

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 1, 2004

TO: Persons on the attached mailing list.

RE: City of Austin; CCN Nos. 11322 and 20636; Application Nos. 33562-C and 33563-C
TCEQ Docket Nos. 2002-0189-UCR, 2000-0112-UCR, 2002-0756-UCR
and 2002-1197-UCR; SOAH Docket No. 582-02-3056

This letter is your notice that the Texas Commission on Environmental Quality (TCEQ) executive director has issued final approval of the above-named application.

You may file a **motion to overturn** with the chief clerk. A motion to overturn is a request for the commission to review the TCEQ executive director's approval of the application. Any motion must explain why the commission should review the TCEQ executive director's action.

A motion to overturn must be received by the chief clerk within 23 days after the date of this letter. An original and 11 copies of a motion must be filed with the chief clerk in person or by mail. The Chief Clerk's mailing address is Office of the Chief Clerk (MC 105), TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. On the same day the motion is transmitted to the chief clerk, please provide copies to the applicant, the Executive Director's attorney, and the Public Interest Counsel at the addresses listed on the attached mailing list. If a motion is not acted on by the commission within 45 days after the date of this letter, then the motion shall be deemed overruled.

Individual members of the public may seek further information by calling the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040.

Sincerely,

A handwritten signature in black ink, appearing to read "LaDonna Castañuela".

LaDonna Castañuela
Chief Clerk

LDC/is

DEC 02 2004

City of Austin
Page 2

FOR THE EXECUTIVE DIRECTOR:

Mike Howell
Texas Commission on Environmental Quality
Water Supply Division MC-153
P.O. Box 13087
Austin, Texas 78711-3087

Geoffrey Kirshbaum, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087

FOR THE CHIEF CLERK:

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

File

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Tammy Davis
Office of the Chief Clerk

Date: November 8, 2004

From: Amy Cortinas
Administrative Support
Water Supply Division

Subject: Item for the Executive Director's Signature

City of Austin-Application Number 33562-C and 33563-C, CCN # 11322/20636,
CN # 600135198, RN # 101208072 (water) RN # 103049821 (sewer)

The item listed above is for the Executive Director's Signature. Please present this to Tammy Davis.

Contact Name: Mike Howell

Date Stamp This Page Only

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

CERTIFIED MAIL

Mr. Ken Ramirez
Bracewell & Patterson, L.L.P.
111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043

Re: Application of the City of Austin to amend Water Certificate of Convenience and Necessity (CCN) No. 11322 in Travis, Hays and Williamson Counties; Application No. 33562-C
Order Amending Water CCN

Application of the City of Austin to amend Sewer Certificate of Convenience and Necessity (CCN) No. 20636 in Travis, Hays and Williamson Counties; Application No. 33563-C
Order Amending Sewer CCN

Dear Mr. Ramirez:

Enclosed is a certified copy of the order amending Water and Sewer Certificate of Convenience and Necessity (CCN) Nos. 11322 and 20636.

If you have any questions, please contact Mr. Mike Howell, Drinking Water Quality Team, Public Drinking Water Section, at (512)239-1108 (phone), (512)239-6050 (fax), by email at mhowell@tceq.state.tx.us, or if by correspondence, include MC-155 in the letterhead address.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Abrams".

for Earl Lott, Section Manager
Utilities & Districts Section
Water Supply Division

EL/DH/JS/MA/MH/ac

Enclosures: water and sewer CCN maps

cc: see mailing list

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



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

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|---|---|-----------------------------|
| IN THE MATTER OF THE | § | |
| APPLICATIONS OF THE CITY OF | § | BEFORE THE TEXAS COMMISSION |
| AUSTIN TO OBTAIN A WATER | § | |
| CERTIFICATE OF CONVENIENCE | § | ON |
| AND NECESSITY (APPLICATION | § | |
| NO. 33562-C) AND A SEWER | § | ENVIRONMENTAL QUALITY |
| CERTIFICATE OF CONVENIENCE | § | |
| AND NECESSITY (APPLICATION NO. 33563-C) | § | |
| IN HAYS, TRAVIS, AND WILLIAMSON | § | |
| COUNTIES, TEXAS | § | |
| | § | |
| AND | § | |
| | § | |
| 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 | § | |

ORDER

Applications by the City of Austin to obtain a new water and sewer Certificate of Convenience and Necessity (CCN) in Hays, Williamson, and Travis Counties, Texas, and by Hornsby Bend Utility Company, Inc. (Hornsby Bend) to amend CCN Nos. 11978 and 20650 in Travis County, Texas, were presented to the Executive Director of the Texas Commission on Environmental Quality (Commission) for approval pursuant to Section 5.122 of the Texas Water Code (Code) and Commission rules. The City of Austin's applications have been revised to request amendments to Water CCN No. 11322 and Sewer CCN No. 20636 in Hays, Williamson, and Travis

Counties, Texas, instead of obtaining new water and sewer CCNs.

The City of Austin currently provides water and sewer utility service in Williamson and Travis Counties, Texas, and seeks to also provide water and sewer utility service in Hays County, Texas, and is a retail public utility as defined in Section 13.002(19) of the Code. Hornsby Bend provides water and sewer utility service in Travis County, Texas, and is a retail public utility as defined in Section 13.002(19) of the Code.

On August 13, 2001, the City of Austin filed two applications with the Commission, pursuant to Section 13.241, *et seq.* of the Code, to obtain water and sewer CCNs in Hays, Williamson, and Travis Counties, Texas. The applications were declared administratively complete on August 20, 2001, were accepted for filing on August 31, 2001, by the Commission and assigned Application Nos. 33562-C and 33563-C. The City of Austin provided mailed notice of its water CCN application to neighboring utilities and affected persons on September 25, and 26, 2001, and mailed notice of its sewer CCN application to neighboring utilities and affected persons on September 25, 2001.

Notices by the City of Austin for both the water and sewer CCN applications were published on the following dates in the following publications: September 24, and October 1, 2001, in the Austin American-Statesman, a newspaper generally circulated in Travis County, Texas; September 25, and October 2, 2001, in the San Marcos Daily Record, a newspaper generally circulated in Hays County, Texas; and September 26, and October 3, 2001, in the Williamson County Sun, a newspaper generally circulated in Williamson County, Texas.

The notices of the City of Austin's applications to obtain water and sewer CCNs complied with the notice requirements of 30 Texas Administrative Code (TAC) Section 291.106 and were sufficient to place affected persons on notice of the applications. The Commission received requests for a contested case hearing on the City of Austin's applications from the following entities: Lower

Colorado River Authority, Creedmoor-Maha Water Supply Corporation, Capital Pacific Holdings, L.L.C., AquaSource Utility, Inc., AquaSource Development Company, City of Mustang Ridge, Manville Water Supply Corporation, City of Round Rock, Mr. Kent Taylor (Taylor Commercial), Mr. Ed Wolf, Dessau Utilities, Inc., Ms. H. C. Caruthers, Onion Creek Wastewater Corporation, Hornsby Bend Utility Company, Inc., and Mr. Jack Condon (Legends Way).

Hornsby Bend filed four applications with the Commission: (1) Application No. 32800-C to amend sewer CCN No. 20650, filed October 15, 1999, declared administratively complete on November 23, 1999, and accepted for filing on November 29, 1999; (2) Application No. 33738-C to amend water CCN No. 11978, filed December 31, 2001, declared administratively complete on January 16, 2002, and accepted for filing on January 30, 2002; (3) Application No. 33988-C to amend water CCN No. 11978, filed June 25, 2002, declared administratively complete on July 18, 2002, and accepted for filing on August 1, 2002; and (4) Application No. 33989-C to amend sewer CCN No. 20650, filed June 25, 2002, declared administratively complete on July 18, 2002, and accepted for filing on August 1, 2002.

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. Notice of Application No. 32800-C was published on December 7, and 4, 1999, in the Austin American-Statesman, a newspaper generally circulated in Travis County, Texas.

Hornsby Bend mailed notice of Application No. 33738-C, seeking to amend water CCN No. 11978, to neighboring utilities and affected persons on February 11, 2002. Notice of Application No. 33738-C was published on February 18, and 25, 2002, in the Austin American-Statesman, a newspaper generally circulated in Travis County, Texas.

Hornsby Bend mailed notice of Application Nos. 33988-C and 33989-C, seeking to amend water CCN No. 11978 and sewer CCN No. 20650, to neighboring utilities and affected persons on

August 15, 2002. Notice of Application Nos. 33988-C and 33989-C was published on August 16, and 23, 2002, in the Austin American-Statesman, a newspaper generally circulated in Travis County, Texas.

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. The Commission received requests from the City of Austin for a contested case hearing on all four Hornsby Bend applications.

On July 9, 2002, the Honorable Kerry Sullivan, an administrative law judge (ALJ) of the State Office of Administrative Hearings (SOAH), held a preliminary hearing on the City of Austin's water and sewer CCN applications and Hornsby Bend's Application No. 32800-C to amend sewer CCN No. 20650. Judge Sullivan established jurisdiction and designated the following parties: the City of Austin (City), represented by Ken Ramirez and Monica Jacobs of Bracewell & Patterson, L.L.P.; the Executive Director (ED), represented by John Deering and Geoffrey Kirshbaum; the Public Interest Counsel (PIC), represented by Scott Humphrey; the "Aligned Parties," consisting of AquaSource Development, AquaSource Utility, City of Mustang Ridge, and Creedmoor-Maha Water Supply Corporation, represented by Mark Zeppa; Capital Pacific Holdings, L.L.C. (Capital) represented by Gary Bradley; Hornsby Bend Utility Company, Inc. (Hornsby Bend) represented by John Carlton of Armbrust & Brown, L.L.P.; and the Lower Colorado River Authority (LCRA) represented by Ronald Freeman and Madison Jechow.

On July 16, 2002, Judge Sullivan issued Order No. 1 granting a motion to consolidate the dockets for the City of Austin's Application Nos. 33562-C and 33563-C and Hornsby Bend's Application No. 32800-C (seeking to amend sewer CCN No. 20650) into one docket number, SOAH Docket No. 582-02-3056. On July 16, 2002, the ALJ issued Order No. 2 confirming the action taken during the July 9, 2002, preliminary hearing on those applications and establishing a procedural

schedule. The order established a discovery schedule and control plan, relevant substantive and procedural rules, requirements for pre-filed testimony and exhibits, hearing and pre-hearing dates and locations, the order of presentation for the hearing on the merits, and addressed procedure for the resolution of other pending motions. Discovery commenced in August 2002.

On September 3, 2002, the ALJ held a preliminary hearing on Hornsby Bend's Application No. 33738-C to amend water CCN No. 11978. The ALJ established jurisdiction and consolidated the application with the City of Austin and other Hornsby Bend applications already pending in SOAH Docket No. 582-02-3056.

On December 12, 2002, the ALJ held a preliminary hearing on Hornsby Bend's Application No. 33988-C to amend water CCN No. 11978 and Application No. 33989-C to amend sewer CCN No. 20650. The ALJ established jurisdiction and consolidated the applications with the City of Austin and other Hornsby Bend applications already pending in SOAH Docket No. 582-02-3056.

All parties were eventually dismissed as parties to the contested case hearing on the City of Austin and Hornsby Bend's CCN applications except for the City of Austin, Hornsby Bend, the ED, and the TCEQ PIC (who did not participate in the contested case hearing on these applications). Capital Pacific Holdings, L.L.C.'s request to withdraw party status was granted on October 1, 2002. AquaSource Utility, Inc. and AquaSource Development Company's motion to withdraw party status was granted on February 3, 2003. LCRA was formally dismissed as a party on June 13, 2003. Finally, Creedmoor-Maha Water Supply Corporation and the City of Mustang Ridge were dismissed as parties on July 14, 2003.

On July 14, 2003, the ALJ extended the deadline for filing prefiled testimony and exhibits to August 8, 2003. On July 25, 2003, pursuant to 30 TAC Section 80.101, the ALJ partially granted the City of Austin's motion to sever and remand the portions of City of Austin's water and sewer CCN applications seeking service area south of the Colorado River to the ED as a severed

proceeding involving an uncontested item. The action was taken based on Hornsby Bend's admission that it would not be negatively affected if TCEQ granted the City of Austin water and sewer CCNs for that area. The ALJ dismissed Hornsby Bend as a party to the severed proceeding. The ALJ denied the City of Austin's motion to sever and remand the portions of the City of Austin's water and sewer CCN applications seeking service area north of the Colorado River.

On August 1, 2003, August 22, 2003, and September 17, 2003, the ALJ granted joint motions by the parties to extend the time for filing prefiled testimony and an agreed motion to abate in order to accommodate settlement negotiations. On October 21, 2003, the City of Austin and Hornsby Bend filed a Joint Motion to Remand their applications, supported by the ED, stating that a comprehensive Settlement Agreement had been reached and that no facts or issues remained controverted. The Settlement Agreement is included as "Attachment A" to the Joint Motion to Remand. The motion requested remand to the ED of the remaining portions of City of Austin's CCN applications and Hornsby Bend's applications pursuant to 30 TAC Section 80.101. The ALJ granted the Joint Motion to Remand on November 7, 2003, dismissed the proceeding from the SOAH docket, and remanded the proceeding to the TCEQ ED pursuant to 30 TAC Section 80.101.

As part of the City of Austin and Hornsby Bend's Settlement Agreement, executed on October 20, 2003, maps depicting revised, but not expanded, proposed service areas were agreed upon. Subsequently, those maps were submitted to the ED amending the water and sewer CCN applications originally submitted to the Commission by the City of Austin and Hornsby Bend.

On October 8, 2004, a letter requesting a further amendment to City of Austin's applications was submitted to the Commission. In the letter, the City of Austin requested that its existing CCN numbers be used for the new CCN areas requested in its applications. Effectively, City of Austin's applications to obtain new water and sewer CCNs were revised to request amendments to existing City of Austin water CCN number 11322 and to existing sewer City of Austin CCN number 20636.

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 No. 20636, and the certification of the City of Austin is necessary for the service, accommodation, convenience, or safety of the public. Hornsby Bend 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. 11978 and amended sewer CCN No. 20650, and the certification of Hornsby Bend is necessary for the service, accommodation, convenience, or safety of the public.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

The applications by the City of Austin to amend water and sewer Certificates of Convenience and Necessity Nos. 11322 and 20636 in Hays, Williamson, and Travis Counties, Texas, as reflected in the attached copies of the Commission's official water and sewer service area maps, are hereby approved.

The applications by Hornsby Bend Utility Company, Inc. to amend water and sewer Certificates of Convenience and Necessity Nos. 11978 and 20650 in Travis County, Texas, as reflected in the attached copies of the Commission's official water and sewer service area maps, are hereby approved.

The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to the parties. The Commission shall issue amended water and sewer Certificates of Convenience and Necessity to the City of Austin and Hornsby Bend Utility Company, Inc.

If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issue Date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

For the Commission



Texas Commission on Environmental Quality

By These Presents Be It Known To All That

City of Austin

having duly applied for certification to provide sewer utility service for the convenience and necessity of the public, and it having been determined by this commission that the public convenience and necessity would in fact be advanced by the provision of such service by this Applicant, is entitled to and is hereby granted this

Certificate of Convenience and Necessity No. 20636

to provide continuous and adequate sewer utility service to those service areas in Hays, Williamson, and Travis Counties as by final Order duly entered by this Commission, which Order resulting from Application No. 33563-C is on file at the Commission offices in Austin, Texas; and is a matter of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of City of Austin to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Issued at Austin, Texas, this _____

For the Commission



Texas Commission on Environmental Quality

By These Presents Be It Known To All That

City of Austin

having duly applied for certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this commission that the public convenience and necessity would in fact be advanced by the provision of such service by this Applicant, is entitled to and is hereby granted this

Certificate of Convenience and Necessity No. 11322

to provide continuous and adequate water utility service to those service areas in Hays, Williamson, and Travis Counties as by final Order duly entered by this Commission, which Order resulting from Application No. 33562-C is on file at the Commission offices in Austin, Texas; and is a matter of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the City of Austin to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Issued at Austin, Texas, this _____

For the Commission

MAILING LIST FOR APPLICATION NOS. 33562-C and 33563-C
City of Austin
SOAH Docket No. 582-02-3056
TCEQ Docket No. 2002-0189-UCR

Mr. Ken Ramirez
Bracewell & Patterson, L.L.P.
111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043

Representing: City of Austin

Mr. John J. Carlton
Casey L. Ware
Armbrust & Brown, L.L.P.
100 Congress Avenue, Suite 1300
Austin, Texas 78701-2744

Representing: Hornsby Bend Utility
Company, Inc.

Chris Lippe, P.E., Director
City of Austin Water and Wastewater Utility
625 East 10th Street
Suite 800
Austin, Texas 78701

Bart Jennings
City of Austin
625 E. 10th Street
Suite 800
Austin, Texas 78701

Monica Jacobs
Bracewell & Patterson L.L.P.
111 Congress Avenue
Suite 2300
Austin, Texas 78701-4043

Representing: City of Austin

Mr. Mark Zeppa
Attorney at Law
4833 Spicewood Springs Road
Suite 202
Austin, Texas 78759-8436

Representing: AquaSource Utility, Inc. and
AquaSource Development Company, and
Creedmoor-Maha WSC

Mark W. Smith
Casey, Gentz & Sifuentes, L.L.P.
919 Congress Avenue
Suite 1060
Austin, Texas 78701

Representing: Onion Creek Wastewater Corporation

Gary Bradley
Bradley Development
The Castle
1111 West 11th Street
Austin, Texas 78703

Madison Jechow
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

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

Mr. Ed Wolf
Route 2, Box 236 "D"
Cameron, Texas 76520

Kent Taylor
Taylor Commercial
900 Congress Avenue
Suite L-165
Austin, Texas 78701

Richard Buratti
6617 Argentia Road
Austin, Texas 78757

Jack Condon
405 Beardsley Lane
Austin, Texas 78746

Teresa Reel
3503 Crownover Street
Austin, Texas 78725

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

Mr. Geoff Kirshbaum, Staff Attorney
Legal Services Division - MC 173
Texas Commission on
Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Representing: Lower Colorado River Authority

Representing: Austin Estates Limited Partnership

Representing: The Executive Director of the
Texas Commission on Environmental Quality

Honorable Kerry Sullivan, Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Mr. Scott Humphrey, Attorney
Public Interest Council - MC-103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Amy Cortinas
Water Information & Assistance Section
Water Supply Division - MC 153
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

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

◆ TCEQ Docket Clerk

TCEQ:

Region 11 - Austin Office

Lucie Sainvilus, Program Support Section, MC 153, Water Supply Division

Ms. Michelle Abrams, Utilities & Districts Section, MC 153 Water Supply Division

Please send a copy of the signed order to Central Records to be included in the following Certificate of Convenience and Necessity (CCN) permanent files:

City of Austin, CCN Nos. 11322 and 20636



Kenneth Ramirez
Partner

111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043
Phone: 512.494.3611
Fax: 512.472.9123
kramirez@bracepatt.com

October 18, 2004

Via Fax

Mr. Doug Holcomb
Utilities & Districts Section, MC-153
Water Permits & Resource Management Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Hornsby Bend Utility Company
City of Austin, Texas
TCEQ Docket Nos. 2002-0189-UCR and 2002-0112-UCR

Dear Mr. Holcomb:

The City of Austin's ("City") is writing in response to Austin Estates Limited Partnership's ("AELP") October 12, 2004 letter in which AELP sets forth its misunderstanding of Texas Water Code Section 13.248. Please refer to the City's letter of September 30, 2004 (attached) for further background.

In its October 12 letter, AELP asserts that the City improperly failed to provide AELP with notice of the settlement agreement with Hornsby Bend Utility Company, Inc. ("Hornsby") under Texas Water Code Section 13.248. As you know, Section 13.248 is completely inapplicable to the agreement between Hornsby and the City.

Section 13.248 provides that:

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.



Kenneth Ramirez
Partner

111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043
Phone: 512.494.3611
Fax: 512.472.9123
kramirez@bracepatt.com

September 30, 2004

Mr. Glen Shankle
Executive Director
Texas Commission on Environmental Quality
MC 109
P.O. Box 13087
Austin, Texas 78711-3087

Re: Hornsby Bend Utility Company
City of Austin, Texas
TCEQ Docket Nos. 2002-0189-UCR and 2002-0112-UCR

Dear Mr. Shankle:

The City of Austin ("City" or "Austin") files this letter in response to the September 15, 2004 letter of Austin Estates Limited Partnership ("AELP") regarding the City's application for a wastewater certificate of convenience and necessity ("CCN"), Application No. 33563-C. AELP is complaining that it should have received notice of the City's application to transfer CCN areas to Hornsby Bend pursuant to a settlement agreement reached with that entity.

Additionally AELP now requests a contested case hearing, a full three years after the City filed its original application, and ten months after the administrative law judge remanded this matter back to TCEQ for issuance of the City's CCN.

For the many substantive reasons set forth below, AELP's assertions are legally incorrect and woefully dilatory, and should therefore be disregarded. AELP is not entitled to a hearing or any other relief in this matter.

PROCEDURAL BACKGROUND

The City filed applications for both water and wastewater CCNs on August 13, 2001. AELP's letter addresses the wastewater application only, and raises no questions about the water CCN application, hence this response will be limited to wastewater issues only.



Over the course of the next 16 months, all parties, including the Executive Director, 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 Utility Company ("Hornsby Bend"), on October 20, 2003, and SOAH referred the City's water and wastewater applications back to TCEQ on November 7, 2003. At that time, then, the contested case hearing was over.

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 CCN No. 20650 to the City under existing CCN No. 20636. The City mailed notice of the application to transfer CCN areas as required by TCEQ rules. It is this notice that AELP now complains about not having received even though it was not entitled to receive this or any other notice as explained in detail below. The City submitted copies of the mailed notice and the affidavit that notice was provided to the appropriate utilities on December 30, 2003. 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 during this process as well.

As of this moment, the only remaining task before TCEQ issues final CCNs is for Staff to complete computer mapping of the geographic territory covered by the CCNs. Staff informs us that it will complete the mapping process this week.

THE CITY PROPERLY ISSUED NOTICE FOR BOTH THE WASTEWATER CCN APPLICATION AND THE WASTEWATER CCN TRANSFER APPLICATION

Wastewater CCN Application

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

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 of the requested service area boundaries, and any city with an extra-territorial jurisdiction which overlaps the proposed service area boundaries.

AELP, as a landowner, does not fall within the categories of entities entitled to individual mailed notice under section 291.106, and hence was not entitled to receive such notice. Regardless, the City also, in accordance with 30 TAC §291.106(c) published "the notice in a newspaper having general circulation in the county or counties where a certificate of convenience and necessity is being requested, one each week for two consecutive weeks beginning with the week after the notice is received from the commission." Thus, AELP, like the three individual landowners discussed above who filed timely protest letters,



extraterritorial jurisdiction which overlaps the proposed service are boundaries.
30 TAC §§291.112(c)(1) and 291.112(c)(3).

The City provided mailed notice, with TCEQ's approval, to entities that fit the above regulatory criteria. 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" The City once again met all required notice obligations.

AELP Is Not A Customer Under Applicable Regulations

It is undisputed that AELP does not fall within the category of neighboring municipality or retail public utility. Instead, AELP is now claiming to be a "customer" who is entitled to notice. AELP has never been a customer of Hornsby Bend or the City, and therefore was not entitled to mailed notice of the transfer. AELP is simply wrong about this issue.

"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 in turn 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).

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At best, the agreement between Hornsby Bend and AELP is a commitment to provide future wastewater service in the event that AELP develops its Tract, but it does not, in and of itself, constitute wastewater service or even an act performed by Hornsby Bend in the performance of its duties 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. Consequently, AELP was not in the past, and is not currently, a customer of either Hornsby Bend or the



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

| | |
|-----------------|----------------|
| Marty Terry | (512) 974-2312 |
| Bart Jennings | (512) 972-0111 |
| Geoff Kirshbaum | (512) 239-0606 |
| Patrick Lindner | (210) 349-0041 |
| John Carlton | (512) 435-2360 |

Fax Number: 016928.000013

This fax is from Kenneth Ramirez

and is being transmitted on 10/19/2004 at _____. The length of this fax, (including the cover letter), is 10 pages.

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Message



TNRCC Route Slip

Date: 10/20/04

| | | | |
|------------|---------------------|--------------|--------------------------|
| TO: | | FROM: | |
| Buildi | MIKE HOWELL | Build | GEOFF KIRSHBAUM |
| Divisi | WATER SUPPLY | Divi | ENVIRONMENTAL LAW |
| Secti | TCEQ- MC 153 | Sec | TCEQ- MC 173 |
| | BLDG. F | | BLDG. A |

Attachment(s) for:

- | | |
|---|--|
| <input type="checkbox"/> Information | <input type="checkbox"/> Approval |
| <input type="checkbox"/> Review | <input type="checkbox"/> Your Signature |
| <input type="checkbox"/> Comment/Response | <input type="checkbox"/> Signature of: _____ |

Comments: _____



111 Congress Avenue, Suite 2300
 Austin, Texas 78701-4043
 Phone: 512.472.7800
 Toll Free: 800.472.1401

Fax Cover Letter

Please deliver the following pages to Marty Terry (512) 974-2912
Bart Jennings (512) 972-0111
Mike Howell (512) 239-6145

This fax is from Eric Groten
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111 Congress Avenue, Suite 2300
Austin, Texas 78701-4061
Phone: 512.472.7800
Fax: 512.472.9123

October 8, 2004

Geoffrey Kirshbaum
Texas Commission on Environmental Quality
Post Office Box 13087
MC-173
Austin, TX 78711-3087

Re: TCEQ Docket Nos. 2002-0189-UCR and 2002-0112-UCR

Dear Geoff:

As you know, TCEQ's mapping of the City of Austin's water and sewer certificates of convenience and necessity ("CCNs") is close to being complete. There are existing CCN areas - the product of separate CCN area transfers - held by the City within the area covered by the above-referenced applications. Suzanne Jaster, the staff person handling the mapping, has indicated that the maps would appear cleaner and less confusing if the existing CCN numbers were also used for the new areas. In order to simplify the final maps and avoid the appearance that the areas are being served by different providers, the City requests that its existing CCN numbers be used for its new CCN areas.

Please contact me at (512) 494-3620 if you have any questions. I appreciate your assistance.

Very truly yours,

Bracewell & Patterson, L.L.P.

A handwritten signature in cursive script, appearing to read 'Monica Jacobs'.

Monica Jacobs

MMJ/mk



Geoffrey Kirshbaum

October 8, 2004

Page 2

cc: Marty Terry
Bart Jennings
Mike Howell
Suzanne Jaster



111 Congress Avenue, Suite 2300
 Austin, Texas 78701-4043
 Phone: 512.472.7800
 Toll Free: 800.472.1401

Fax Cover Letter

Please deliver the following pages to Geoffrey Kirshbaum

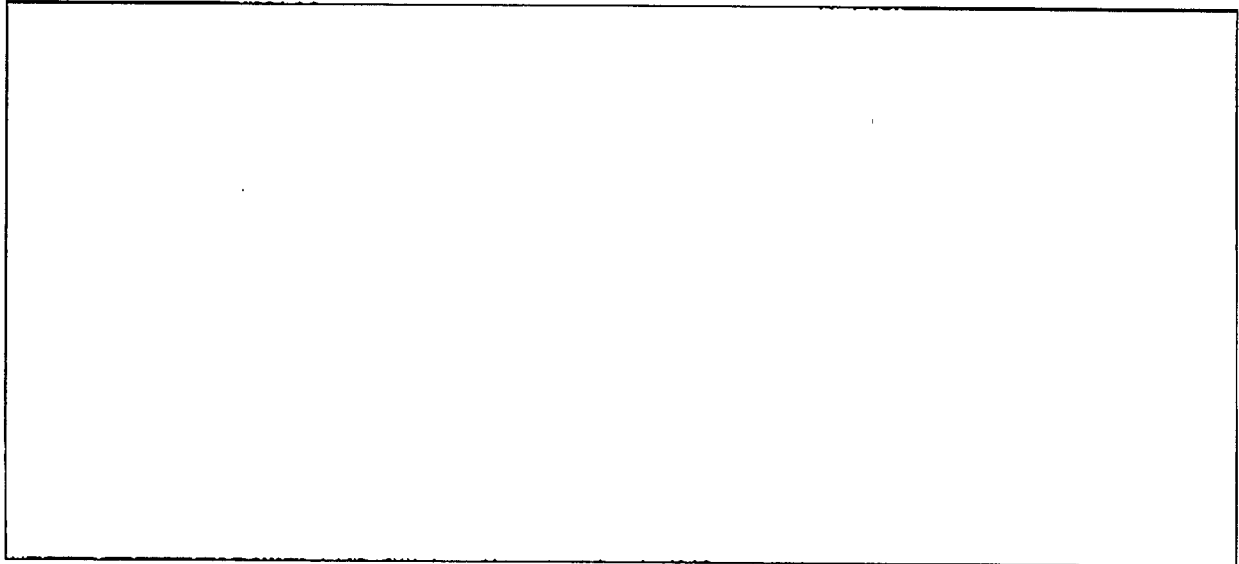
Fax Number: 239-0606

This fax is from Miki Kirby

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RECEIVED



Kenneth Ramirez
Partner

111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043
Phone: 512.494.3611
Fax: 512.472.9123
kramirez@bracepatt.com

September 30, 2004

Mr. Glen Shankle
Executive Director
Texas Commission on Environmental Quality
MC 109
P.O. Box 13087
Austin, Texas 78711-3087

Re: Hornsby Bend Utility Company
City of Austin, Texas
TCEQ Docket Nos. 2002-0189-UCR and 2002-0112-UCR

Dear Mr. Shankle:

The City of Austin ("City" or "Austin") files this letter in response to the September 15, 2004 letter of Austin Estates Limited Partnership ("AELP") regarding the City's application for a wastewater certificate of convenience and necessity ("CCN"), Application No. 33563-C. AELP is complaining that it should have received notice of the City's application to transfer CCN areas to Hornsby Bend pursuant to a settlement agreement reached with that entity.

Additionally AELP now requests a contested case hearing, a full three years after the City filed its original application, and ten months after the administrative law judge remanded this matter back to TCEQ for issuance of the City's CCN.

For the many substantive reasons set forth below, AELP's assertions are legally incorrect and woefully dilatory, and should therefore be disregarded. AELP is not entitled to a hearing or any other relief in this matter.

PROCEDURAL BACKGROUND

The City filed applications for both water and wastewater CCNs on August 13, 2001. AELP's letter addresses the wastewater application only, and raises no questions about the water CCN application, hence this response will be limited to wastewater issues only.



Approximately 931 acres of AELP's property ("AELP Tract") falls within the CCN area originally requested by the City. The City sent notice of its original application by individual mail to 133 entities, including all cities, retail utilities, and districts whose corporate boundaries or service area falls within five miles of the City's proposed service areas. Of these 133 notices, 50 specifically announced the City's wastewater application. The City sent these notices by certified mail on September 24, 2001, pursuant to 30 TAC §291.106(b)(1).

In addition, the City published newspaper notice in Travis, Hays, and Williamson Counties. Specifically, newspaper notice of the City's wastewater 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.

During the comment period, the TCEQ received eleven protest letters, including three from individual landowners. AELP was silent during this process. TCEQ later referred the City's applications to the State Office of Administrative Hearings ("SOAH"). The City and the landowners settled their differences before the Administrative Law Judge took jurisdiction. At the preliminary hearing, an additional landowner (Gary Bradley for Capital Pacific Holdings, LLC) and a municipality (the City of Mustang Ridge), were granted party status.



Over the course of the next 16 months, all parties, including the Executive Director, 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 Utility Company ("Hornsby Bend"), on October 20, 2003, and SOAH referred the City's water and wastewater applications back to TCEQ on November 7, 2003. At that time, then, the contested case hearing was over.

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 CCN No. 20650 to the City under existing CCN No. 20636. The City mailed notice of the application to transfer CCN areas as required by TCEQ rules. It is this notice that AELP now complains about not having received even though it was not entitled to receive this or any other notice as explained in detail below. The City submitted copies of the mailed notice and the affidavit that notice was provided to the appropriate utilities on December 30, 2003. 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 during this process as well.

As of this moment, the only remaining task before TCEQ issues final CCNs is for Staff to complete computer mapping of the geographic territory covered by the CCNs. Staff informs us that it will complete the mapping process this week.

THE CITY PROPERLY ISSUED NOTICE FOR BOTH THE WASTEWATER CCN APPLICATION AND THE WASTEWATER CCN TRANSFER APPLICATION

Wastewater CCN Application

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

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 of the requested service area boundaries, and any city with an extra-territorial jurisdiction which overlaps the proposed service area boundaries.

AELP, as a landowner, does not fall within the categories of entities entitled to individual mailed notice under section 291.106, and hence was not entitled to receive such notice. Regardless, the City also, in accordance with 30 TAC §291.106(c) published "the notice in a newspaper having general circulation in the county or counties where a certificate of convenience and necessity is being requested, one each week for two consecutive weeks beginning with the week after the notice is received from the commission." Thus, AELP, like the three individual landowners discussed above who filed timely protest letters,



received the required published notice of the City's wastewater CCN application. Individual notice to landowners is not required.

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's CCN applications and reporting on some reactions to those applications on August 21, 2001. The article included a map of the potentially affected areas. And finally, the Austin Business Journal ran a front page article on the City's applications in its April 26-May 2, 2002 issue. Both of these articles appeared well before the July 9, 2002 preliminary hearing at SOAH.

In sum, the City not only properly met all applicable regulatory notice requirements, but went out of its way to inform the public as to its plans. It is almost impossible to understand how AELP could not have known about the CCN applications, yet they chose to remain silent.

Wastewater CCN Transfer Application

At the time that Hornsby Bend and the City entered into their settlement agreement, both parties had competing applications on file at TCEQ for sewer CCNs that included a portion of the AELP Tract. As part of the settlement, the parties agreed that:

1. The City would remove certain tracts from both its water and wastewater CCN applications, thereby removing acreage from the noticed application areas;
2. Hornsby Bend would remove certain tracts from both its water and wastewater CCN applications, thereby removing acreage from the noticed application areas; 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 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).

The City provided mailed notice, with TCEQ's approval, to entities that fit the above regulatory criteria. 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" The City once again met all required notice obligations.

AELP Is Not A Customer Under Applicable Regulations

It is undisputed that AELP does not fall within the category of neighboring municipality or retail public utility. Instead, AELP is now claiming to be a "customer" who is entitled to notice. AELP has never been a customer of Hornsby Bend or the City, and therefore was not entitled to mailed notice of the transfer. AELP is simply wrong about this issue.

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City. As such, AELP had no right to notice under 30 TAC §291.112(c), and is not entitled to be heard at this late date because of alleged lack of notice.

THE SETTLEMENT AGREEMENT BETWEEN HORNSBY BEND AND THE CITY DID NOT CONSTITUTE A MAJOR AMENDMENT REQUIRING NEW NOTICE

The only change to the City's application resulting from the settlement agreement was the *removal* of a portion of the originally requested CCN area from the application. Notice of such removal was not required by any rule or law. In fact, it would not have made any sense to publish notice of this removal, as such "notice" would have been nothing more than mere announcement of the status quo – that the City is *not* applying for a CCN for that area. Such notice would have served no purpose.

Moreover, even if removal of areas from the City's application did constitute a major amendment, AELP was not entitled to notice in the first place, for reasons discussed above, and therefore would not receive the revised notice.

Finally, the original portion of the AELP Tract that was included in the City's application remained in the City's application and was not affected by the settlement. The other half of the AELP Tract—the portion that was in Hornsby Bend's existing CCN—was transferred to the City through a separate transfer application as described above. Therefore, the removal of area from other portions of the City's application had no affect whatsoever on the AELP Tract.

For the above reasons, the City requests that TCEQ take no action with respect to AELP's September 15, 2004 letter.

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

/mk
Enclosure

cc: Bart Jennings, City of Austin
Marty Terry, City of Austin
Doug Holcomb, TCEQ

*** RX REPORT ***

RECEPTION OK

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* AUSTIN OFFICE

September 15, 2004

Mr. Glenn Shankle
Executive Director
TCEQ
MC 109
P.O. Box 13087
Austin, TX 78711-3087

COPY

210
2016

RE: Hornsby Bend Utility Company
City of Austin, Texas
TCEQ Docket Nos. 2002-0189-UCR and 200-0112-UCR

Dear Mr. Shankle:

The above-referenced utilities filed competing applications for wastewater service areas in eastern Travis County and then entered a settlement agreement designating service areas and transfer of service areas under the existing certificates.

Austin Estates Limited Partnership, a client of this firm, owns land located within the area subject to the settlement agreement.

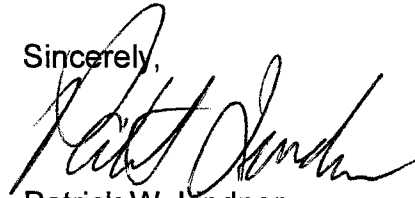
Austin Estates Limited Partnership is concerned regarding the effect of the settlement agreement on the availability and cost of wastewater service. Austin Estates Limited Partnership objects to not receiving actual notice of the TCEQ's consideration and possible approval of the agreement designating service areas. Austin Estates Limited Partnership was known by the parties to the settlement as a person directly affected by the agreement designating service areas/transferring CCN because Austin Estates Limited Partnership was a party to an agreement captioned "Agreement to Provide Wastewater Service. However, notice was not mailed contrary to TCEQ rules, specifically rule 291.112(c)(1) requiring mailed notice to customers affected by a transfer of a CCN and 291.106(d). Additionally and alternatively, the settlement agreement constituted a major amendment of the application requiring new notice under rule 281.23(a).

PCD # 141413

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OF
ENVIRONMENTAL QUALITY

If final action on these applications has not been taken, Austin Estates Limited Partnership requests a contested hearing. If final action has been taken, Austin Estates Limited Partnership requests reconsideration by the Executive Director or a rehearing by the Commission. If final action has been taken and the request for reconsideration/motion for rehearing is not timely, Austin Estates Limited Partnership requests the Commission to reopen the matter under rule 50.17(a).

Sincerely,



Patrick W. Lindner
For the Firm

PWL:md

COPY

Cc:

Crockett Camp, Austin Estates Limited Partnership
Doug Holcomb, MC 109, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087
Latus R. Prikyl, Phillips & Prikyl, L.L.P., 515 Congress Ave., Ste, 2600, Austin,
Texas 78711