relevant to wastewater service) "owning or operating for compensation in this state equipment or facilities...for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public..." Because Hornsby does not own or operate equipment or facilities for such services for the public as concerns the Property owned by AELP, the definition does not apply.

Even if the consideration for the contract or any other term of the contract between Hornsby and AELP constitutes a rate under this definition, it is irrelevant, because, in order to trigger notice, the rate must be affected by the administrative hearing. Here, it cannot be affected—the contract remains intact and the terms in effect and unchanged. The administrative hearing, if anything, has further memorialized, not degraded, the agreement, and the hearing has had and can have no effect whatsoever on the consideration for or other terms in that agreement.

Legislative purpose tends to invalidate AELP's claims.

It is also important to construe the various notice arguments against the backdrop of the legislature's stated or implicit intent behind the rules. The legislative intent behind the applicable statutes and rules lends further support to Hornsby's position concerning notice, as follows:

The stated purpose of Chapter 13 of the Water Code is "to protect the public interest inherent in the rates and services of retail public utilities," which public interest is not impacted whatsoever by the transfer of AELP from Hornsby's to City's CCN under the exact, agreed upon terms and conditions of service. Chapter 13 of the Water Code simply does not include landowners, such as ALEP, in its definition of affected persons and thus does not require the Commission to notify AELP of the applications. This is the only interpretation that maintains the integrity of that chapter in light of its stated purpose.

In addition, the Commission has adopted particular rules, specifically designating the persons to whom the applicant shall mail notice of a CCN application for issuance or amendment. Section 291.106(b)(1) and (2) together provide that applicant shall *mail* notice only 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 required service area boundaries, and any city with an extra-territorial jurisdiction which overlaps the proposed service area boundaries." Clearly, none of these categories includes landowners such as AELP. But also important is the fact that section 291.106(c), immediately following the provisions addressing the mailing requirement, adds that the applicant shall then *publish* the notice in a newspaper having general circulation in the county or counties where a CCN is being requested, once each week for two weeks—the clear and obvious purpose of which is to put *other* interested persons who are not entitled to notice by mail, on notice of the application.

Section 291.106 (d) supports this interpretation, stating that the Commission may require the applicant to deliver notice to *other* affected persons or agencies. This language demonstrates that the Commission anticipated that there may be *other* affected persons *not* expressly required by the rules to receive notice by delivery. Even in the unlikely event that the Commission now finds that AELP is an affected person (which Hornsby maintains is contrary to the definitions set forth in the Commission rules), Hornsby asserts that AELP does not fall within the expressly designated categories of persons required to receive mailed notice, and the Commission did *not* require delivered notice to landowners, as it was entitled to do in its sole discretion.

Notice was properly published, and AELP was on constructive notice.

Finally, it is crucial to note that, although mailed notice was not required as to AELP, both Hornsby and the City caused notice to be published in newspapers of general circulation in

Travis County. Additionally, the City published notice twice each in three different newspapers covering three counties, held meetings with the Real Estate Council of Austin, Austin Chamber of Commerce and others. The Austin-American Statesman and the Austin Business Journal published articles about the City's applications before the first hearing. Hornsby caused notice to be published once per week for two consecutive weeks in the Austin-American Statesman. In light of the published notices, the public meetings, newspaper articles, magazine write-ups, and all the general publicity connected with the subject applications, due in large part to efforts by Hornsby and City to inform all interested persons, it would be almost impossible for AELP to have not been aware of the applications, and AELP should accordingly be charged with constructive notice of the matter.

In sum, AELP was not entitled under law to receive mailed notice of the applications, by virtue of the language of the applicable statutes, and, in the alternative, because AELP is not an affected person as defined by the statutes and Commission rules. The Commission did not choose, as it was entitled to do, to require landowners to receive mailed notice. The City and Hornsby complied with the notice requirements and went above and beyond by undertaking to cause widespread exposure through a variety of avenues in efforts to inform the public of the applications. AELP did not protest or seek affected person status and has remained disinterested throughout the process. But most importantly, AELP is not an affected person under the applicable rules and statutes, and was never entitled to notice other than published notice of the applications. Because the Commission, Hornsby and City fully satisfied, indeed, exceeded, the requirements for publication of the notice, AELP does not have a basis for complaint or to step in at this late date and re-open the contested case or in any other manner hinder or abate the process or proceedings.

b. Entitlement to notice of Transfer Application and Settlement Agreement.

i. AELP claims that, by virtue of its contract with Hornsby, it is a customer of Hornsby, pursuant to section 291.3(15) of the Commission rules, and that, therefore, notice of the settlement agreement between Hornsby and the City was required, pursuant to section 291.112(c)(1) of the Commission rules.

First, AELP has not filed a motion for reconsideration on application 34449-S, which is the application for transfer, and did not include any reference to that application in its Motion. Therefore, it appears that AELP is relying on the above-reference rules in support of its claim that it was entitled to notice of the settlement agreement, but the rules govern sale, acquisition, lease, rental, merger or consolidation and transfer of a CCN, and thus AELP's reliance on those rules is misplaced. The settlement agreement is not an application to transfer; indeed, it is not an application at all. However, if AELP is implicitly claiming that notice was required of the transfer application, and in the event the Commission chooses address AELP's arguments as such, Hornsby argues that no notice was required of the transfer application; nor was notice required of the settlement agreement, for the following reasons:

The Commission rules governing notice of proposed sale, acquisition, lease, rental, merger or consolidation and transfer of a CCN provide that, unless notice is waived by the executive director for good cause shown, "mailed notice shall be given to customers of the...sewer system to be sold, acquired, leased or rented or merged or consolidated and other affected parties as determined by the executive director..." 30 TAC 291.112(c)(1).

AELP is not a customer of Hornsby.

AELP is correct that "customer" is defined by the Commission rules as "[a]ny person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency

provided with services by any retail public utility," and that "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(15) and (41). Where Hornsby and AELP part ways, however, is in the application of those definitions.

Hornsby has never provided service to AELP and thus AELP cannot be considered a customer of Hornsby. AELP had not even *requested* service until September of 2004, over a year after the settlement agreement between Hornsby and City was executed and Hornsby's contract with AELP assigned to City. Thus, there were no duties under the Texas Water Code that Hornsby would have been required to perform. While, certainly, Hornsby undertook duties to AELP under the contract with AELP to perform acts of service if and when all the conditions precedent to service were satisfied, these duties were duties *under contract;* they were not duties under the Water Code. There has been no act performed, anything furnished or supplied, or any facilities used by Hornsby in the performance of its duties under the Water Code, as no service has been provided: the land is as yet undeveloped as is any infrastructure necessary for the provision of service. Again, the contract between AELP and Hornsby simply set out the terms and conditions that would attach to future service, and conditions precedent to providing such service, including the condition precedent that the area "has been included in the area of [Hornsby]'s CCN." The contract clearly contemplated that service by Hornsby may never occur, being dependent upon the inclusion of the land in Hornsby's CCN. It is simply not logical and is counterintuitive to interpret "service", as defined in the rules, as including an agreement as to terms and conditions under which service may (or may not) be provided.

AELP's arguments concerning the requirement of notice of the settlement agreement (as opposed to the transfer application) based on its claim that it is a customer of Hornsby are somewhat confusing. AELP complains that it should have received notice of the settlement agreement; AELP grounds this argument in its assertion that it is a customer, then complains that the notice (presumably of the applications) pre-dated the settlement agreement that, according to AELP, affects its interests. First, the notice of the applications clearly *must* pre-date any settlement between parties to the hearing on those applications; it is not clear how the fact that notice pre-dated the settlement agreement could negatively affect AELP. At any rate, the rules do not make provision for or require in any way the notification of terms of a settlement reached between parties in a contested case hearing, other than to specific categories of persons, which, for the reasons discussed above, do not include AELP.

ii. AELP also argues that the settlement agreement between the City and Hornsby is governed by section 13.248 of the Water Code and entitles AELP to notice of the settlement agreement.

AELP is mistaken with respect to its characterization of the settlement agreement. First, section 13.248 of the Water Code addresses contracts between utilities and customers. That provision reads as follows:

> Contracts Valid and Enforceable. Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the commission after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.

The settlement agreement is a contract between two utilities, not a contract between a utility and a customer. Neither Hornsby nor the City is a customer of the other. But even if the contract were (and it is not) subject to section 13.248 of the Water Code, the clear purpose of the

provision is assurance that such contracts, if proper notice and opportunity for a hearing has been given, are valid and enforceable. AELP relies on the language regarding notice and hearing to argue that the settlement agreement entitles AELP to direct notice. However, it is clear from the context that that particular language is intended to prevent the situation in which a utility and a customer enter into an agreement without the opportunity for public participation.

The settlement agreement in issue is simply a *part* of the larger contested case hearing, for which notice was properly given and for which all proper parties had ample opportunity to participate. A settlement agreement resolving issues being contested in a contested case hearing clearly does not fall within the classification of agreements covered by this statute. Moreover, it is arguable that the statute does not require mailed notice, and AELP, for the reasons discussed above, had, at the very least, constructive notice of the applications.

2. AELP argues that 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.

Hornsby will not present argument on this issue, as it concerns only the City and not Hornsby. However, Hornsby supports the City's position with respect to this issue.

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.

The findings concerning notice of the application referenced by AELP are not required by Texas Water Code section 13.246 or any other rules or statutes for the reasons described above.

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.

The argument that Hornsby abandoned its obligation to provide service to AELP is without merit, as discussed in great detail above. With regard to AELP's claim that Hornsby made a major amendment to the application, AELP has no basis for reaching such a conclusion. The application originally included a larger area than was ultimately included in its CCN. Reducing the area in a CCN application does not constitute a major amendment.

IV. CONCLUSION

In sum, Hornsby believes that AELP was not entitled to mailed notice, regardless of whether AELP is an affected person; that AELP is not an affected person; that AELP was on constructive, if not actual, notice of the application; that AELP is not a customer of Hornsby by virtue of any receipt of service or by the terms of a contract; that AELP was not entitled to notice of the settlement agreement or transfer application; and that AELP is not entitled to re-open the contested case hearing. For all of these reasons, Hornsby Bend respectfully requests that AELP's Motion to Overturn be denied.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Hornsby Bend Utility Company, Inc. respectfully prays that, upon consideration, Austin Estates Limited Partnership's Motion to Overturn be denied.

Respectfully submitted,

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ATTORNEYS FOR HORNSBY BEND UTILITY COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response has been sent by Facsimile and/or U. S. First Class Mail on this 31st day of January, 2005, to the following:

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JOHN J. CARLTON

Agreement to Provide Wastewater Service

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

This Agreement is by and between HORNSBY BEND UTILITY COMPANY, INC. ("Utility"), a Texas corporation, and AUSTIN ESTATES LIMITED PARTNERSHIP ("Developer") a Texas Limited Partnership, and is as follows:

1.
WASTEWATER SERVICE

1.1 Reservation of Capacity: Utility reserves sufficient Living Unit Equivalents (LUE's) as defined in Exhibit "A" attached hereto to service the properties that are described in Exhibits "B-1," "B-2," "B-3," and "B-4," up to a maximum of four thousand (4,000) LUE's. Utility represents that the Land as described below in Exhibit B-1 is within the service area of Utility and the land described in Exhibits B-2, B-3, and B-4 is not within the service area of Utility as approved by the Texas Natural Resources Conservation Commission ("TNRCC").

This Wastewater Service Commitment shall be limited to:

Exhibit B-1 Property: Being 750.33 acres of land, more or less, out of the Oliver Buckman Survey No. 40 and the John Burleson Survey No. 33, in Travis County, Texas, being the same property conveyed to Austin Estates Limited Partnership in deed dated August 30, 1997, recorded in Volume 13017, Page 1564, of the Real Property Records of Travis County, Texas, and being more fully described by metes and bounds in the attached Exhibit "B-1" attached hereto and made a part for all purposes;

Exhibit B-2 Property: 72.50 acres of land, more or less, out of the Oliver Buckman Survey No. 40, in Travis County, Texas, and being the same property more fully described by metes and bounds on Exhibit "B-2" attached hereto and made a part hereof for all purposes;

Exhibit B-3 Property: 548.06 acres of land, more or less, out of the Oliver Buckman Survey No. 40, in Travis County, Texas, and being the same property more fully described by metes and bounds on Exhibit "B-3" attached hereto and made a part hereof for all purposes; and

Exhibit B-4 Property: 164.70 acres of land, more or less, out of the Oliver Buckman Survey No. 40, Abstract No. 60, Travis County, Texas, being the same tract as conveyed by deed dated July 17, 1973, from Wendell C. Carter to Judy Johnson, Trustee, recorded in Volume 4683, Page 407 of the Deed Records of Travis County, Texas, SAVE AND EXCEPT 10.0 acres conveyed by deed recorded in Volume 7085, Page 418 of the Deed Records of Travis County, Texas, more fully described by metes and bounds on Exhibit "B-4" attached hereto and made a part hereof for all purposes.

Collectively, the Exhibit B-1, B-2, B-3, and B-4 Properties are sometimes hereinafter referred to as the "Land" or as the "Exhibit B Properties."

1.2 It is expressly agreed that this Agreement extends only to the wastewater service and the treatment of any domestic and commercial sewage originating from the Land. Commercial sewage is defined to include domestic and commercial sewage. Domestic sewage is defined as waterborne human waste and waste from domestic activities such as bathing, washing, and residential food preparation. Any sewage that is not domestic sewage shall be considered commercial sewage. Any sewage other than domestic sewage may require pretreatment at the sole cost and expense of Developer, and the right to determine the necessity of such sewage pretreatment shall rest with the Utility at its sole discretion. Sole costs and expenses to be paid by Developer for any pretreatment shall include design, installation, operation, record keeping, and maintenance of any pretreatment facilities and/or processes. The pretreatment requirements shall be such requirements that may be required by the Rules for Commercial Wastewater Pretreatment as promulgated by the TNRCC, the City of Austin, and any State and Federal laws, rules or regulations that may be adopted from time to time by the utility. The commercial sewage shall be pretreated to a standard that makes the commercial sewage equivalent to domestic residential sewage and/or to the rules stated same whichever is a less stringent standard. Developer agrees to be

responsible and liable for and agrees to pay for any costs of operation, maintenance, repair, compliance and fines and penalties that result from any misuse and/or any failure of any pretreatment facilities on any pretreatment facilities installed by Developer and/or installed upon the Land. When used in this Agreement, the terms *sewage* and *wastewater* have the same meaning.

1.3 This Agreement is in all respects subject to and limited by all federal, state, and local statutes, rules, permits, and approvals in determining treatment, sites, and all other related considerations.

1.4 Developer understands and agrees he is reserving sufficient LUE's for the Land which are only to be allocated to serving residential use and other uses (subject to the pretreatment requirement) and construction thereon, limited to a maximum number of four thousand (4,000) LUE's. The Parties hereto recognize that there are currently no buildings constructed upon the Land. In the event the Utility determines that the demand for wastewater treatment capacity to any buildings and/or other uses on the Land will cause the demand for wastewater treatment to the Exhibit B Properties within or from the Land to exceed the number of LUE's reserved in this Agreement, Utility may refuse to allow the building and/or other uses to be connected to the wastewater collection system. Utility agrees that it will use its best efforts to provide additional LUE's (above the 4,000 LUE's committed) to the Exhibit B Properties if such additional LUE's are needed. Developer agrees to obtain from any transferee, successor, or assign a written acknowledgment that service may be withheld by the Utility to a lot in the event the demand for wastewater service is determined by the Utility to exceed the amount of capacity reserved for the lot. In the event of Utility's refusal, Developer will indemnify Utility, its successors and assigns, and hold the Utility free, clear, and harmless from and against any and all claims, demands, and causes of action which may be asserted by anyone on account of such refusal, including all attorney's fees and other expenses which may be incurred by Utility in connection with such claims, demands, and causes of action. The Parties acknowledge that Developer will allocate the LUE capacity among the lots which make up the Exhibit B Properties. Service to lots within the Land will not be connected until Developer designates in writing the number of LUE's for the respective lots. Utility is not bound to commit additional LUE's to any of the lots, either individually or collectively.

2. DEVELOPER'S SCHEDULE

2.1 Developer represents that the design of the lines necessary to connect the service to the Land is not completed and Developer is, in the process of planning the wastewater collection lines necessary to serve the Land. Upon completion of the lines to connect the Land, Developer represents that he will connect to the facilities. Developer and Utility agree that they will allocate the LUE's to phases and/or sections of the development of the Exhibit B Properties. This allocation shall include a schedule of prospective development to assist Utility in providing timely and sufficient capacity to the Exhibit B Properties. These phases and/or sections shall not be in increments of lots that would require no less than one hundred (100) LUE's of service capacity. Developer acknowledges and utility agrees that this 100 LUE phase and/or section requirement is designed for ease of administration, financing, and construction of utility infrastructure.

3. PROVISION OF FACILITIES BY UTILITY

3.1 Utility agrees to expand its wastewater treatment and collection facilities, if necessary, in a reasonable and orderly manner to provide the LUE capacity reserved in this Agreement. Utility represents that, as of the date of this Agreement, Utility has existing capacity to meet the requirements of Developer's reservation. Utility agrees that it will use its best efforts to provide additional LUE's (above the 4,000 LUE's committed) to the Exhibit B Properties if such additional LUE's are needed.

4. CONDITIONS PRECEDENT TO SERVICE

4.1 Wastewater service will not be provided to the Land until:

(a) the installation, inspection, and acceptance of the wastewater approach main and any wastewater lines interior to the Land approved by Utility's Engineers, and until Utility obtains title to the wastewater collection facilities necessary, if any, to serve the Land as provided in Article 5 of this Agreement;

(b) all fees, tap fees, LUE fees and post-connection fees and charges pursuant to Utility's wastewater tariff as approved by the TNRCC, or any other governing body having jurisdiction, as applied to commercial customers, are paid;

(c) Developer has engineered and Utility has accepted any pretreatment and facilities pretreatment plan and record-keeping plan for such pretreatment facilities in the event commercial sewage is to be generated on the Land;

(d) Developer has made arrangements to provide Utility with monthly reports of water usage to the Land;

(e) Developer has provided to Utility and/or Utility has obtained a satisfactory agreement with the water provider that will be serving the Land, and this agreement shall include, but shall not be limited to including, allowing Utility to direct the discontinuing of water service in the event that the end-user customers are not current in their sewer-service billings. In the alternative, Developer may make arrangements with the water CCN holder upon the land to allow utility to provide water service to the land. Developer and Utility agree that the water commitment of utility shall be governed by separate agreement that shall only be operating in the event the CCN holder on the land releases the land from its CCN.

(f) Developer has provided written notice six (6) months prior to the date of connection of the wastewater collection service for each particular section or phase of development for which service is to be connected. Said written notice shall be given a minimum of six (6) months before Developer will require connection to the wastewater collection system;

(g) The Land has been included in the area of utilities CCN (as defined hereinafter); and

(h) Developer has provided any sites and easements necessary to construct, install, and operate any lift stations and/or pumping stations for transportation of wastewater, except the Option Site addressed in Article 10 below, which Utility agrees to purchase pursuant to the terms of the option as set out hereinbelow.

5.
CONSTRUCTION OF FACILITIES AND PHASING OF SERVICE

5.1 Developer shall be solely responsible for designing and constructing the wastewater collection system that will connect to Utility's existing systems and/or subsequently built systems at the point or points to be designated by Utility. Developer shall be solely responsible for designing and constructing all lines necessary to connect the wastewater collection system to Utility's existing systems at a point or points to be designated by Utility. Prior to construction, the plans and specifications for the wastewater collection system must be approved by Utility and any other regulatory authorities that have jurisdiction over the project. Construction of the wastewater collection system shall be subject to inspection by Utility and approval by the appropriate and applicable regulatory authorities. Developer shall be responsible for paying all fees to all governmental or regulatory authorities having jurisdiction in connection with the approval of the plans, specifications, and construction of the wastewater collection system.

5.2 Prior to connection to the Utility, Developer shall provide to Utility all necessary easements on the Land for the wastewater collection system, if any, and any easements necessary to transport wastewater from the Land to Utility's treatment plant, unless otherwise agreed to by Utility. All service lines, transmission mains and lines, and other facilities necessary for transmission of the wastewater collection system shall be located outside of roadway (state, county, or otherwise) right of way but shall be located within utility easements and/or easements specifically identified for these mains and lines.

5.3 The wastewater collection system shall not be connected to Utility's system until the following have occurred:

(a) all the consideration provided in paragraph 7 has been paid in full;

(b) the system has been approved by Utility;

(c) the system has been accepted by and conveyed to Utility as set forth in the following paragraph and the conditions precedent as set forth in Article 4 above have been met.

5.4 Once the wastewater collection system or any parts thereof have been completed and approved by Utility, Developer will, upon Utility's request, convey to Utility ownership of all or such part of the system, if any, as designated by Utility, including but not limited to pipes, meters, valves, lift stations, approvals, easements and interests in land, and all other rights and fixtures, real and personal property, which are part of or related to the wastewater collection system, whether on or off the Land. With respect to that part of the wastewater collection system being conveyed to the Utility, Developer will execute an affidavit that, to the best of Developer's knowledge, no debt remains unpaid to any contractor, laborer, or material supplier which has or could result in a claim against the system or a valid lien encumbering the system. Developer shall also convey (I) any easements and interests in land held by Developer within which the wastewater system of Utility is located, unless such easements and interests in land have been dedicated to the public, and/or are provided as access easement to the utility; (II) all easements and interests in land necessary to own, operate, and maintain the wastewater collection system. Developer shall additionally convey fee simple title, free and clear of all liens, to any and all necessary sites, together with necessary rights of way thereto where such site or sites are not accessible by a dedicated public street, and all licenses, franchises, and permits for the system held by Developer; and, (III) all warranties, representations, and contract rights which have been made and granted by Developer which relate to any of the wastewater collection system being conveyed. Developer represents that the system will be constructed in easements and interests in land or sites owned by Developer or within easements and interests in land dedicated to the public or to the Utility. All documents or instruments of conveyance, release, transfer, or assignment required hereunder shall be in form and content reasonably acceptable to Utility's attorney. Prior to conveyance, Developer will provide Utility with "as built" drawings of the wastewater collection system, computer (electronic data files) showing the plans and drawings in a "CAD" form, and an affidavit of a registered professional engineer certifying that the system was built pursuant to the plans and specifications.

5.5 To allow Utility to expand and construct, in an orderly manner, facilities that may be necessary to serve the Land at the time service is required, Developer agrees to notify Utility six (6) months in advance of its need to connect to the wastewater collection system. Developer agrees that Utility shall not be obligated to connect Developer's lines to the wastewater collection system unless Developer has notified Utility six (6) months in advance of such need to connect.

5.6 Developer and Utility agree that Developer may wish to have lines internal to its development used exclusively by development within the Exhibit B Properties which is owned and operated by municipal utility districts and/or water, sewer, and irrigation districts (i.e., the retail system). Utility agrees that, in such event, it will become a wholesale utility provider to such entities, and Developer agrees to have such entities use Utility as their wholesale provider. Furthermore, Developer and Utility agree to cooperate with each other to modify this Agreement to allow Developer to accomplish its possible goals regarding the retail-system arrangements set forth above.

6. ALLOCATION AND TRANSFER OF LUE'S

6.1 This Agreement extends and applies only to the provision of wastewater service to Land in LUE units as described on Exhibit "A" hereto. Developer warrants that the legal descriptions in paragraph 1.1 are accurate, and that it is the only owner of the Land described in the Exhibit B-1, B-2, and B-3 Properties and that it is acquiring the Exhibit B-4 Property. This Agreement or any part thereof may only be transferred, pursuant to the provisions of paragraph 6.2 below, when the Land or any part of it is transferred by deed, duly recorded in the Travis County Deed Records, to a new owner.

6.2 The LUE's reserved in this Agreement do not run with the Land. Developer may transfer or assign this Agreement subject to prior written approval by Utility. Developer and the transferee will return this Agreement to Utility, and Utility will issue a replacement agreement to the transferee. The provisions of the replacement agreement will be substantially identical to this Agreement and Developer shall have no further liability to the Utility. After any transfer, Utility shall have no further liability to Developer, as to the part of the Land and/or LUE's addressed in the transfer, and Developer shall have no further liability to the Utility as to the transferred part of the Land and/or LUE's respectively. No transfer will be made until all Developer's obligations to Utility are satisfied. No transfer will be made until Developer has reimbursed the Utility for all reasonable legal and engineering expenses incurred by Utility in connection with the transfer, and Developer's transferee has affirmatively accepted all responsibilities under the Agreement and Utility has in its reasonable discretion qualified the transferee.

7.
CONSIDERATION AND ALLOCATION OF LUE'S

7.1 Developer hereby tenders and Utility accepts Twenty-five Thousand Dollars ($25,000.00), along with the mutual promises of each party as consideration for this Agreement. This payment shall be applied to the last of the LUE fees reserved hereunder. The LUE charge may increase and/or decrease depending upon the cost of construction of new plant facilities and/or improvements to the existing facilities which may be necessary to provide the level of service necessary to serve the commitments contemplated in this Agreement. The LUE fee will be in an amount sufficient to furnish the development with all facilities compliant with the TNRCC minimum design criteria for production, storage, treatment, or transmission facilities necessary for a wastewater system. The per LUE charge shall be computed by allocating the cost of utility constructed infrastructure needed to supply the needed and required service, pursuant to TNRCC standards and prudent wastewater treatment business practices, over the number of LUE's that can be served by the infrastructure constructed. The parties agree that the maximum LUE charge for the first Four years of this Agreement shall in no event exceed One Thousand Dollars ($1,000.00) per LUE. Thereafter, the per LUE charge may increase as costs increase as set forth above. Thirty-three and one-third percent (33 1/3%) of each LUE fee shall be payable upon the earlier of final site plan approval and/or development permit approval, and an additional thirty-three and one-third percent (33 1/3%) being payable upon the completion of construction of each section or phase of the Land and the final thirty-three and one-third percent (33 1/3%) payable upon connection to the wastewater collection system of that particular phase and/or section. The initial twenty-five thousand dollars shall be credited to amounts payable as the last dollars paid.

7.2 An inspection fee as set forth in the Utility's tariff may be charged to Developer prior to acceptance of the facilities constructed by Developer. This inspection will be to insure that such facilities meet with all applicable standards. This fee to Developer shall be at Utility's cost. Utility's cost are defined to be any professional service fees which it incurs and third party management fees it incurs in the inspection process.

7.3 Developer additionally agrees to pay to Utility the Utility's cost of engineering, attorney's', and consultant fees which are reasonable and necessary for Utility to assist Developer (that Developer's request) in designing, planning, and otherwise assisting Developer in obtaining any necessary approvals for Developer's project from any city, other governmental, and/or quasi-governmental entity or authority.

8.
WATER USAGE RECORDS

8.1 Developer is not utilizing water service provided by Utility on the Land. To allow Utility to properly bill Developer, he agrees to provide access to monthly water usage billings for the Land and/or separate lots or parcels of the Land, respectively. Developer shall supply these monthly billing records within thirty (30) days of their receipt or at such other intervals as Utility requests and/or shall request such information from Developer's water provider.

9.
CERTIFICATE OF CONVENIENCE AND NECESSITY

9.1 Developer and Utility agree that the Exhibit B-1 Property is in the area covered by Utility's Certificate of Convenience and Necessity ("CCN") for wastewater service. Developer and Utility agree that the Exhibit B-2, B-3, and B-4 Properties are not currently in the area covered by Utility's CCN for wastewater service, but Developer and Utility acknowledge that Utility is currently in the process of including the B-2, B-3, and B-4 Properties in Utility's wastewater CCN.

9.2 Utility has processed the application for inclusion of the Exhibit B-1 Property into Utility's CCN for provision of wastewater and is in the process of doing the same for the Exhibit B-2, B-3, and B-4 Properties.

10.
OPTION

10.1 Developer and Utility have discussed the possibility of design, installation, construction, and operation of a sewer treatment plant on and within the Exhibit B Properties. Developer agrees to and hereby grants to Utility the option to acquire a site sufficient for the construction and operation of such a sewer treatment plant on and within the Exhibit B Properties if the parties agree that such a wastewater treatment plant would be preferable to transmission of the wastewater to Utility's current treatment site. Developer agrees to make the site available at Developer's per-acre cost of the particular site (said per-acre cost to include Developer's pro rata per-acre carrying cost, i.e., interest, points, loan commitment fees, appraisals, closing costs, insurance, survey fees attributable to the site in question, plus twenty-five percent (25%) of the total of the land cost plus the carrying cost).

10.2 Developer and Utility agree that Developer will have the right of first refusal to utilize effluent generated by development upon Developer's Land and/or effluent that is generated on land other than Developer's Land to the extent that is treated by facility's located on Developer's Land and/or is treated on other land but is transported through Developers Land.

11.
NOTICES

11.1 Any notice to be given hereunder by either party to the other party shall be in writing and may be effected by personal delivery in writing or by registered or certified mail, return receipt requested. Notice shall be effective upon personal delivery or upon the expiration of three (3) days after it has been deposited in the United States mail, properly addressed, postage prepaid. Notice to the parties shall be sufficient if made or addressed as follows:

Hornsby Bend Utility Company, Inc.
Attention: Thom W. Farrell
P.O. Box 161173
Austin, Texas 78716

with copies to: Latius R. Prikryl
Phillips & Prikryl, L.L.P.
515 Congress Avenue, Suite 2600
Austin, Texas 7870

Austin Estates Limited Partnership
c/o Larry R. Beard, Project Administrator
6200 Gilbert Road
Austin, Texas 78724

with copies to: Taylor Lane, L.L.C.
c/o Larry R. Beard
6200 Gilbert Road
Austin, Texas 78724

12.
DEFAULT

12.1 In the event of default by a party with respect to this Agreement, or any other agreement between the parties to this Agreement, the other party not being in default, the party not in default may give to the defaulting party written notice of such default specifying the failure or default relied upon. If the defaulting party fails to fully cure the default specified in such notice within thirty (30) days after receipt of such notice or if such default cannot reasonably be cured within such thirty (30) day period and the defaulting party has failed to use reasonable efforts to attempt to cure such default, the party not in default shall have the right to:

(a) terminate this Agreement in full without liability of any kind to the defaulting party; or

(b) pursue specific performance of this Agreement.

The party not in default may employ attorneys to pursue its legal rights and, if the party not in default prevails before any court or agency of competent jurisdiction, the defaulting party shall be obligated to pay all expenses incurred by the party not in default, including reasonable attorneys' fees.

The parties recognize that each of their undertakings in this Agreement is an obligation which, if not performed, could not adequately be compensated by money damages. The parties have therefore negotiated this Agreement without allowance for any potential damages either may suffer as a result of the failure of the other to perform its obligations hereunder. Accordingly, Utility and Developer agree that, in the event of any failure to perform any covenants, conditions, or obligations of this Agreement on the part of either party, the remedies of the parties are limited to those set forth above, i.e., the right to terminate this Agreement or to pursue specific performance.

In the event of default by Developer, no money paid by Developer under this Agreement is refundable for any reason. All sums paid will be retained by Utility as just compensation for processing, system planning, withholding water and wastewater treatment capacity to others, and for other costs and expenses experienced by Utility.

13. GENERAL

13.1 If any party is rendered unable, wholly or in part, by Force Majeure to carry out any of its obligations under this Agreement other than an obligation to pay or provide money, then such obligations of that party, to the extent affected by such Force Majeure and to the extent that due diligence is being used to resume performance at the earliest practicable time, shall be suspended during the continuance of any inability so caused to the extent provided but for no longer period, provided that immediate notice is given to each of the affected parties. Such cause, as far as possible, shall be remedied with all reasonable diligence.

13.2 The provisions of this Agreement are severable, and if any provision or part of this Agreement or the application thereof to any person or circumstance shall ever be held by any agency or court of competent jurisdiction to be unenforceable, invalid, or unlawful for any reason, the remainder of this Agreement and the application of such provision or part of this Agreement to other persons or circumstances shall not be affected thereby; provided, however, in such event the parties mutually covenant and agree to: (1) implement the unenforceable, invalid, or unlawful provision in a manner which is enforceable, valid, or lawful, or (2) amend this Agreement in a manner which restores a reasonable balance of burdens and benefits for each party.

13.3 There are no oral agreements between the parties hereto with respect to the subject matter hereof. This Agreement shall be subject to change or modification only with the mutual written consent of Utility and Developer.

13.4 The terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas and the United States of America from time to time in effect. Travis County, Texas shall be a proper place of venue for suit hereon, and the parties hereby agree that any and all legal proceedings in respect of this Agreement shall be brought in the District Courts of Travis County, Texas, or the United States District Court for the Western District of Texas, Austin Division.

13.5 Time is of the essence with respect to all matters covered by this Agreement.

13.6 This Agreement shall bind the parties to this Agreement, their affiliates, successors, and assigns. No other persons or entities may enforce this Agreement or claim any benefits under this Agreement.

14. COUNTERPARTS AND FACSIMILE COPIES

14.1 The parties agree that this Agreement to Provide Wastewater Service may be executed in multiple counterparts which, taken together, shall form the contractual agreement of the parties.

14.2 For purposes of negotiating and finalizing this Agreement or any of the agreements that are contemplated herein, this document and such documents may be transmitted by facsimile machine ("fax") and such faxed copies shall be treated for all purposes as original documents. Additionally, the signature of any party on a document transmitted by fax shall be considered for all purposes as an original

signature. all such faxed documents shall be considered to have the binding legal effect as an original document. Each party hereto agrees that any document so faxed shall upon request of any party be executed by each signatory party in an original form.

15.
AUTHORITY FOR SIGNATURE AND EFFECTIVE DATE

15.1 The person signing this Agreement for Developer warrants that he is authorized to sign this Agreement on its behalf. This Agreement is effective and begins on February 2, _____, 2000.

"UTILITY"
HORNSBY BEND UTILITY COMPANY, INC.

By: _____
Thom W. Farrell, President

"DEVELOPER"
AUSTIN ESTATES LIMITED PARTNERSHIP

By: TAYLOR LANE, L.L.C., General Partner

By: _____
Mark Levy

Exhibit "A"
LUE Criteria

A. A living unit equivalent (LUE) is defined as the typical flow that would be produced by a single family residence (SFR) located in a typical subdivision. For water this includes consumptive uses such as lawn watering and evaporative coolers. The wastewater system does not receive all of these flows, so the flows expected differ between water and wastewater. The number of LUE's for a project are constant; only the water and wastewater flows are different.

One (1) LUE produces: 2.2 GPM (Peak Hour) of water flow
1.3 GPM (Peak Day) of water flow
350 GPD (0.243 G.P.M.) average dry weather flow

B. Peak Flow Factor Formula

$$PFF = \frac{18 + [0.0144\,(F)]^{0.5}}{4 + [0.0144\,(F)]^{0.5}}$$

F= AVERAGE FLOW (GPM)

RESIDENTIAL	LUE CONVERSION
One (1) Single Family Residence Modular Home; Mobile Home	1 LUE
One (1) Duplex	2 LUE's
One (1) Triplex; Fourplex; Condo Unit P.U.D. unit (6+ Units/Acre to 24 Units/Acre)	0.7 LUE/Unit
One (1) Apartment Unit (24 + Units/Acre)	0.6 LUE/Unit
One (1) Hotel or Motel Room	0.5 LUE/Room

COMMERCIAL	LUE CONVERSION
Office	1 LUE/3000 Square Feet of Floor
Office Warehouse	1 LUE/4000 Square Feet of Floor
Retail; Shopping Center	1 LUE/1660 Square Feet of Floor
Restaurant; Cafeteria	1 LUE/200 Square Feet of Floor
Hospital	1 LUE/Bed
Rest Home	1 LUE/2 Beds
Church (Worship Services Only)	1 LUE/70 Seats
School (Includes Gym and Cafeteria)	1 LUE/13 Students

The LUE conversions to uses not described above will be determined by Hornsby Bend Utility Company, Inc.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 18, 2005

To: Persons on the attached mailing list (by mail and facsimile 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 in response to the Motions to Overturn (Motions) timely filed by Maria Sanchez and Patrick Lindner on behalf of Austin Estates Limited Partnership (Movant). The Movant requests that the Texas Commission on Environmental Quality (Commission) overturn the Executive Director's approval of the above-referenced applications. Complete copies of the Motions and Application Nos. 33562-C, 33563-C, 33738-C, 32800-C, 33988-C, 33989-C, and 34449-S may be obtained from the Office of Chief Clerk, TCEQ, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087.

Title 30 of the Texas Administrative Code (TAC) Section 50.139 authorizes an extension of the time for taking action on a Motion to Overturn up to 90 days after the date written notice of the Executive Director's action is mailed to a respondent. Accordingly, pursuant to 30 TAC Section 50.139, this letter shall serve as the order extending the time for the Commission to act on these Motions until **5:00 p.m.** on **Tuesday, March 1, 2005.**

The Commission's Office of General Counsel, having reviewed the Motions, has decided to set the above-referenced matters for consideration by the Commission at its public meeting on **Wednesday, February 23, 2005,** starting at **1:00 p.m.** in Room 201S, Building E, 12100 Park 35 Circle, Austin, Texas 78753.

The Commission will take oral argument on this matter. The parties are hereby notified that oral presentations shall be limited to five minutes each, excluding time for answering questions raised by the Commissioners, pursuant to 30 Texas Administrative Code § 80.263.

In addition, the Applicant, Executive Director, and the Office of Public Interest Counsel, are hereby notified that they are encouraged to file briefs or supplemental briefs with regard to the issues raised in the Motions. The briefs and supplementations must be filed with the Chief Clerk's Office no later than **5:00 p.m.** on **Monday, January 31, 2005.** Any reply briefs must be filed with the

Chief Clerk's Office no later than **5:00 p.m.** on **Monday, February14, 2005.** Filings should include an original and eleven (11) copies, reference TCEQ Docket Nos. 2000-0112-UCR, 2002-0189-UCR, 2002-0756-UCR, 2002-1197-UCR, and 2004-2048-UCR, and be filed to the attention of the Agenda Docket Clerk.

If you have questions concerning this matter, please contact Elaine M. Lucas, Assistant General Counsel, at 512/239-6215.

Very truly yours,

Duncan C. Norton
General Counsel

Mailing List
h:/counsel/lucas/letters/agendaset/AELPmtoextset.ltr

Mailing List
City of Austin
TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR,
2002-0756-UCR, and 2002-1197-UCR
SOAH Docket No. 582-02-3056

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Chris Lippe, P.E., Director
City of Austin Water and Wastewater Utility
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Austin, Texas 78701-2102

Steve Stratton
Dessau Utilities, Inc.
4104 Belmont Park Drive
Austin, Texas 78746-1147

Kent Taylor
Taylor Commercial
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Austin, Texas 78701-2437

Ed Wolf
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Cameron, Texas 76520

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512/239-0600 FAX 512/239-0606

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Docket Clerk
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512/239-3300 FAX 512/239-3311

Jody Henneke
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Kyle Lucas
TCEQ Office of Alternative Dispute
Resolution MC 222
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Austin, Texas 78711-3087
512/239-4010 FAX 512/239-4015

TCEQ

Protecting Texas by Reducing and Preventing Pollution

FAX TRANSMITTAL

DATE: **January 18, 2005** NUMBER OF PAGES *(including this cover sheet)*: 5

TO:
Name (See Below)
Organization
FAX Number

FROM: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Name Duncan C. Norton, General Counsel
Division/Region Office of the General Counsel
Telephone Number 512/239-5500
FAX Number 512/239-5533

NOTES:

Kenneth Ramirez Monica Jacobs	Bracewell & Paterson, L.L.P.	512/472-9123
John J. Carlton	Armbrust & Brown, L.L.P.	512/435-2360
Madison Jechow	Lower Colorado River Authority	512/473-4010
Ronald J. Freeman		512/453-0865
Ronnie Jones	City of Austin	512/974-2912
Patrick W. Linder	Davidson & Troilo	210/349-0041
Maria Sanchez	Davidson & Troilo	512/473-2159
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Mike Howell	TCEQ Water Supply Division	512/239- 2214
Geoffrey Kirshbaum	TCEQ Environmental Law Division	512/239-0606
Scott Humphrey	TCEQ Office of Public Interest Counsel	512/239-6377
Docket Clerk	TCEQ Office of Chief Clerk	512/239-3311
Jody Henneke	TCEQ Office of Public Assistance	512/239-4007
Kyle Lucas	TCEQ Office of Alternative Dispute Resolution	512/239-4015

JOHN W. DAVIDSON
ARTHUR TROILO
TERRY TOPHAM
CHEREE TULL KINZIE
R. GAINES GRIFFIN
RICHARD E. HETTINGER
PATRICK W. LINDNER
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RICHARD D. O'NEIL

LAW OFFICES OF
DAVIDSON & TROILO
A Professional Corporation

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R. JO RESER
MARIA SANCHEZ*
DALBY FLEMING
LISA M. GONZALES

FRANK J. GARZA
OF COUNSEL

* AUSTIN OFFICE

TELECOPY TRANSMITTAL LETTER

TO :

Party	Fax No.
John J. Carlton Armbrust & Brown LLP Representing: Hornsby Bend Utility Company, Inc.	512/435-2360
Ronald J. Freeman Representing: Lower Colorado River Authority	512/453-0865
Madison Jechow Lower Colorado River Authority Representing: Lower Colorado River Authority	512/473-4010
Ronnie Jones, Assistant City Attorney City of Austin, Law Department Representing: City of Austin	512/974-2912
Kenneth Ramirez Bracewell & Patterson, LLP 111 Congress Avenue, Suite 2300 Austin, Texas 78701-4050 Representing: City of Austin	512/472-9123
Mark H. Zeppa 4833 Spicewood Springs Road Suite 202 Austin, Texas 78759-8436 Representing: AquaSource Utility, Inc.	512/346-6847
Geoffrey Kirshbaum, Staff Attorney Texas Commission on Environmental Quality Environmental Law Division MC-173 Representing: Executive Director, Texas Commission On Environmental Quality	512/239-0606
Celeste Baker Assistant General Counsel Texas Commission on Environmental Quality.	512/239-5533

Pcd #145213

Scott Humphrey, Attorney
Texas Commission on Environmental Quality
Austin, Texas 78711-3087

512/239-6377

FROM : Patrick W. Lindner

RE : Hornsby Bend Utility Company, Inc.; CCN Nos.11978 and 20650;
Application 33738-C, -C, 33988-C and 33989-C;
TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR, 2002-0756-UCR
and 2002-1197-UCR Hornsby Bend Utility Company, Inc.

FILE NO. : 4887/1
DATE : 12/30/2004

This transmission consists of a total of 5 pages, including this cover page. If you do not receive all 5 pages, or if any difficulty in transmission occurs, please contact Marsha Glowatski at 210/349-6484.

Message:

Pcd #145213

JOHN W. DAVIDSON
ARTHUR TROILO
TERRY TOPHAM
CHEREE TULL KINZIE
R. GAINES GRIFFIN
RICHARD E. HETTINGER
PATRICK W. LINDNER
IRWIN D. ZUCKER
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PETER CARIO
LISA M. GONZALES
RENEE R. HOLLANDER

* AUSTIN OFFICE

December 30, 2004

Via Fax No. 512/239-3311

Office of the Chief Clerk
MC 105
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

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, 2002-0756-UCR and 2002-1197-UCR

Dear Chief Clerk:

By letter dated December 13, 2004, this office submitted a motion to overturn in the above-referenced matter on behalf of Austin Estates Limited Partnership.

Yesterday, we learned that the transmittal letter erroneously stated the motion was submitted on behalf of Hornsby Bend Utility Company, Inc., the applicant.

This is an embarrassing mistake and we apologize profusely for the confusion and inconvenience that was caused. I specifically apologize to John Carlton representing Hornsby Bend Utility Company.

However, the motion attached to the erroneous transmittal letter was timely filed in this matter.

Sincerely,

Patrick W. Lindner
For the Firm

PWL:mg

Cc: Attached Mailing List Via Fax
Crockett Camp
Maria Sanchez

PCD #: 145206

Mailing List

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,
2002-0756-UCR and 2002-1197-UCR

Party	Fax No.
John J. Carlton Armbrust & Brown LLP 100 Congress Avenue, Suite 1300 Austin, Texas 78701-4072 Representing: Hornsby Bend Utility Company, Inc.	512/435-2360
Ronald J. Freeman 2304 Hancock Drive, Suite 6 Austin, Texas 78756-2543 Representing: Lower Colorado River Authority	512/453-0865
Madison Jechow Lower Colorado River Authority P.O. Box 220 Austin, Texas 78767-0220 Representing: Lower Colorado River Authority	512/473-4010
Ronnie Jones, Assistant City Attorney City of Austin, Law Department Norwood Tower 114 West 7th Street Austin, Texas 78701-3000 Representing: City of Austin	512/974-2912
Kenneth Ramirez Bracewell & Patterson, LLP 111 Congress Avenue, Suite 2300 Austin, Texas 78701-4050 Representing: City of Austin	512/472-9123
Mark H. Zeppa 4833 Spicewood Springs Road Suite 202 Austin, Texas 78759-8436 Representing: AquaSource Utility, Inc.	512/346-6847

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Celeste Baker — 512/239-5533
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Texas Commission on Environmental Quality.

Scott Humphrey, Attorney — 512/239-6377
Texas Commission on Environmental Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087

MOTION TO OVERTURN

TO: **Chairman Kathleen White**
Commissioner Larry Soward
Duncan Norton, General Counsel

DATE:12/21/2004

FROM: **LaDonna Castañuela, Chief Clerk**

Applicant/Permittee: **City of Austin**

Date Administratively Complete: N/A

Permit Type: App. Nos. 33562-C & 33563-C; Docket No.: 2002-0189-UCR

Note: If any dates fall on a weekend or a holiday, the next working date becomes the due date.

MTO Filed By: Patrick W. Lindner

MTO Filed For: Austin Estates Limited Partnership

Order/CCN Mailed Date: 12/01/2004

Date MTO Filed (OCC date stamp): 12/17/2004

Date MTO Due: 12/27/2004
(23 days after order mailed date)

If no action, MTO overruled: 01/18/2005
(45 days from permit mailed date)

If extended, action due by: 03/01/2005
(90 days from permit mailed date)

Attachments:	❑ **Motion**
Permit & cover letter	❑ **Attached** ❑ **Previously submitted**
Was an RTC prepared (check CCO Tracker & Program)	❑ **YES - if yes, attach copy** ❑ **NO**

cc: (Tracking Sheet Only)
Office of Public Interest Counsel
Program Section
Environmental Law Division - Sr. Atty.
OCC - Final Documents Team Leader

MOTION TO OVERTURN

TO: Chairman Kathleen White
Commissioner Larry Soward
Duncan Norton, General Counsel

DATE:12/21/2004

FROM: LaDonna Castañuela, Chief Clerk

Applicant/Permittee: Hornsby Bend Utility Company, Inc.

Date Administratively Complete: N/A

Permit Type: UCR CCN Nos.: 11978 & 20650; App. Nos.: 33738-C, 32800-C, 33988-C, & 33989-C; Docket No.: 2000-0112-UCR

Note: If any dates fall on a weekend or a holiday, the next working date becomes the due date.

MTO Filed By: Patrick W. Lindner

MTO Filed For: Hornsby Bend Utility Company, Inc.

Order/CCN Mailed Date: 12/01/2004

Date MTO Filed (OCC date stamp): 12/17/2004

Date MTO Due: 12/27/2004
(23 days after order mailed date)

If no action, MTO overruled: 01/18/2005
(45 days from permit mailed date)

If extended, action due by: 03/01/2005
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Attachments:	❑ **Motion**
Permit & cover letter	❑ **Attached** ❑ **Previously submitted**
Was an RTC prepared (check CCO Tracker & Program)	❑ **YES - if yes, attach copy** ❑ **NO**

cc: (Tracking Sheet Only)
Office of Public Interest Counsel
Program Section
Environmental Law Division - Sr. Atty.
OCC - Final Documents Team Leader

ARMBRUST & BROWN, L.L.P.

ATTORNEYS AND COUNSELORS

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FACSIMILE 512-435-2360

JOHN J. CARLTON
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December 15, 2004

Office of the Chief Clerk
Texas Commission Environmental Quality
P. O. Box 13087
Austin, Texas 7811-3087

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 and 2002-1197-UCR

Dear Chief Clerk:

In response to correspondence received from Patrick Lindner of Davidson & Troilo, this letter is to inform you that the firm of Armbrust & Brown, L.L.P. represents Hornsby Bend Utility Company, Inc. Additionally, Hornsby Bend Utility Company, Inc. has **not** filed a Motion to Overturn in the above referenced matters.

If you have any questions, please do not hesitate to contact me.

Sincerely,

ARMBRUST & BROWN, L.L.P.

John J. Carlton

cc: Service List

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December 13, 2004

Office of the Chief Clerk
MC 105
TCEQ
P.O. Box 13087
Austin, Texas 78711-3087

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, 2002-0756-UCR and 2002-1197-UCR

Dear Chief Clerk:

We enclose one original and eleven copies of Hornsby Bend Utility Company, Inc., Motion to Overturn.

Sincerely,

Patrick W. Lindner
For the Firm

PWL:md
Enclosure

Cc:

John J. Carlton
Armbrust & Brown LLP
100 Congress Avenue, Suite 1300
Austin, Texas 78701-4072

PCD #142348

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SOAH DOCKET NO. 582-02-3056
TCEQ DOCKET NOS. 2002-0189-UCR, 2000-0112-UCR, 2002-0756–UCR, AND 2002-1197-UCR

IN THE MATTER OF THE APPLICATIONS OF THE CITY OF AUSTIN TO OBTAIN A WATER CERTIFICATE OF CONVENIENCE AND NECESSITY (APPLICATION NO. 33562-C) AND A SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY (APPLICATION NO. 33563-C) IN HAYS, TRAVIS, AND WILLIAMSON COUNTIES, TEXAS	§	BEFORE THE TEXAS
AND	§	COMMISSION ON
IN THE MATTER OF THE APPLICATIONS OF HORNSBY BEND UTILITY COMPANY, INC. TO AMEND CERTIFICATE OF CONVENIENCE AND NECESSITY NOS. 11978 AND 20650 (APPLICATION NOS. 33738-C, 32800-C, 33988-c & 33989-C) IN TRAVIS COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

AUSTIN ESTATES LIMITED PARTNERSHIP'S MOTION TO OVERTURN

Austin Estates Limited Partnership ("AELP") hereby files its Motion to Overturn and in support thereof shows the following:

1. The Executive Director issued final approval of the above-referenced applications on December 1, 2004. Pursuant to the TCEQ regulations a motion to overturn must be filed within 23 days after the date of the agency provides notice. Therefore, Austin Estates Limited Partnership's Motion to Overturn is timely filed.

2. AELP's Motion to Overturn is limited only to that portion of the Order that includes AELP's property within the wastewater service area of the City of Austin

("Austin"). The Order is defective as it pertains to AELP's property due to lack of due process, specifically the lack of notice, and failure to comply with applicable requirements, described in more detail below. AELP is an affected person for the reasons described below.

3. AELP is the owner of land located within the vast area of undeveloped land to be included within Austin's sewer CCN, if the Order is not set aside. AELP never requested sewer service from Austin or to be included within Austin's sewer CCN area. Austin did not ask AELP if AELP wanted to be within Austin's sewer CCN nor did Austin attempt to give AELP actual notice of the application.

4. By contrast, AELP requested wastewater service from Hornsby Bend Utility Company, Inc. ("Hornsby") as most of AELP's property was located in Hornsby's then-existing wastewater CCN area. Prior to Austin filing its application, Austin approved a preliminary plat of the initial development within AELP's property and the plat specifically states that wastewater service would be provided by Hornsby. AELP entered a contract with Hornsby to obtain wastewater service to the AELP property from Hornsby and AELP paid Hornsby $25,000 for service. By virtue of the contract and the payment of money, AELP became a customer of Hornsby.

5. The Order is based upon a settlement agreement between Austin and Hornsby that expressly refers to the AELP property. Contrary to the terms of the plat approved by Austin and the contract signed by Hornsby, Austin and Hornsby agreed between themselves that Austin should provide wastewater service to AELP's property. The Order implements the terms of the settlement agreement that requires Hornsby to transfer that part of the AELP within Hornsby's wastewater service area to Austin and amend its application to delete the remainder of the AELP property from Hornsby's

application. Due to lack of notice as described below, AELP was never provided an opportunity to object to the settlement agreement.

6. Contrary to the conclusion stated on page 2, beginning on line 19, of the Order, Austin did not mail notice of its application to affected persons, or if mailed notice was sent to some affected persons, mailed notice was not sent to all affected persons, such as AELP. AELP submits that (1) the notice provided by Austin was not sufficient to place AELP on notice of the above-referenced applications and (2) the notice predated the settlement agreement that adversely affected AELP's interests.

7. Pursuant to Water Codes Section 13.246(a), 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 and give notice of the hearing.... "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 and proceeding before the regulatory authority*...." (Emphasis added.) Clearly, in this instance, AELP is an affected person and should have been provided notice of the CCN application. Since Austin had approved a preliminary plat of the first phase of AELP's development designating another wastewater service provider, Austin had a statutory duty to provide actual notice of the application to AELP.

8. Neither Austin nor Hornsby provided actual notice of the settlement agreement to AELP and there is no finding of fact to the contrary. AELP is a customer of Hornsby and as such should be provided notice of the settlement agreement and the transfer of service areas contemplated by the settlement agreement. "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" means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter 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." Section 13.001(21), Texas Water Code. A utility that is transferring its service area to another utility is required to provide notice to its customers of the sale and transfer. The notice requirements for application 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 the 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. 30 TAC § 291.112(c)(1).

9. In addition, Section 5.115 of the Texas Water Code contemplates that an affected person includes a person who may be affected. Based on the statutory definition of affected person, AELP is clearly an affected person and should have been provided notice of these CCN applications, the major amendments to the CCN applications after referral to SOAH, and transfer of that portion of Hornsby's CCN covering AELP's property to Austin.

10. The Settlement Agreement upon which the Order is based required Hornsby to amend its then pending application to delete a portion of the AELP property from its competing application, thus making Austin's application uncontested between the two applicants. This deletion of territory was a major amendment of Hornsby's application after the application had been referred to the State Office of Administrative Hearings. AELP was not given any notice of this major amendment of Hornsby's application and no published notice occurred.

11. The Settlement Agreement is an agreement between Austin and Hornsby designating service areas under Texas Water Code, section 13.248. The Order implements the terms of the Settlement Agreement, but contrary to the express provisions of Texas Water Code section 13.248, neither Austin nor Hornsby provided notice of the agreement to AELP or any other person. Approval of the Order as it pertains to AELP's property is premature before providing the notice and opportunity for hearing required by Water Code, section 13.248.

12. The Order is not based upon findings of fact and conclusions of law required by the Administrative Procedures Act. The Order, as it relates to AELP and its property, is not based upon evidence and there are no findings required by Texas Water Code, section 13.246. The following recitations in the Order, shown by italics, are wrong for the reasons described earlier in this Motion:

A. Page 2, lines 10-12, "The City of Austin provided mailed notices of its water CCN to neighboring utilities and affected persons on September 15, and 26, 2001 and mailed notice of its sewer CCN application to neighboring utilities *and affected persons* on September 25, 2001." Austin did not mail notice to AELP. After notice was published, there was a major amendment to the application.
B. Page 2, lines 19-21, "The notices of the City of Austin's applications to obtain water and sewer CCN *complied* with the notice requirements of 30 Texas Administrative Code (TAC) Section 291.106 and *were sufficient to place affected person on notice of the applications.*" Austin did not provide notice to AELP as required by Water Code, Section 13.246(a). After notice was published, there was a major amendment to the application.
C. Page 3, lines 13-14, "Hornsby Bend mailed notice of Application No. 32800-C, seeking to amend sewer CCN NO. 20650, to neighboring utilities *and affected persons* on December 3, 1999." Hornsby did not mail notice to AELP. After the notice was published, there was a major change in the application.
D. Page 4, lines 1-4, "The notices of Hornsby Bend's applications to amend water CCN No.11978 and sewer CCN No. 20650 complied with the notice requirements of 30 TAC Section 291.106 *and were sufficient to place affected persons on notice of the applications.*" Hornsby did not mail notice to AELP. After the notice was published, there was a major change in the application.

E. Page 6, lines 20-24, The City of Austin possesses the financial, managerial and technical capability to provide continuous and adequate water and sewer utility service to every customer in the area proposed to be included in amended water CCN No. 11322 and amended sewer CCN 20636, *and the certification of the City of Austin is necessary for the service, accommodation, convenience, or safety of the public.*" The record contains no evidence to support this conclusion.

The statement of procedural history within the Order is deficient for the previously stated reasons and because it omits any reference to the following facts:

A. Hornsby made a major amendment to its application after referral to SOAH, abandoning its contractual obligation to provide service to AELP.
B. No notice of the settlement agreement and the terms of the settlement agreement were given to affected persons, including but not limited to AELP.

WHEREFORE, PREMISES CONSIDERED, Austin Estates Limited Partnership respectfully prays that, upon consideration, its Motion to Overturn be granted.

Respectfully submitted,

DAVIDSON & TROILO,
A PROFESSIONAL CORPORATION
7550 West IH-10, Suite 800
San Antonio, Texas 78229-5815
Telephone (210) 349-6484
Facsimile (210) 349-0041

By: _____
Patrick W. Lindner
State Bar No. 12367850

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Austin Estates Limited Partnership's Motion for Reconsideration was served on all parties of record via facsimile transmission or U.S. mail on this, the 13th day of December 2004.

Patrick Lindner

JOHN W. DAVIDSON
ARTHUR TROILO
TERRY TOPHAM
CHEREE TULL KINZIE
R. GAINES GRIFFIN
RICHARD E. HETTINGER
PATRICK W. LINDNER
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* AUSTIN OFFICE

December 13, 2004

Ms. La Donna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application No. 34449-S; 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:

Enclosed please find the original and eleven true and correct copies of Austin Esates Limited Partnership's Motion to Overturn the order issued on the above-referenced matter. Thank you for your attention to this matter. If you have any questions, please call me at 469-6006.

Sincerely,

Maria Sánchez
For Firm

Enclosure

APPLICATION NO. 34449-S

IN THE MATTER OF THE APPLICATION OF THE CITY OF AUSTIN, CCN NO. 20636 TO TRANSFER A PORTION OF CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 20650 FROM HORNSBY BEND UTILITY COMPANY, INC. AND TO AMEND CCN NO. 20636 IN TRAVIS COUNTY, TEXAS	§	BEFORE THE TEXAS COMMISSION OF ENIVRONMETNAL QUALITY

AUSTIN ESTATES LIMITED PARTNERSHIP'S MOTION TO OVERTURN

Austin Estates Limited Partnership ("AELP") hereby files its Motion To Overturn and requests that the Commission review the Executive Director's approval of the above-referenced application and in support would show the following:

On December 1, 2004, the Executive Director issued final approval of the above-referenced application. Pursuant to the TCEQ regulations a motion to overturn must be filed within 23 days after the date of the agency provides notice. Therefore, AELP's Motion to Overturn is timely filed.

AELP asserts that the City of Austin failed to comply with the applicable statutory and regulatory notice requirements as described in more detail below. Notice of the above-referenced application, and the City of Austin's Sewer CCN application were not provided to AELP, therefore, AELP was denied due process.

On February 2, 2002, Hornsby Bend Utility Company, Inc. entered into a contract with AELP to provide up to a maximum of 4,000 Living Unit Equivalents for Wastewater Service.

AELP paid Hornsby Bend Utility Company $25,000 for service. AELP requested wastewater service from Hornsby Bend Utility Company, Inc. as most of AELP's property was located in Hornsby Bend Utility Company, Inc.'s existing wastewater service area. Hornsby Bend Utility Company, Inc. then filed a CCN application with the TCEQ to obtain the right to provide service to all of AELP's nine hundred thirty-one acres. The City of Austin filed a competing application for a wastewater CCN on August 13, 2001. Although a portion of AELP's tract was included in the City's application, the City did not provide notice to AELP. Prior to the City of Austin filing its CCN application, the City of Austin approved a preliminary plat of the initial development within AELP's property. The plat specifically provides that the wastewater service was to be provided by Hornsby Bend Utility Company, Inc.

Pursuant to Section 13.246(a), 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 and give notice of the hearing...." "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 and 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 competition." Section 13.002 Texas Water Code.

In addition, Section 5.115 of the Texas Water Code contemplates that an affected person includes a person who may be affected. Austin Estates Limited Partnership contends that it is affected by this application. Based on the statutory definition of affected person, clearly, Austin Estates Limited Partnership is an affected person and should have been provided notice of this Sale, Transfer and Merger application.

Hornsby Bend Utility Company and the City of Austin executed a settlement agreement

on October 20, 2003. Pursuant to the settlement agreement Hornsby Bend Utility Company agreed to transfer a portion of Hornsby Bend Utility Company's CCN No. 20650 to the City of Austin, and on November 24, 2003, the City of Austin filed Application No. 34449-S with the Commission. AELP contends that it is a customer of Hornsby Bend Utility Company, Inc. and as such should be provided 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" means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter 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." Section 13.001(21) Texas Water Code. However, the City of Austin did not provide notice to AELP. A utility that is transferring its service area to another utility is required to provide notice to its customers of the sale and transfer.

The notice requirements for an application 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 show, mailed notice shall be given to the 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. 30 TAC § 291.112(c)(1).

The Order indicates that, "notice of the application was given to all affected and interested parties." However, AELP did not receive notice of this application. Even if such application was published in the Austin American Statesman, AELP submits that the type of notice was not sufficient to place it on notice of the above-referenced application. Accordingly, AELP did not receive notice of this application and was able to file a request for a public hearing on the application. If AELP had been provided notice of this application it would have certainly

requested a hearing on the application. Because, AELP had contracted with Hornsby Bend Utility Company, Inc. to provide wastewater service, AELP contemplated that Hornsby Bend Utility Company, Inc. would provide the wastewater service to its nine hundred thirty-one acres.

WHEREFORE, PREMISES CONSIDERED, Austin Estates Limited Partnership respectfully prays that, upon consideration, its Motion to Overturn be granted.

Respectfully submitted,

DAVIDSON & TROILO, P.C.
919 Congress, Suite 810
Austin, Texas 78701
(512) 469-6006
Facsimile (512) 473-2159

By: _____
Maria Sánchez
State Bar No. 17570810

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Austin Estates Limited Partnership's Motion to Overturn was served on the Applicant's Attorney, Executive Director's attorney, and Public Interest Counsel via first class U.S. mail on this, the 13th day of December 2004.

_____
Maria Sánchez

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 10, 2004

Mr. Patrick W. Lindner
Law Offices of Davidson & Troilo
7550 W. IH-10, Suite 800
San Antonio, Texas 78229-5815

Re: Application of the City of Austin to transfer a portion of the Certificate of Convenience and Necessity from Hornsby Bend Utility Company, Inc. in Travis County, Texas

Dear Mr. Lindner:

Thank you for your letters to Mr. Glenn Shankle, expressing concern about the above referenced application. Specifically, you indicated your client, Austin Estates Limited Partnership ("AELP"), owns land located within the area subject to the settlement agreement between the City of Austin and Hornsby Bend Utility Company in TCEQ Docket Nos. 2002-0189-UCR and 2000-0112-UCR. The settlement agreement resulted in the City of Austin filing a Sale, Transfer, or Merger Application currently being processed by the TCEQ and assigned Application No. 34449-S.

According to your letter dated September 15, 2004, AELP is concerned regarding the effect of the settlement agreement on the availability and cost of wastewater service and AELP objects to not receiving actual notice of the TCEQ's consideration and possible approval of the agreement designating service areas. AELP requested a contested hearing.

A review of the documents and correspondence that has been submitted indicated AELP had a contract with Hornsby Bend and paid them $25,000 for wastewater service in accordance with the "Agreement to Provide Wastewater Service". Hornsby Bend assigned the contract to the City of Austin. AELP alleges that the City of Austin is refusing to provide service in accordance with the contact and is imposing conditions to obtain or continue service under Texas Water Code, Section 13.250.

TCEQ has reviewed the correspondence that was received by you and the City of Austin. The applicant provided Notice to Customers, Neighboring Utilities and Other Affected Parties on December 30, 2003. The comment period for the timely filing of a protest ended January 30, 2004. Your letter requesting a contested hearing is dated September 15, 2004. Also, it appears this is a Request for Service Issue and not an issue that would require a contested case hearing related to the Sale, Transfer or Merger Application. Therefore, the matter will not be referred for a public hearing at this time.

Please be advised the TCEQ staff has completed the final map and recommendation on this application. The next step will be for the Chief Clerk's Office to post the recommendation on the Executive Director's Agenda for signature by the executive director or a designee no fewer than three and no more than fourteen (14) working days from the date of posting. During the period the item is posted you may submit a Motion to Overturn to the Chief Clerk's Office in accordance with Commission filing procedures.

Thank you for the opportunity to respond to your concerns. If you have any additional concerns, please contact Ms. Sheresia Perryman, of our TCEQ Utilities & Districts Section at (512) 239-3654.

Sincerely,

Michelle Abrams

Michelle Abrams, Team Leader
Utilities Financial Review
Water Supply Division

MA/SP/ac

cc: Mr. Glenn Shankle, Executive Director, TCEQ, MC 109, P.O. Box 13087, Austin, Texas, 78711
Latius R. Prikyl, Phillips & Prikyl, L.L.P., 515 Congress Ave., Suite 2600, Austin, Texas, 78711
Mr. Kenneth Ramirez, Bracewell & Patterson, L.L.P., 111 Congress Avenue, Suite 2300, Austin, Texas, 78701