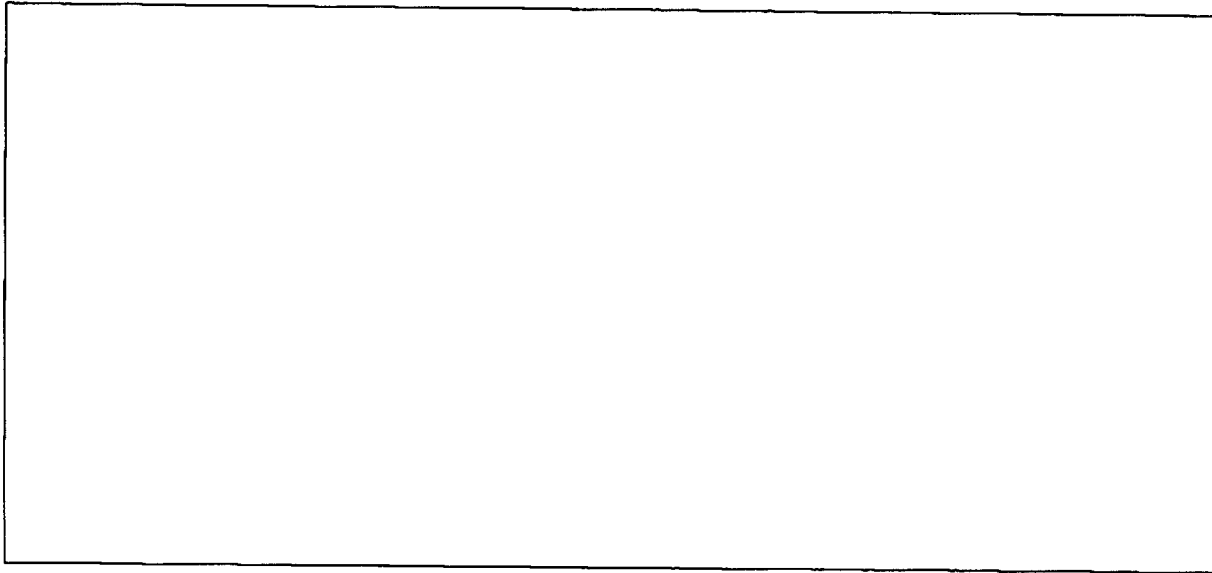
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- John J. Carlton (512) 435-2360
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- Sharon Smith (512) 974-2912
- Bart Jennings (512) 972-0111
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- Mike Howell (512) 239-2214
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Message



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Kenneth Ramirez
Partner

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Fax: 512.472.9123
kramirez@bracepatt.com

February 1, 2005

Via Messenger

Agenda Docket Clerk
Chief Clerk's Office
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Re: Hornsby Bend Utility Company, Inc.; CCN Nos. 11978 and 20650;
Application 33738-C, 32800, 33988-C and 33989-C; TCEQ Docket Nos.
2002-0189-UCR, 2000-0112-UCR, 2002-0765-UCR, 2002-1197-UCR
and 2004-2048-UCR

Dear Docket Clerk:

Yesterday, January 31, 2005, we filed The City of Austin's Response to Austin Estates Limited Partnership's Motion to Overturn. An incorrect version of Attachment B, Timeline for City CCN Application and City Transfer Application, was attached to that document.

Please accept the attached, a correct version of Attachment B, for filing as replacement for the incorrect version of Attachment B.

If you have any questions, please contact me at (512) 494-3611.

Very truly yours,

Bracewell & Patterson, L.L.P.

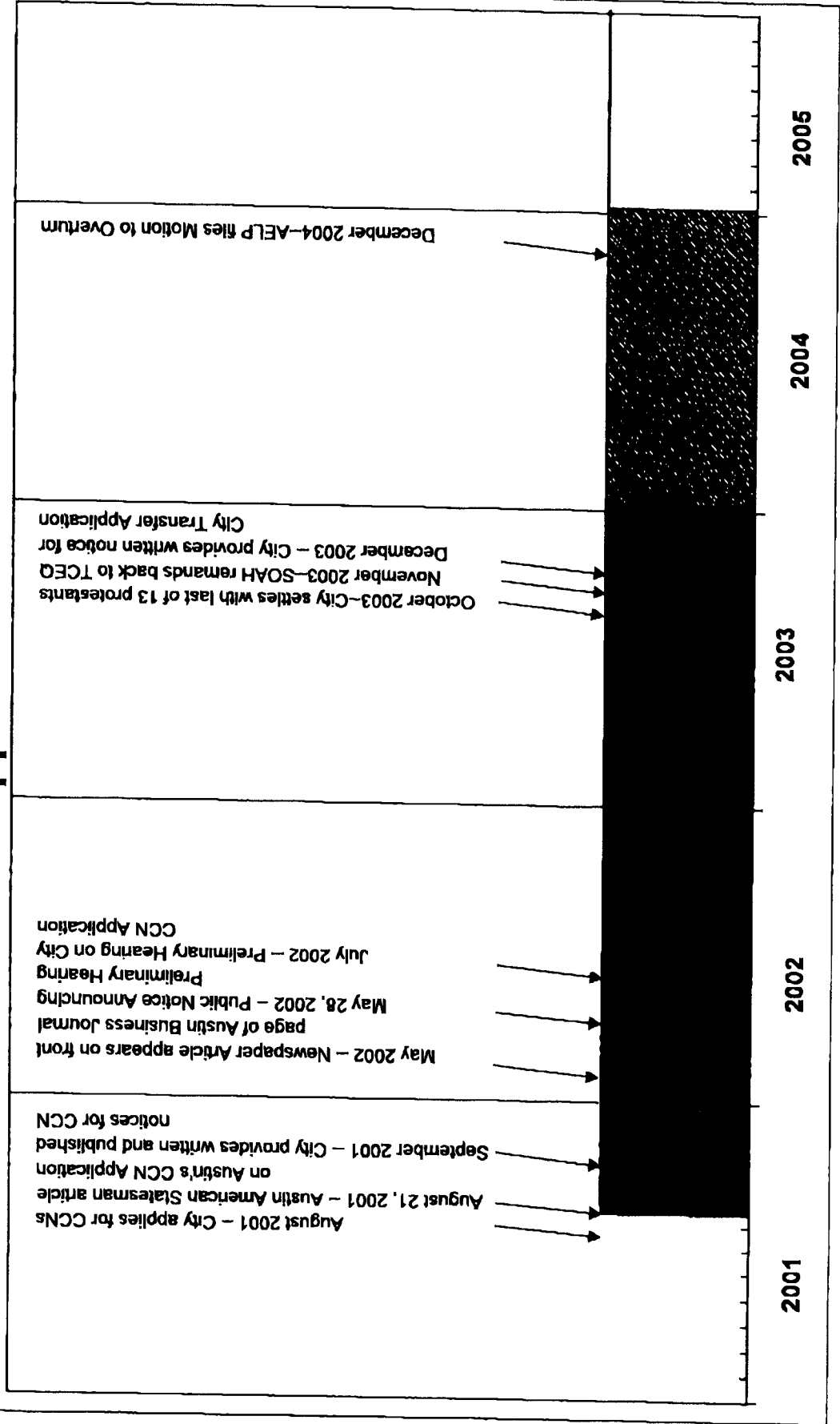
A handwritten signature in black ink, appearing to read 'Kenneth Ramirez', written over a horizontal line.

Kenneth Ramirez

KR/mk
Enclosures

cc: Service List

Timeline for City CCN Application and City Transfer Application





111 Congress Ave, Ste 2300
 Austin, Texas 78701-4061
 Phone: 512.472.7800
 Toll Free: 800.478.6271

Fax Cover Letter

Please deliver the following pages to

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- Bart Jennings (512) 972-0111
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 ON
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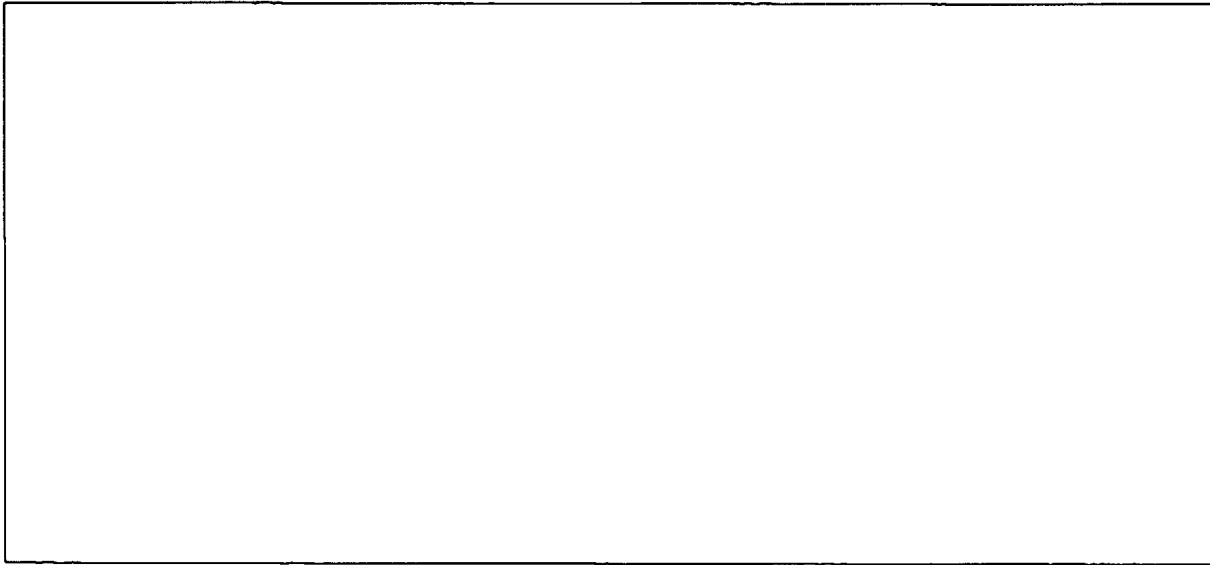
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AELP's Motion to Overturn is limited only to that portion of the ED's Order that includes AELP's property (approximately 1,495 acres) within the wastewater CCN area of the City; AELP's property ("AELP Tract" is) shown on Attachment A as the area outlined in red. Therefore, the City's water CCN application is not affected by AELP claims and should be granted by the TCEQ Commission pursuant to the ED's Order. Consequently, this Response, after stating the facts of the City's wastewater CCN application, is similarly limited to only wastewater CCN issues and only as they pertain to the area covered by the AELP Tract.

II. SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

Austin filed its wastewater CCN application ("City CCN Application") on August 13, 2001. TCEQ declared the Application administratively complete on August 20, 2001, and instructed the City to proceed with notice on August 31, 2001.

The City complied with all notice requirements of the TCEQ rules, Texas Water Code Chapter 13, and the notice specifically required by the TCEQ. In September of 2001, Austin sent approximately 50 notices by individual mail to various entities, including all cities, retail utilities, and districts whose corporate boundaries or service areas fall within five miles of the City's proposed wastewater service area.

In addition, the City published newspaper notice in Travis, Hays, and Williamson Counties. Specifically, newspaper notice of the City CCN Application, pursuant to 30 TAC §291.106(c), appeared in the following newspapers on the following dates:

Austin American Statesman:

Monday, September 24, 2001 at page B6

Monday, October 1, 2001 at page B3

San Marcos Daily Record:

Tuesday, September 25, 2001 at page 5

Tuesday, October 2, 2001 at page 5

Williamson County Sun:

Wednesday, September 26, 2001 at page 8A

Wednesday, October 3, 2001 at page 4A

Documentation of both the individual notices and the newspaper notices can be found in the TCEQ files.

Contemporaneously with the notices discussed above, the City also completed significant public outreach to inform the interested public, including meetings with the Real Estate Council of Austin, Austin Area Research Organizations, Inc., and the Austin Chamber of Commerce. Furthermore, the Austin-American Statesman published a lengthy article fully describing the City CCN Application on August 21, 2001. The article, which was prompted by a City press release, included a map of the potentially affected areas. And finally, the Austin Business Journal ran a front-page article on the City CCN Application in its April 26-May 2, 2002 issue. Both of these articles appeared well before the July 9, 2002 preliminary hearing at SOAH where party status and involvement in the contested case hearing process was established.

The comment period, during which potentially affected persons could submit comments and/or request a contested case hearing, lasted from September 24, 2001 to November 3, 2001. TCEQ received eleven protest letters: one from a municipality, one from a river authority, six from other utilities, and three from individual landowners. AELP was absent and silent during this open process. TCEQ referred the City CCN Application to the State Office of Administrative Hearings ("SOAH") on February 25, 2002. Soon after, the Austin Business Journal published the aforementioned front-page story on the City CCN Application in its April/May 2002 edition. Meanwhile, the City and the three landowners settled their differences before the Administrative Law Judge took jurisdiction over the matter. At the July 9, 2002 preliminary hearing, an additional landowner and a second municipality

appeared, and the Administrative Law Judge granted them party status, despite the fact that they had missed the official comment period. AELP was absent and silent during this entire process, even though the City's notice was sufficient to attract other landowners to participate in the proceedings.

Over the course of the next 16 months, all remaining 10 protestants and the City worked very hard and expended valuable resources to complete both pre-hearing discovery and settlement negotiations, culminating in settlement with all but one party. The City executed a settlement agreement with that last remaining protestant, Hornsby Bend Utilities Company, Inc. ("Hornsby Bend"), on October 20, 2003. With no protestants remaining, the Administrative Law Judge referred the City CCN Application back to TCEQ on November 7, 2003. At that time, the contested case hearing process concluded, and the City CCN Application, which had been pending for over two years, then went forward for the final Agency step in securing the CCN: mapping the precise geographic area that had been agreed to by all parties, including the Agency. For the sake of clarity, the portion of the AELP Tract that was included in the City CCN Application is labeled as "AELP Area A" on Attachment A.

Pursuant to the settlement agreement with Hornsby Bend, Austin then filed Application No. 34449-S on November 24, 2003, to transfer a portion of Hornsby Bend's existing CCN No. 20650 to the City's existing CCN No. 20636. The transferred area included approximately 762 acres of the AELP Tract, which is labeled on Attachment A as "AELP Area B". Again the City complied with all notice requirements for the matter. The City mailed notice of the application to transfer the CCN area ("City Transfer Application") as required by the TCEQ rules. The City submitted to the TCEQ copies of the mailed notice and the affidavit that notice was provided to the appropriate utilities on December 30, 2003. Since the area did not contain Hornsby Bend wastewater customers, a notice to customers was not required. A 30-day public comment period ensued, lasting from December 30, 2003 to January 30, 2004. TCEQ received no protest letters, and informed the City, by letter dated February 27, 2004, that it

had "reviewed the criteria in Texas Water Code (TWC), Section 13.301(e) and determined that a public hearing will not be requested." AELP was silent and absent during this process as well.

Because of TCEQ backlogs and understaffing, the City CCN Application remained in the TCEQ's mapping section for 13 months, ultimately being issued at the same time as the map for the City Transfer Application. On September 15, 2004, AELP filed its request for a contested case hearing. AELP's Request for Hearing came woefully late, three years after the public notice of the City CCN Application, months after the contested case hearing had concluded, and nine months after public notice of the City Transfer Application. TCEQ denied AELP's request for a contested case hearing on November 10, 2004. A summary overview of the timeline and major milestones for both the City CCN Application and City Transfer Application is attached as Attachment B.

III. THE CITY PROPERLY ISSUED NOTICE FOR ITS CCN APPLICATION, WHICH INCLUDED AELP AREA A

A. THE APPLICABLE LEGAL REQUIREMENTS DO NOT REQUIRE ACTUAL NOTICE TO ALL POTENTIALLY AFFECTED PERSONS

AELP misconstrues the notice requirement contained in Texas Water Code Section 13.246, which provides that "the commission shall cause notice of the application to be given to affected parties" In furtherance of that provision, the Commission promulgated 30 TAC §291.106 to spell out the specific mechanisms by which notice would be provided.

Under 30 TAC §291.106(b)(1), for issuance of a new CCN, the applicant must:

[m]ail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within five miles of the requested service area boundaries, and any city with an extra-territorial jurisdiction which overlaps the proposed service area boundaries.

Applicants must also, in accordance with 30 TAC §291.106(c), "publish the notice in a newspaper having general circulation in the county or counties where a certificate of convenience and

necessity is being requested, once each week for two consecutive weeks beginning with the week after the notice is received from the commission."

The City complied with all these requirements, down to the precise details, and did so hand-in-hand with TCEQ staff. Both agency staff and the City carefully adhered to the structure of the notice and comment procedures. Nowhere in sections 13.246 or 291.106, or any place else in the Texas Water Code or Texas Administrative Code, does it state that the commission or the applicant is required to provide actual notice to all landowners, as AELP is apparently now claiming.

Moreover, on October 21, 2004, the TCEQ Commissioners issued a rule petition decision which stated that those CCN applications that had completed the notice period prior to that date would not be required to provide notice to individual landowners. The City completed its notice for the City CCN Application almost three years before this determination, and the City completed its notice for the City Transfer Application almost nine months before this determination.

B. AELP RECEIVED CONSTRUCTIVE NOTICE OF THE CITY CCN APPLICATION

The combination of actual public notice and high-profile publicity makes it inconceivable that AELP did not have actual notice of the City CCN Application through one of the many venues in which it was featured. Furthermore, as indicated in the attached affidavit (see Attachment C), representatives of AELP had multiple conversations with City staff during the City's settlement negotiations with Homsby Bend, a period extending from approximately July 2003 through October 2003. Never once did AELP representatives seek to intervene or express misgivings to the TCEQ about the settlement negotiations.

Moreover, since AELP is not a city or a retail public utility, AELP does not fall within the categories of entities entitled to individual mailed notice under Section 291.106. The commission could have required the City to provide actual notice to AELP under 30 TAC 291.106(d) if it felt that such notice was warranted, but it did not. Like the three individual landowners who filed timely protest

letters, and like the one landowner who did not file a timely protest but was named a party because he appeared at the preliminary hearing, AELP could have come forward.

In short, AELP's claim that it is entitled to mailed notice under the commission's rules or that the commission somehow failed to meet its statutory obligations under the Water Code is completely without basis. Simply put, the commission fulfilled its duty in promulgating rules to provide notice to potentially affected persons, and the City fulfilled its duty by following the commission's rules and providing the notice as required.

IV. THE SETTLEMENT AGREEMENT BETWEEN HORNSBY BEND AND THE CITY DID NOT RESULT IN A MAJOR AMENDMENT REQUIRING NEW NOTICE

AELP's argument that the City's amendment of the City CCN Application constituted a major amendment requiring new notice is irrelevant to this Motion, and is also impractical. The portion of the AELP Tract that was included in the City CCN Application—AELP Area A—remained in the City CCN Application. The removal of area from other portions of the City CCN Application resulting from the Hornsby Bend settlement or proposed in the amendment had no effect whatsoever on the AELP Tract. Since AELP's Motion to Overturn is limited only to the AELP Tract, this argument regarding the character of the amendment is irrelevant.

Moreover, the only change to the City CCN Application resulting from the settlement agreement was the *removal* of a portion of the originally requested CCN area from the City CCN Application. Notice of the removal is not required by any rule or law, and it would not have made any sense to publish notice of this removal of area. To do so would have accomplished nothing more than merely announcing the status quo: that the area in question would not be in the City's CCN. Such notice would have served no purpose except to waste the time and resources of all the parties involved, including the ED.

V. THE CITY PROPERLY ISSUED NOTICE FOR ITS TRANSFER APPLICATION

At the time that Hornsby Bend and Austin entered into their settlement agreement, both parties had competing applications on file that included AELP Area A. As part of the settlement, the parties agreed that:

1. The City would remove certain tracts from its CCN application;
2. Hornsby Bend would remove certain tracts from its CCN application; and
3. Hornsby Bend would transfer certain areas included in its existing wastewater CCN to the City by way of a separate CCN transfer application.

The tracts that Hornsby Bend agreed to remove included AELP Area A, leaving that area included only in the pending City CCN Application. The existing CCN area that Hornsby Bend agreed to transfer to the City included AELP Area B. The City and Agency Staff then carefully implemented the notice requirements pertaining to the City Transfer Application.

A. AELP AREA B WAS TRANSFERRED FROM HORNSBY BEND TO THE CITY BY FORMAL APPLICATION, NOT BY CONTRACT

Hornsby Bend transferred AELP Area B to the City under 30 TAC §291.112, "Transfer of Certificate of Convenience and Necessity." AELP mistakenly asserts that Hornsby Bend transferred that Area by contractual agreement with Austin under Texas Water Code §13.248, "Contracts Valid and Enforceable." AELP is simply wrong. Hornsby Bend and the City accomplished the transfer through TCEQ's formal Sale, Transfer, and Merger application process and TCEQ required notice to neighboring utilities, not by private arrangement that would only be publicly noticed through the commission's agenda. As such, Water Code §13.248 is not applicable because the parties accomplished the transfer through TCEQ's formal application process.

The notice requirements for applications to transfer CCN areas from one provider to another are, in pertinent part, as follows:

Unless notice is waived by the executive director for good cause shown, mailed notice shall be given to customers of the water or sewer system to be sold, acquired, leased or rented or merged or consolidated and other affected parties as

determined by the executive director. . . . The applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction which overlaps the proposed service area boundaries. 30 TAC §§291.112(c)(1) and 291.112 (c)(3).

B. AELP WAS NOT ENTITLED TO NOTICE UNDER APPLICABLE REGULATIONS

1. AELP IS NOT A CITY OR A NEIGHBORING RETAIL PUBLIC UTILITY

To effect the transfer from Hornsby Bend to Austin, the City provided mailed notice, with TCEQ's approval, to all cities and retail public utilities that fit the regulatory criteria quoted above. AELP is not a city or a retail public utility, and, as such, was not entitled to notice under 30 TAC §291.112(c)(3). In addition, as stated in its letter to the City dated February 27, 2004, TCEQ determined that a public hearing would not be necessary under the criteria listed in Texas Water Code §13.301(e); this section states in pertinent part that "[t]he executive director may request a hearing if: (1) the application filed with the commission or the public notice was improper" No protests or comments were received, notice was proper, and consequently, no public hearing was held. AELP was absent and silent during this entire process.

2. AELP IS NOT A CUSTOMER

It is undisputed that AELP does not fall within the category of neighboring municipality or retail public utility. Instead, AELP now claims to be a "customer" who is entitled to notice under §13.248 and presumably, although not clear from AELP's Motion, 30 TAC §291.112(c)(1).

AELP has never been a customer of either Hornsby Bend or the City of Austin, and therefore was not entitled to mailed notice of the transfer. "Customer" is defined as "[a]ny person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility." 30 TAC §291.3(15). "Service" is defined as "[a]ny act performed, anything furnished or supplied, and any facilities used by a retail public utility in the performance of its

duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities." 30 TAC §291.3(41). AELP has never been "provided with services" and is therefore not a customer.

AELP's claim to customer status appears to rest solely upon the document entitled "Agreement to Provide Wastewater Service" between Hornsby Bend and AELP, which was executed on February 2, 2000. This document is exactly what its title indicates: it memorializes Hornsby Bend's agreement to provide service if and when AELP actually develops on the AELP Tract and requires service. This agreement is merely an agreement to provide service, not service itself. To the City's knowledge, there is not now and never have been any wastewater plants, wastewater lines, wastewater connections, or any infrastructure whatsoever on any AELP tract, whether it be Area A or Area B. No wastewater facilities have ever been used to provide wastewater service to the AELP Tract. To date, AELP has not followed the City's service extension policies and completed an application for wastewater service.

In sum, the agreement between Hornsby Bend and AELP is a commitment to provide future wastewater service in the event AELP develops its Tract, but it does not, in and of itself, constitute wastewater service or an act performed by Hornsby Bend in the performance of its duties as a utility under the Water Code. Indeed, because the agreement is fully assignable, and has now been assigned to the City, it is nothing more than a commitment by Hornsby Bend to ensure that AELP will receive service from some utility—not necessarily Hornsby Bend—under the terms of the agreement. Austin intends to provide AELP with service if and when the landowner is ready to develop the land and formally apply for wastewater service from the City.

AELP did pay Hornsby Bend \$25,000 under its agreement to secure the above commitment from Hornsby Bend. In exchange for its money, AELP got a guarantee that when it was ready to become a customer, Hornsby would make sure it received service. The agreement is still in force, AELP

still has that guarantee, and the City intends to honor all the conditions of the agreement. What AELP does not have, to date, is a customer relationship with or wastewater service from either Hornsby Bend or the City.

C. AELP'S CLAIMS REGARDING THE CITY'S MUNICIPAL PLAT APPROVAL PROCESS ARE IRRELEVANT AND OUTSIDE THE SCOPE OF THIS PROCEEDING

In its discussion of Texas Water Code §13.246(a), AELP states that since Austin approved a preliminary plat of the first phase of AELP's proposed development, that "Austin had a statutory duty to provide actual notice of the [CCN] application to AELP." It is not clear whether AELP is referring to the City CCN Application or the City Transfer Application, but either way, its claim has no bearing on this proceeding. The issue in this proceeding is whether proper notice was provided under the Texas Water Code and the Texas Administrative Code, not Austin's City Code.

In any case, the City, as a home-ruled municipality, is not legally required to obtain a CCN in order to provide municipal water or wastewater service. Therefore, the Austin City Code does not require notice to landowners whose utility provider may change. The approval date of the preliminary plat (essentially a conceptual plan) was August 7, 2001; that plat still to this date has not been finalized nor has the property been developed. Since the preliminary plat has not been finalized, the plat expired on September 28, 2004, more than three years after it was approved by the City.

VI. CONCLUSION AND PRAYER

AELP chose to remain absent and silent during the many opportunities for public participation, and its efforts to derail this process now come long past the deadline allowed by law. And, AELP's attack is not only dilatory but also groundless. Moreover, AELP not only attacks Austin; it also attacks the TCEQ staff, who worked diligently by strictly adhering to all notice and comment regulations. AELP failed to show up for the many opportunities legally and statutorily afforded to AELP to express its interests. The TCEQ would establish negative precedent damaging to parties who play by the rules if

it allows AELP's tardy and last-ditch efforts to succeed. Further, the commission could possibly affect other CCN applications that have completed the notice period, but have not yet received a CCN Order. Neither the regulations in place at the time the CCN and Transfer Applications were filed require actual notice to AELP. Austin, agency staff, and the thirteen other parties who participated in this very public process all adhered to the rules and regulatory requirements. AELP chose not to participate in that process, and cannot now be allowed to upset these proceedings.

Therefore, in light of the foregoing facts, the City respectfully requests that the commission deny AELP's Motion to Overturn.

Respectfully submitted,

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Telephone: (512) 472-7800
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TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR

SOAH Docket No. 582-02-3056

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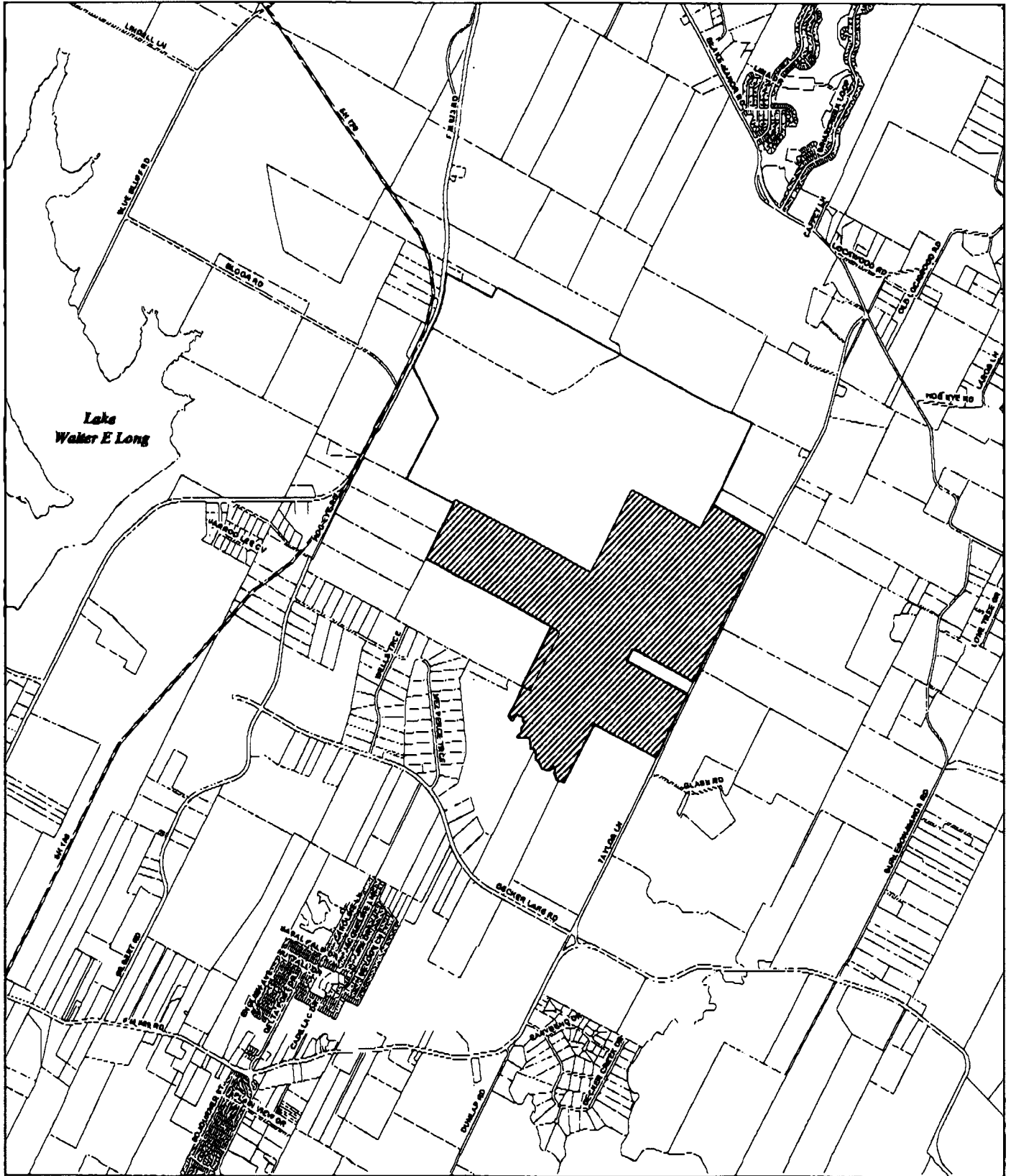
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ATTACHMENT

A



-  AELP Tract
-  AELP Area A
-  AELP Area B



City of Austin
Austin Water Utility
 January 27, 2005

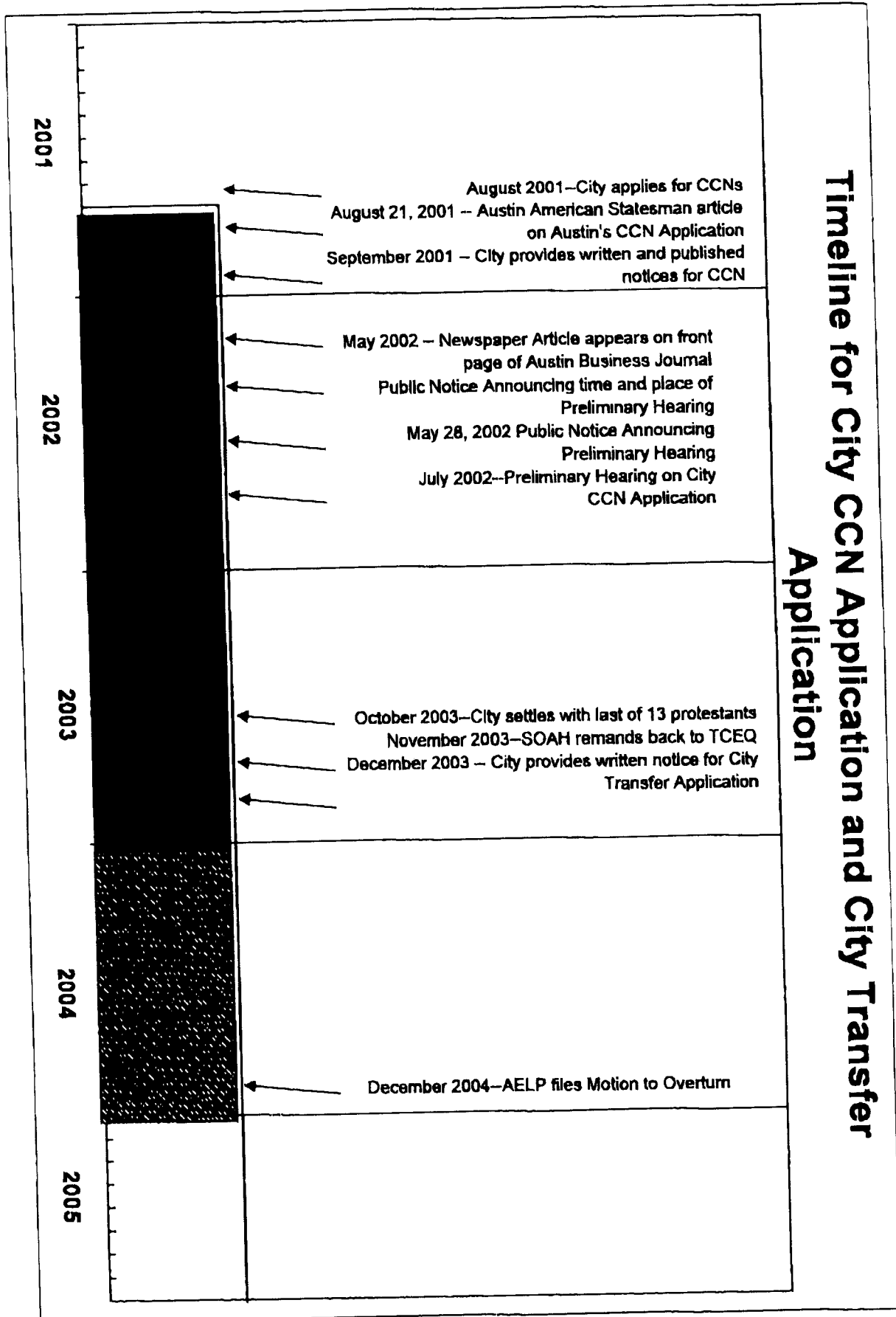


Attachment A

This map has been produced by the City of Austin for its needs and purposes and is not warranted for any other use. No warranty is made by the City regarding its accuracy or completeness.

ATTACHMENT

B



ATTACHMENT

C

AFFIDAVIT OF BART JENNINGS

THE STATE OF TEXAS

§

COUNTY OF TRAVIS

§

§

BEFORE ME, the undersigned notary public, on this day personally appeared BART JENNINGS who, being by me first duly sworn on his oath, deposed and stated as follows:

1. My name is Bart Jennings. I am over eighteen (18) years of age, and I have personal knowledge of the facts stated herein, and they are all true and correct. I am fully competent and duly authorized to make this affidavit..

2. My name is Bart Jennings. I am employed by the City of Austin, Texas, Austin Water Utility.

3. During July and August of 2003, I was actively involved in a mediation between my employer, the City of Austin ("Austin") and Hornsby Bend Utilities, Inc. ("Hornsby Bend") regarding competing CCN application both organizations had filed for the same property. During this general time period, I received phone calls from two individuals associated with Austin Estates Limited Partnership ("AELP") about the potential settlement between Austin and AELP.

4. Larry Beard, who I understand was the local representative associated with the development for AELP, called me and asked about the City's settlement with Hornsby Bend and if Austin was planning to assume the contract between AELP and Hornsby Bend. I indicated that Austin was in settlement negotiations with Hornsby Bend and that Austin did want to provide wastewater services in the area where AELP's property was located. I also said that I believed Austin and Hornsby Bend would settle the competing CCN applications.


5. I also received a call from Wayne Levy, who I understood maintained ownership and management interests in AELP. Mr. Levy asked me about the settlement discussions between Austin and AELP, and I gave Mr. Levy the same information I had earlier given to Mr. Beard. Mr. Levy called back one or two weeks later to check on the status of negotiations, and I gave him the same response.

6. After Austin and Hornsby Bend negotiated their settlement, I called Mr. Levy and left him a voicemail apprising him of that settlement and that Austin would assume the contract between AELP and Hornsby Bend. In January and February I called Mr. Levy requesting information about AELP's purchase of the property because Austin was evaluating the AELP contract it has assumed from Hornsby Bend.

Attachment C

7. Futher affiant sayeth not.

SIGNED this 31st day of January, 2005



Bart Jennings

THE STATE OF TEXAS

§
§
§

COUNTY OF TRAVIS

SUBSCRIBED AND SWORN TO BEFORE ME this 31st day of January, 2005, to certify which, witness by hand and official seal.



Sheila M. Vick

Notary Public in and for the State of TEXAS

Printed Name: SHEILA M. VICK

My Commission Expires: 12/04/08

ARMBRUST & BROWN, L.L.P.
ATTORNEYS AND COUNSELORS

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AUSTIN, TEXAS 78701-2744
512-435-2300

FACSIMILE 512-435-2360

FACSIMILE COVER PAGE

Date: January 31, 2005

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MISSION
H
TAL QUALITY

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Duncan Norton	TCEQ General Counsel	239-5533	
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Kyle Lucas	TCEQ Office of Alternative Dispute Resolution	239-4015	239-4010
Mike Howell	TCEQ Water Supply Division	239-2214	239-4691
Jody Henneke	TCEQ Office of Public Assistance	239-4007	239-4000

Please call us immediately if the document you receive is incomplete or illegible

From: John J. Carlton	Telephone No.. (512) 435-2308
Client/Matter No.: 43310.0101	Total No. of Pages Sent: 33

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE (COLLECT), AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U. S. POSTAL SERVICE. THANK YOU

165794-1 06/24/2003

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512-435-2300

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JOHN J. CARLTON
(512) 435-2308
jcarlton@abausnm.com

January 31, 2005

Via Hand Delivery

Agenda Docket Clerk
Chief Clerk's Office
Texas Commission Environmental Quality
12100 Park 35 Circle
Building F
Austin, Texas 78753

Re: Hornsby Bend Utility Company, Inc.; CCN Nos. 11978 and 20650; Application
33738-C, 32800-C, 33988-C and 33989-C; TCEQ Docket Nos. 2002-0189-UCR,
2000-0112-UCR, 2002-0765-UCR, 2002-1197-UCR and 2004-2048-UCR

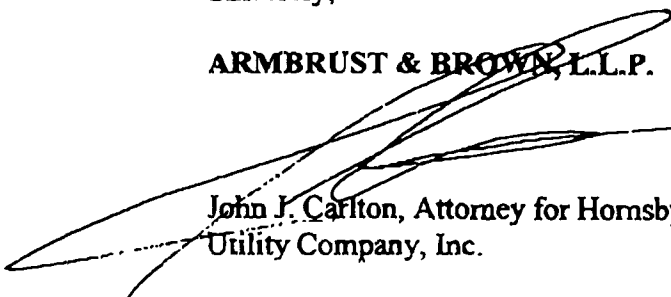
Dear Docket Clerk:

Enclosed for filing in the above-referenced matter please find the original and twelve copies of Hornsby Bend Utility Company, Inc.'s Response to Austin Estates Limited Partnership's Motion to Overturn. Please file-mark one copy and return it via the courier delivering same.

If you have any questions, please contact me at your convenience.

Sincerely,

ARMBRUST & BROWN, L.L.P.


John J. Carlton, Attorney for Hornsby Bend
Utility Company, Inc.

cc: Service List

ARMBRUST & BROWN, L.L.P.

ATTORNEYS AND COUNSELORS

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JOHN J. CARLTON
(512) 435-2308
jcarlton@abrown.com

January 31, 2005

Via Hand DeliveryDuncan C. Norton
General Counsel
Texas Commission Environmental Quality
12100 Park 35 Circle
Building F
Austin, Texas 78753

Re: Hornsby Bend Utility Company, Inc.; CCN Nos. 11978 and 20650; Application 33738-C, 32800-C, 33988-C and 33989-C; TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR, 2002-0765-UCR, 2002-1197-UCR and 2004-2048-UCR

Dear General Counsel Norton:

I am filing this Response on behalf of Hornsby Bend Utility Company ("Hornsby"). Hornsby has always strived to have a good working relationship with customers, neighboring utilities, potential customers and other landowners in surrounding areas. Because of the pressing service needs for several landowners who are developing projects in the area to be certificated to Hornsby under these applications, Hornsby is filing the attached pleading. If Hornsby's applications are not approved several development projects in the area will be delayed indefinitely because Hornsby is not permitted to serve those areas without a CCN. Consequently, Hornsby requests that this matter be resolved as expeditiously as possible and in a manner that gives certainty to those developments.

Please note, however, that Hornsby is committed to working with both the City of Austin and Austin Estates Limited Partnership in order to try to help them reach a mutually beneficial resolution of their dispute. If any involvement by Hornsby could help to achieve a resolution, we will make ourselves available to attempt to accomplish that goal.

ARMBRUST & BROWN, L.L.P.
Page 2

Sincerely,

ARMBRUST & BROWN, L.L.P.



John J. Carlin, Attorney for Hornsby Bend
Utility Company, Inc.

34449-S, which is the application for transfer, and did not include any reference to that application in its Motion.

The Texas Commission on Environmental Quality ("TCEQ" or "Commission") sent a letter dated January 18, 2005, extending the time for the Commission to respond to the Motion until March 1, 2005. In its letter, the TCEQ indicated that the matter has been set for consideration by the Commission at its public meeting on February 23, 2005, and indicated that the deadline for filing written responses to the Motions is January 31, 2005. Applicant's Response to AELP's Motion to Overturn is, therefore, timely filed.

II. BACKGROUND

Hornsby filed applications to amend its wastewater Certificate of Convenience and Necessity ("CCN") No. 20650 (Application Nos. 32800-C and 33989-C) and its water CCN No. 11978 (Application Nos. 33738-C and 33988-C) in June of 2002.

In August of 2001, the City of Austin ("City") filed applications for water and wastewater CCNs covering territory that overlaps portions of the land covered by Hornsby's applications, and Hornsby and City each then protested the other's competing applications.

As part of a settlement of the contested case, Hornsby and City entered into a settlement agreement whereby both parties agreed to remove territory from their respective applications, and whereby the parties agreed that the City would file an application to transfer portions of the land included in Hornsby's wastewater CCN to City. AELP owns land (the "Property") that is contained within the areas subject to the transfer from Hornsby to City.

Prior to the filing of the subject applications, AELP and Hornsby had entered into that certain Agreement to Provide Wastewater Service (attached hereto as Exhibit "A"), which provided the terms and conditions for wastewater service by Hornsby to the Property.

Subsequently, as a result of and in accordance with the settlement of the contested case between Hornsby and City, Hornsby assigned its interest in that contract to the City. Approval of the applications by the Commission and the inclusion of the Property within the City's CCN area will ultimately result in AELP receiving wastewater service from the City rather than from Hornsby, if and when AELP develops the Property.

AELP did not protest any of the above-referenced applications or participate in the contested case as did other landowners who successfully settled their claims and issues within the timeframe and parameters provided by the rules of the Commission. Prior to the settlement of the contested case between Hornsby and City, AELP had never requested wastewater service. Now, over a year after the conclusion of the contested case hearing, AELP desires to re-open the contested case based on its claims that it was entitled to mailed notice and that its consent was required for the various actions that were the subject of the contested case.

III. ARGUMENTS AND AUTHORITIES

A. AELP's arguments can be summarized as follows:

1. Due Process/Notice.

a. AELP argues that it is an affected party pursuant to sections 5.115 and 13.002 of the Texas Water Code and was thus entitled to mailed notice of the applications pursuant to Section 13.246(a) of the Texas Water Code.

b. AELP claims that it was entitled to notice of the notice of the settlement agreement and transfer between Hornsby and the City, based on the following arguments:

- i. AELP is a customer of Hornsby pursuant to the definition set forth in section 291.3(15) of the Commission rules, based on the Agreement to Provide Wastewater Service, and that, therefore, notice of the settlement agreement and

transfer between Hornsby and the City was required, pursuant to section 291.112(c)(1) of the Commission rules, governing notice of proposed sale, acquisition, lease, rental, merger, or consolidation and transfer of a CCN. AELP additionally complains that notice predated the settlement agreement.

- ii. The settlement agreement between the City and Hornsby, in settlement of the contested case between the City and Hornsby, constituted a contract between a retail public utility and a customer, as described in section 13.248 of the Water Code, thus entitling AELP to notice of the settlement agreement.

2. The preliminary plat approved by City identified Hornsby as the wastewater service provider. Therefore, the City had a statutory duty to provide actual notice of the applications.

3. AELP argues that the Executive Director's Order approving the applications that are the subject of this matter is not based upon findings of fact and conclusions of law required by the Administrative Procedures Act. The Order, argues AELP, is not based upon evidence and there are no findings required by section 13.246 of the Water Code.

4. Finally, AELP argues that Hornsby made a major amendment to its application after referral to the State Office of Administrative Hearings, abandoning its contractual obligation to provide service to AELP.

B. Hornsby's arguments and authorities are as follows:

1. Due Process/Notice.

a. Entitlement to Notice of Applications. First and foremost among AELP's arguments is that AELP was entitled to notice of the applications pursuant to Section 13.246(a) of the Texas Water Code by virtue of its status as "affected person" under various

rules and statutes. Hornsby maintains that AELP has misconstrued and misapplied the rules on which it relies and that AELP is not an affected person and was not entitled to notice under the rules applicable to the contested case.

Are affected persons entitled to mailed notice?

It is important to note at the outset that section 291.106 of the Commission rules, governing notice for applications for CCNs, does not require that notice of applications for issuance or amendment of CCN's be mailed to affected persons. The relevant rules merely require that for applications for issuance of a new CCN or an amendment of a CCN, "the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within [five miles/two miles] of the requested service area boundaries, and any city with an extra-territorial jurisdiction which overlaps the proposed service area boundaries." See 30 TAC 291.106(b)(1) and (2).

The rules relied upon by AELP in support of its argument that notice is required to be mailed to affected persons are misconstrued.

First, AELP relies on Section 5.115, in Subchapter D of the Texas Water Code, setting forth the general powers of the Commission, for its assertion that it is an affected person. That section provides in relevant part:

For the purpose of an administrative hearing held by or for the commission involving a contested case, 'affected person [...]'...means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the...water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings.

TEX. WATER C. ANN. §5.115(a) (West 2004).

AELP is misguided in its reliance on this statute to support its claim that it was entitled to notice. This provision is not related to notice, but, rather, to standing. It makes repeated reference to case as a contested case and includes the definition of an affected person in the context of a contested case and for the purpose of determining whether that person is entitled to standing in that case. This provision is unrelated to the provision in the Water Code governing notice of CCN applications.

AELP then relies upon section 13.246 of the Water Code in support of its contention that affected persons are entitled to mailed notice. That section states that if an application for a CCN is filed, the commission shall "cause notice of the application to be given to affected parties and, if requested, shall fix a time and place for a hearing..." The term "affected parties" is not a defined term in Chapter 13 of the Water Code and may not be identical to the defined term "affected persons." Even assuming, however, that affected parties is interchangeable with affected persons, the provision does not require mailed notice, but merely notice. The much more detailed and specific provisions in the Commission rules set forth in great specificity the types of notice required for the various categories of persons. Simply said, AELP is mistaken in its position that section 13.246 requires mailed notice to all affected persons, particularly since the rules adopted by the Commission and that apply specifically to utility regulations do not include that requirement.

AELP is not an Affected Person.

Even if the rules did (and they do not) require that notice be mailed to all affected persons, AELP does not fall within that category under any of the applicable statutes or rules.

AELP relies on Section 13.002 of the Texas Water Code in support of its contention that it is an affected person. That section defines "affected person" as follows:

"Affected Person" means any retail public utility affected by any action of the regulatory authority; any person or corporation, whose utility service or rates are affected by any proceeding before the regulatory authority; or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.¹

TEX. WATER C. ANN. §13.002(1)(West 2004).

Regardless of the definition applied, AELP does not fall within the categories provided by statute as constituting affected persons. Presumably, based on the process of elimination, AELP is arguing, in reliance on the two definitions of affected person (in Section 5.115 and 13.002), that (i) it has rights, duties or economic interests that would be affected by the administrative hearing, and (ii) that its service or rates are affected by the proceeding; however, these arguments are without merit.

First, with respect to the definition set forth in section 5.115 of the Water Code, while certainly AELP has rights, duties, and economic interests in connection with its ownership of the land, it has no *legal* rights, duties or economic interests that would or could be affected by the administrative hearing, because AELP does not receive and has never received wastewater service at the Property. AELP's contract with Hornsby does not render AELP an affected person under this definition by creating a legal right or economic interest.

The contract between Hornsby and AELP does no more than provide the terms and conditions of future wastewater service, which service may or may not ever be provided or

¹ As required by section 5.115, the Commission has adopted specific rules specifying factors which must be considered in determining whether a person is an affected person under the chapter governing utility regulation, and the Commission rules define "affected person" in identical terms as Section 13.002 of the Water Code. See 30 TAC § 291.3.

requested. The contract itself is replete with evidence of this point. Perhaps most importantly, the agreement covers four different properties owned by AELP, only one of which was included in Hornsby's CCN at the time of execution. The agreement includes a full section delineating the conditions precedent to service, which includes, most tellingly, a provision that states that service will not be provided "until the land has been included in the area of Hornsby's CCN." It further provides that the agreement is subject to various limitations relating to permits, approvals and other considerations. It does not specify any retail rates.

Even if the terms of the agreement brought AELP under the umbrella of affected person, it is inconsequential. That is because the statute requires that the interest be affected by the administrative hearing. The contract has been assigned in its entirety and, secondly, AELP's interests are fully protected. Any purported legal rights or economic interests resulting from AELP's contract with Hornsby will not and cannot be affected by the administrative hearing.

Secondly, with respect to Section 13.002 of the Water Code, AELP's claim that it is an affected person must rest on an assertion that its utility service or rates are affected by any proceeding before the regulatory authority, because AELP clearly is not a retail public utility or a competitor of a public utility. See TEX. WATER C. ANN. §13.002(1). However, this is problematic for AELP, in that AELP, again, does not receive and has never received wastewater service at the Property. If AELP's argument relies on its contract with Hornsby, the same counterarguments apply: In short, the contract merely sets forth the terms and conditions of future wastewater service, not including rates, and, perhaps most important, the contract has been assigned, as permitted by its terms, and AELP's interests under the document are fully and completely protected. Thus, AELP does not have service or rates or any interest provided by its contract that could be affected by the administrative hearing.

In further support of this analysis, the definitions in the rules of "service" and "rates" clearly demonstrate that AELP does not receive service and that there are no rates being charged or that can be said in any way to be affected by the administrative hearing. "Service" is defined as "[a]ny act performed, anything furnished or supplied, and any facilities used by a retail public utility in the performance of its duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public..." See 30 TAC 291.3(41). AELP has never received wastewater service at the Property, nor are there any plants, lines, facilities or any infrastructure at all necessary for the provision of service at this time. In addition, the agreement between Hornsby and City does not constitute the performance of any act of service, as more fully explained in section b, below.

Similarly, the contract between Hornsby and AELP does not fit within the definition of Rate. "Rate" is defined in the Commission rules as follows:

Rate - Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in the Texas Water Code, §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

30 TAC §291.3(35). Here again, AELP must rely on its contract with Hornsby, yet the contract does not affect "any compensation, tariff, charge, fare, toll, rental or classification to be demanded, charged, observed or collected by Hornsby." Moreover, the applicability of the definition above is limited, by its own terms, and does not apply to the relationship between Hornsby and AELP. Specifically, the definition of "rate" stipulates that to be considered a rate, the charge must be for any service, product, or commodity described in the Texas Water Code, §13.002(23). The service, product or commodity described in that section is limited to (as