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Addendum StartPage: 0

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

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SOAH DOCKET NO. 582-02-3056
TNRCC DOCKET NO. 2002-0189-UCR 2002 JUL -1 PM 4:05

IN THE MATTER OF THE	§	BEFORE THE STATE OFFICE
APPLICATIONS OF THE CITY OF	§	OF PUBLIC UTILITIES
AUSTIN FOR A WATER	§	
CERTIFICATE OF CONVENIENCE	§	OF
AND NECESSITY (NO. 33562-C) AND	§	
A WASTEWATER CERTIFICATE OF	§	
CONVENIENCE AND NECESSITY	§	ADMINISTRATIVE HEARINGS
(NO. 33563-C)	§	

**THE CITY OF AUSTIN'S MOTION TO
DEFINE THE SCOPE OF THE HEARING**

TO: The Honorable William G. Newchurch, Administrative Law Judge, State Office Of
Administrative Hearings, 300 W. 15th Street, Austin, Texas 78711

The City of Austin ("City") files this Motion to Define the Scope of the Hearing to request that the Administrative Law Judge ("ALJ") issue an order clarifying and addressing the following: 1) the City's burden of proof; 2) issues to be considered at hearing; and 3) consolidation of related applications. The City's arguments regarding these points are detailed in this motion, in the order outlined above, in Parts II through IV; Part I contains a brief procedural history of this proceeding, and Part V contains the City's final conclusions and prayer for relief.

I. PROCEDURAL HISTORY

The City filed its applications for water and sewer certificates of convenience and necessity ("CCN") on August 13, 2001 ("Applications"). The Applications were declared administratively complete on August 20, 2001. The City issued individual and published notices under 30 TAC § 291.106; the last date of publication was October 3, 2001. According to the Texas Natural Resource Conservation Commission ("TNRCC") twelve individuals or entities filed timely written requests for a contested case hearing. Of those twelve, six have since resolved their concerns with the City and withdrawn their requests for a contested case hearing.

The City has now filed written responses to the remaining six requests. TNRCC received two untimely requests for hearing after the comment period ended: (1) John Condon's ("Condon") protest letter on November 30, 2001; and (2) the City of Mustang Ridge's ("Mustang Ridge") letter of protest on June 20, 2002. The City also filed responses to the Condon and Mustang Ridge letters.

II. BURDEN OF PROOF

As the City understands it, as a CCN applicant, it has to meet the requirements of Texas Water Code § 13.246(c) and 30 TAC § 291.102(a) and (d) in order to meet its regulatory burden.

Because the Applications are now referred for a contested case hearing, certain of these issues, if raised by legitimate protestants during the comment period, will be the disputed issues at the hearing (see Part III, Issues to be Considered at Hearing). One issue, raised by both the Executive Director ("ED") in its March 6, 2002 Request for Information and several protestants (specifically, AquaSource Development Company, Inc., AquaSource Utility, Inc., and Creedmoor-Maha Water Supply Company), is the issue of the need for service in the proposed areas. 30 TAC § 291.102(d)(2). The City disagrees with TNRCC staff's position regarding how need for service can be satisfactorily shown and how the burden of proof on the factor may be met.

As the City understands it, TNRCC staff currently requires that applicants provide written service extension requests for each requested area to demonstrate a need for additional service. The informal policy of insisting upon service extension requests to show a need for utility service conflicts with municipalities' legitimate need for effective, long-term, regional planning in their extra-territorial jurisdictions ("ETJs"). Whether there is a legitimate need for service is a critical issue that must be analyzed under both Texas Water Code § 13.246(c) and 30 TAC § 291.102(d)(2). One purpose served by this requirement is to help ensure that the

application is not a speculative "land grab." The City respectfully suggests, however, that the agency staff's analysis of this issue need not conflict with a city's effective regional planning. Indeed, as discussed below, policy established by the Texas Legislature strongly suggests that the two concepts should coexist.

Article 3, section 49-d of the Texas Constitution, which concerns the Texas Water Development Board ("TWDB"), begins with a broad but unmistakably clear policy statement:

It is hereby declared to be the policy of the State of Texas to encourage the optimum development of the limited number of feasible sites available for the construction or enlargement of dams and reservoirs for conservation of the public waters of the state, which waters are held in trust for the use and benefit of the public, and *to encourage the optimum regional development of systems built for the filtration, treatment, and transmission of water and wastewater.*

(Emphasis added). This policy of encouraging optimum regional development of utility systems has been implemented via the following statutes that govern the TWDB and TNRCC, most notably the statutes dealing with the legislatively mandated State Water Plan and its regional water plans:

- (1) Texas Water Code § 16.051(a), regarding the State Water Plan, requiring that the Plan incorporate regional water plans and "provide for the orderly development, management, and conservation of water resources . . .;"
- (2) Texas Water Code § 13.241(d), which requires applicants to demonstrate that regionalization or consolidation with another retail public utility is not economically feasible before constructing physically separate water or sewer systems;
- (3) Texas Water Code § 13.183(c), which provides that water and sewer rates may be based upon factors such as encouraging regionalization;
- (4) The inclusion of a definition of regionalization, added in 2001, in Texas Water Code § 15.001, which defines regionalization to be "development of a water supply or wastewater collection and treatment system that incorporates multiple service areas into an area-wide service facility or any such system that serves an

area that includes more than a single county, city, special district, or other political subdivision of the state;"

- (5) Texas Water Code § 26.081, which states that "[t]he legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state;"
- (6) Texas Health and Safety Code § 341.0315(b), which provides that "[t]he commission shall encourage and promote the development and use of regional and area-wide drinking water supply options;" and
- (7) The Region K Water Supply Plan for the Lower Colorado Regional Water Planning Group, which identifies the City as one of two officially designated "major water providers" for the region (p. 1-37), and states that, as such, the City is "expected to meet the growing needs of [its] existing customers." (p. ES-1).

The optimum regional development of complex and costly treatment and transmission systems can only occur as the result of effective long-term planning, which is exactly why the City has applied for these CCNs. Patchwork, ad hoc changes and additions to the CCN landscape of any city's ETJ wreak havoc on the municipal planning process, making "optimum" planning impossible. Agency concerns regarding speculative CCNs should pose no barriers when a city the size of Austin is seeking CCNs for its own ETJ, especially when, as here, the City's own growth projections and land use policies clearly support the need for utility service in the foreseeable future. Under these circumstances, requiring any municipality to proffer actual service extension requests for each area in order to obtain a CCN directly thwarts that city's ability to undertake necessary planning.

The City of Austin—like many cities—has a history of expansion of its corporate limits in order to provide a consistent level of service to its residents. Experience has shown that when the City annexes an area that includes an existing private or investor-owned utility, the City is usually faced with substantial retrofitting costs in order to meet required urban-level, City

standards, which include the provision of water service adequate for fire flow. *See, e.g.,* Tex. Loc. Gov. Code § 43.056(g).

TNRCC staff's current unwritten policy of requiring that applicants provide written service extension requests for each requested area to demonstrate a need for additional service has the effect of stymying long-term planning efforts. Municipal utility lines are designed and constructed to meet projected future needs, not just those immediate needs represented by recent service requests. Limiting the service boundaries to be included within a CCN strictly on account of existing service requests, without regard to the nature and location of projected development, severely undermines effective municipal utility planning by making it a reactive, rather than proactive, process. In addition, municipal ETJs, by definition, are areas designated for the purpose of actively promoting the health, safety and welfare of persons residing in and adjacent to municipalities. Tex. Loc. Gov. Code § 42.001. Finally, and perhaps most importantly, there is no law, regulation, or rule requiring that need for service be demonstrated in the manner currently required by TNRCC staff.

The City does not dispute that service extension requests may be used to show anticipated need for service; however, the City does dispute that service extension requests are the only way to demonstrate the need for service. Data concerning population and other demographic projections, wholesale service agreements, subdivision development, planned major arterials, etc., should be considered in conjunction with service extension requests in the "need for service" analysis.

Recent SOAH precedent supports the consideration of other factors and data in addition to service extension requests when analyzing need for service. *See, e.g.,* Proposal for Decisions: PFD: Application of the City of Fate and Application of Blackland Water Supply Corporation;

SOAH Docket No. 582-96-2219 and 582-97-0818, and TNRCC Docket Nos. 96-1641-UCR and 97-0320-UCR; August 3, 1998 - ALJ Mike Rogan; PFD: Application of City of Pearland; SOAH Docket No. 582-96-0994 and TNRCC Docket Nos. 98-0377 and 98-0378-UCR; April 21, 1999 - ALJ Lilo Pomerleau; and PFD: Application of City of Mission; SOAH Docket No. 582-99-1202 and TNRCC Docket No. 1999-0601-UCR; March 10, 2000 – ALJ Lilo Pomerleau.

Consequently, the City requests that the ALJ clarify that service extension requests are not the only legitimate method for demonstrating need for service.

III. ISSUES TO BE CONSIDERED AT HEARING

Hearing requests for CCN applications are processed under Subchapter B of Chapter 55 of Volume 30 of the Texas Administrative Code. 30 TAC § 291.107(d); 30 TAC § 55.101(g)(5). Chapter 50, regarding action on applications, then directs that all applications that are declared administratively complete on or after September 1, 1999 and are referred to SOAH for hearing, shall be referred with an accompanying list of disputed issues provided by the commission or the ED. 30 TAC § 50.115(f). "Disputed issues" are defined by section 50.115(f) to be those issues "defined by law governing these applications, unless the commission orders otherwise under § 80.6(d) of this title. . . ."

In addition, the ALJ is also permitted to consider certain issues that were not raised during the public comment period as long as the ALJ determines that the issues are material, supported by evidence, and there are good reasons for the failure to supply available information regarding the issue during the public comment period. 30 TAC §§ 50.115(f), 80.6(d), and 80.4(c)(16).

In other words, issues properly considered at hearing are:

- (1) issues referred by the ED pursuant to section 50.115(f); and
- (2) issues added by the ALJ in accordance with section 80.4(c)(16).

Therefore, while material issues raised during the public comment period are appropriate for consideration during the contested case hearing process, issues not raised during the public comment period can only be addressed during the hearing process if the ALJ determines that there are good reasons for the failure to raise these issues during the public comment period.

Accordingly, the remainder of Part III of this Motion summarizes the legal issues raised by the protestants in their protest letters. The City requests that the ALJ issue an order: (1) clarifying that only those issues raised in the various Protestants' comment letters (and appearing in the right-hand column on pages 8 and 9) should be included in the scope of the hearing; and (2) that each individual Protestant's case is limited only to those issues raised in that Protestant's comment letter (pages 8 and 9); and (3) in the event that certain Protestants are denied party status issues raised by that Protestant not be included in the scope of hearing as they will no longer be relevant.

Issues that Should be Included in the Hearing With Respect to Each Protestant

<u>PROTESTANT</u>	<u>RELEVANT REGULATION(S)</u>
AquaSource Development Company, Inc. ("AquaSource Development") – Water	30 TAC § 291.102(d)(2)
AquaSource Development Company, Inc. ("AquaSource Development") – Sewer	30 TAC § 291.102(d)(2)
AquaSource Utility, Inc. ("AquaSource Utility") – Water	30 TAC § 291.102(d)(2), (3), (5), (8)
AquaSource Utility, Inc. ("AquaSource Utility") – Sewer	30 TAC § 291.102(d)(2), (3), (5), (7), (8) 30 TAC § 291.102(a)
Gary Bradley ("Bradley") – Water	None
Gary Bradley ("Bradley") – Sewer	None
Creedmoor-Maha Water Supply Company ("Creedmoor") – Water	30 TAC § 291.102(d)(2), (3), (5), (8)
Creedmoor-Maha Water Supply Company ("Creedmoor") – Sewer	30 TAC § 291.102(d)(2), (3), (5), (7), (8) 30 TAC § 291.102(a)
Hornsby Bend Utility Company, Inc. ("Hornsby Bend") – Water	30 TAC § 291.102(d)(3)
Hornsby Bend Utility Company, Inc. ("Hornsby Bend") – Sewer	30 TAC § 291.102(d)(3)
Lower Colorado River Authority ("LCRA") - sewer	30 TAC § 291.102(d)(3)
John Condon – water	30 TAC § 291.102(d)(6)

<u>PROTESTANT</u>	<u>RELEVANT REGULATION(S)</u>
John Condon – sewer	30 TAC § 291.102(d)(6)
City of Mustang Ridge ("Mustang Ridge") – water	None
City of Mustang Ridge – sewer	None
Executive Director	30 TAC § 291.102(d)(2)

**Issues Raised in Protest Letters
During the Public Comment Period**

**Protestant AquaSource Development:
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Most of the area sought is not currently in need of centralized water service.	Need for service in the proposed area. 30 TAC § 291.102(d)(2).
AquaSource Development could be adversely affected because granting the application could prevent expansion of AquaSource Development's existing service.	Detriment to AquaSource Development if water CCN is granted to the City. 30 TAC § 291.102(d)(3). Not a material issue because AquaSource Development is not a utility and has no existing service area.
AquaSource Development could be adversely affected because granting the application could take away portions of its ¼-mile service area buffer zone.	Detriment to AquaSource Development if water CCN is granted to the City. 30 TAC § 291.102(d)(3). Not a material issue because AquaSource Development is not a utility and does not have a ¼ mile service area buffer zone.
AquaSource Development is more qualified and can provide more cost-effective and timely service to the requested areas.	Feasibility of obtaining same from an adjacent retail public utility—30 TAC § 291.102(d)(5). Probable improvement in service or lowering of cost to consumers in the proposed area. 30 TAC § 291.102(d)(8). Not a material issue since AquaSource Development is not a utility.
Granting the CCN to the City could deter legitimate development and growth in the requested area to the detriment of AquaSource Development.	Detriment to AquaSource Development if water CCN is granted to the City. 30 TAC § 291.102(d)(3). Not a relevant or material issue since land use and growth are not issues covered by the law governing this application.

**Protestant AquaSource Development:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Most of the area sought is not currently in need of centralized sewer service.	Need for service in the proposed area—30 TAC § 291.102(d)(2).
AquaSource Development could be adversely affected because granting the application could prevent expansion of AquaSource Development's existing service.	Detriment to AquaSource Development if sewer CCN is granted to the City—30 TAC § 291.102(d)(3). Not a material issue because AquaSource Development is not a utility and has no existing service area.
AquaSource Development could be adversely affected because granting the application could take away portions of its ¼-mile service area buffer zone.	Detriment to AquaSource Development if sewer CCN is granted to the City—30 TAC § 291.102(d)(3). Not a material issue because AquaSource Development is not a utility and does not have a ¼ mile service area buffer zone.
AquaSource Development is more qualified and can provide more cost-effective and timely service to the requested areas.	Feasibility of obtaining service from an adjacent retail public utility—30 TAC § 291.102(d)(5). The probable improvement in service or lowering or costs to consumers in that area—30 TAC § 291.102(d)(8). Not a material issue since AquaSource Development is not a utility.
Granting the CCN to the City could deter legitimate development and growth in the requested area to the detriment of AquaSource Development.	Detriment to AquaSource Development if sewer CCN is granted to the City—30 TAC § 291.102(d)(3). Not a material issue since land use and growth are not issues covered by the law governing this application.

**Protestant AquaSource Utility:
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Most of the area sought is not currently in need of centralized water service.	Need for service in the proposed area—30 TAC § 291.102(d)(2).
AquaSource Utility could be adversely affected because granting the application could prevent expansion of AquaSource Utility's existing service.	Detriment to AquaSource Utility if water CCN is granted to the City—30 TAC § 291.102(d)(3).
AquaSource Utility could be adversely affected because granting the application could take away portions of its ¼-mile service area buffer zone.	Detriment to AquaSource Utility if water CCN is granted to the City—30 TAC § 291.102(d)(3).
AquaSource Utility is more qualified and can provide more cost-effective and timely service to the requested areas.	Feasibility of obtaining service from an adjacent retail public utility—30 TAC § 291.102(d)(5). The probable improvement in service or lowering or costs to consumers in that area—30 TAC § 291.102(d)(8).
Granting the CCN to the City could deter legitimate development and growth in the requested area to the detriment of AquaSource Utility.	Detriment to AquaSource Utility if water CCN is granted to the City—30 TAC § 291.102(d)(3).

**Protestant AquaSource Utility:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Most of the area sought is not currently in need of centralized sewer service.	Need for service in the proposed area—30 TAC § 291.102(d)(2).
AquaSource Utility could be adversely affected because granting the application could take away portions of its ¼-mile service area buffer zone.	Detriment to AquaSource Utility if sewer CCN is granted to the City—30 TAC § 291.102(d)(3).
AquaSource Utility could be adversely affected if the City uses package plants in the AquaSource Utility well area and is unable to properly operate them, thereby potentially affecting AquaSource Utility's water supply.	Technical capability of the applicant—30 TAC § 291.102(a).
Potential problems with the City's future sewer facilities in the AquaSource Utility's water service area may affect the environmental integrity within this area.	Environmental integrity—30 TAC § 291.102(d)(7).
The City's construction and operation of a sewer system within AquaSource Utility's water service area may disrupt AquaSource Utility's water service.	Need for service in the proposed area—30 TAC § 291.102(d)(2).
AquaSource Utility is more qualified and can provide most cost-effective and timely service to the requested areas.	Feasibility of obtaining service from an adjacent retail public utility—30 TAC § 291.102(d)(5). The probable improvement in service or lowering or costs to consumers in that area—30 TAC § 291.102(d)(8).
Granting the CCN to the City could deter legitimate development and growth in the requested area to the detriment of AquaSource Utility.	Detriment to AquaSource Utility if sewer CCN is granted to the City—30 TAC § 291.102(d)(3). Not a material issue since land use and growth are not issues covered by the law governing this application.

**Protestant Bradley:
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Bradley represents the ownership of property within Creedmoor's water service area.	None.

**Protestant Bradley:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Bradley represents the ownership of property within Creedmoor's water service area.	None.

**Protestant Creedmoor:
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Most of the area sought is not currently in need for centralized water service.	Need for service in the proposed area—30 TAC § 291.102(d)(2).
Creedmoor could be adversely affected because granting the application could prevent expansion of Creedmoor's existing service.	Detriment to Creedmoor if water CCN is granted to the City—30 TAC § 291.102(d)(3).
Creedmoor could be adversely affected because granting the application could take away portions of its ¼-mile service area buffer zone.	Detriment to Creedmoor if water CCN is granted to the City—30 TAC § 291.102(d)(3).
Creedmoor is more qualified and can provide more cost-effective and timely service to the requested areas.	Feasibility of obtaining service from an adjacent retail public utility—30 TAC § 291.102(d)(5). The probable improvement in service or lowering or costs to consumers in that area—30 TAC § 291.102(d)(8).
Granting the CCN to the City could deter legitimate development and growth in the requested area to the detriment of Creedmoor.	Detriment to Creedmoor if water CCN is granted to the City—30 TAC § 291.102(d)(3). Not a material issue since land use and growth are not issues covered by the law governing this application.

**Protestant Creedmoor:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Most of the area sought is not currently in need of centralized sewer service.	Need for service in the proposed area—30 TAC § 291.102(d)(2).
Creedmoor could be adversely affected if the City uses package plants in the Creedmoor well area and is unable to properly operate them, thereby potentially affecting Creedmoor's water supply.	Detriment to Creedmoor if sewer CCN is granted to the City—30 TAC § 291.102(d)(3).
Creedmoor could be adversely affected if the City is unable to properly operate the sewer collection system and lift station(s) it installs in Creedmoor's water service area, thereby potentially affecting Creedmoor's water supply.	Detriment to Creedmoor if sewer CCN is granted to the City—30 TAC § 291.102(d)(3). Technical capability of the applicant—30 TAC § 291.102(a).
Potential problems with the City's future sewer facilities in the Creedmoor water service area may affect the environmental integrity within this area.	Environmental integrity—30 TAC § 291.102(d)(7).
The City's construction and operation of a sewer system within Creedmoor's water service area may disrupt Creedmoor's water service.	Detriment to Creedmoor if sewer CCN is granted to the City—30 TAC § 291.102(d)(3).
There may be more qualified providers who can provide more cost-effective and timely service to the requested areas.	Feasibility of obtaining service from an adjacent retail public utility—30 TAC § 291.102(d)(5). The probable improvement in service or lowering or costs to consumers in that area—30 TAC § 291.102(d)(8).
Granting the CCN to the City could deter legitimate development and growth in the requested area to the detriment of Creedmoor.	Detriment to Creedmoor if sewer CCN is granted to the City—30 TAC § 291.102(d)(3). Not a material issue since land use and growth are not issues covered by the law governing this application.

**Protestant Hornsby Bend:
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Hornsby Bend will be adversely affected if the City's application is granted because it provides service within areas affected by the application.	Detriment to Hornsby Bend if water CCN is granted to the City—30 TAC § 291.102(d)(3).
Hornsby Bend will be adversely affected if the City's application is granted because it intends to provide service within areas affected by the application.	Detriment to Hornsby Bend if water CCN is granted to the City—30 TAC § 291.102(d)(3).

**Protestant Hornsby Bend:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Hornsby Bend will be adversely affected if the City's application is granted because it provides service within areas affected by the application.	Detriment to Hornsby Bend if sewer CCN is granted to the City—30 TAC § 291.102(d)(3).
Hornsby Bend will be adversely affected if the City's application is granted because it intends to provide service within areas affected by the application.	Detriment to Hornsby Bend if sewer CCN is granted to the City—30 TAC § 291.102(d)(3).

**Protestant LCRA:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
The LCRA is a political subdivision of the State of Texas with authority to provide water and wastewater services in the area for which the City seeks its CCN.	None.
If LCRA purchases Creedmoor's water service area, LCRA wants to provide sewer service within Creedmoor's water service area.	Detriment to LCRA if sewer CCN is granted to the City—30 TAC § 291.102(d)(3).

**Protestant John Condon:
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Mr. Condon is a developer who is unhappy with the progress of his request for final plat approval.	None.
The City is financially insolvent and cannot compete with existing facilities.	The financial stability and capability of the City—30 TAC § 291.102(d)(6).
The applications are a "land grab" so that the City can control growth in the area.	None.

**Protestant John Condon:
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Mr. Condon is a developer who is unhappy with the progress of his request for final plat approval.	None.
The City is financially insolvent and cannot compete with existing facilities.	The financial stability and capability of the City— 30 TAC § 291.102(d)(6).
The applications are a "land grab" so that the City can control growth in the area.	None.

**Protestant: Mustang Ridge
WATER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Mustang Ridge is adversely affected because Austin is attempting to use a CCN as a land use, building code and development tool within the corporate limits and ETJ of another municipality.	Detriment to Mustang Ridge if water CCN is granted to City—30 TAC § 291.102(d)(3). Not a material issue since land use, growth, and boundary disputes are not covered by the law governing this application.
The requested service area should be left open to competition	None.
Mustang Ridge is a landowner that does not need or desire service from the City.	Need for service in the proposed area—30 TAC § 291.102(d)(2). Not a relevant or material issue since the City is not proposing to provide water utility service in Mustang Ridge.

**Protestant: Mustang Ridge
SEWER CCN Application**

<u>POINTS IN PROTEST LETTER</u>	<u>LEGAL ISSUES RAISED</u>
Mustang Ridge is adversely affected because Austin is attempting to use a CCN as a land use, building code and development tool within the corporate limits and ETJ of another municipality.	Detriment to Mustang Ridge if water CCN is granted to City—30 TAC § 291.102(d)(3). Not a material issue since land use, growth, and boundary disputes are not covered by the law governing this application.
The requested service area should be left open to competition	None.
Mustang Ridge is a landowner that does not need or desire service from the City.	Need for service in the proposed area—30 TAC § 291.102(d)(2). Not a relevant or material issue since the City is not proposing to provide water utility service in Mustang Ridge.

IV. MOTION TO CONSOLIDATE

The City requests consolidation of the following CCN applications into one proceeding:

- (1) Application from City of Austin to Obtain a Water Certificate of Convenience and Necessity (CCN) in Travis, Hays and Williamson Counties; Application No. 33562-C; SOAH Docket No. 582-02-3056; TNRCC Docket No. 2002-0189-UCR;
- (2) Application from City of Austin to Obtain a Sewer Certificate of Convenience and Necessity (CCN) in Travis, Hays and Williamson Counties; Application No. 33563-C; SOAH Docket No. 582-02-3056; TNRCC Docket No. 2002-0189-UCR;
- (3) Application from Hornsby Bend Utility Company to Amend Sewer Certificate of Convenience and Necessity No. 20650; Application No. 32800-C, SOAH Docket No. 582-00-0545, TNRCC Docket No. 2000-0112; and
- (4) Application from Hornsby Bend Utility Company to Amend Water Certificate of Convenience and Necessity No. 11978.

Hornsby Bend Utility Company ("Hornsby Bend") filed an application to amend its sewer CCN No. 20650 (Application No. 32800-C) on October 15, 1999. The City received notice of the application and submitted a timely request for contested case hearing on January 13, 2000. The City was subsequently granted party status and the preliminary hearing was held on April 18, 2000. The case was continued to allow for further negotiations between the parties. To date, the discovery process has not yet been scheduled or begun. The City filed its applications for water and sewer CCNs (33562-C and 33563-C) on August 13, 2001. The Applications were declared administratively complete on August 20, 2001.

Hornsby Bend filed a request for contested case hearing regarding the City's water and sewer applications on October 17, 2001. Hornsby Bend then filed an application to amend its water CCN No. 11978 on December 31, 2001. Once again, the City filed a letter of protest and request for contested case hearing, this time for Hornsby Bend's water application, on March 8, 2002.

Under 30 TAC § 80.13, "the judge may consolidate related cases or claims if consolidation will not prejudice any party and may save time and expense or otherwise benefit the public interest and welfare."

In both cases—water and sewer—there are areas of overlap between the service areas being requested by the two entities. Section 291.102 lists the factors that the TNRCC must consider when deciding whether to grant a CCN; the same factors will be common to the consideration of both entities' CCN applications and must be comparatively evaluated in both proceedings. The four applications should therefore be consolidated pursuant to section 30 TAC § 80.13(a) for reasons of judicial efficiency and economy and so that the parties are not burdened with the unnecessary costs associated with having two separate proceedings considering the same issues.

Consequently, the City requests that these applications be consolidated into one single proceeding. If the ALJ is unable to unilaterally effect such consolidation, the City requests that the ALJ take whatever steps are within his authority to consolidate the applications.

In addition, the City notes that Creedmoor's competing water CCN application has already gone through the contested hearing process. The City protested Creedmoor's application and participated as a party in the hearing. The ALJ in that case has yet to issue a proposal for decision.

V. CONCLUSION AND PRAYER

In accordance with the arguments outlined above, the City respectfully requests that the ALJ issue an order:

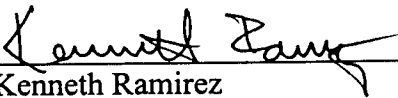
- (1) Clarifying how the City can meet its burden of proof at hearing on the need for service issue;
- (2) Specifying the issues to be considered at hearing with respect to each protestant that is granted party status; and

- (3) Consolidating the applications discussed in Part IV, or in the alternative, taking steps toward such consolidation.

In addition, the City requests to grant to the City such other and further relief, both general and specific, at law and in equity, to which the City may be entitled.

Respectfully submitted,

BRACEWELL & PATTERSON, L.L.P.
111 Congress Avenue, Suite 2300
Austin, Texas 78701-4043
Telephone: (512) 472-7800
Facsimile: (512) 472-9123



Kenneth Ramirez
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Monica Jacobs
State Bar No. 24007433

-and-

Ronnie Jones
State Bar No. 00786003
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-2568
Facsimile: (512) 974-2912

ATTORNEYS FOR THE CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been sent by Facsimile and Regular U.S. Mail, on this 1st day of July, 2002, to the following:

Mark Zeppa
Law Offices of Mark H. Zeppa, P.C.
4833 Spicewood Springs Road, Suite 202
Austin, Texas 78759-8436

Representing: AquaSource Utility, Inc.,
AquaSource Development Company,
Creedmoor-Maha WSC, and City of
Mustang Ridge

John J. Carlton
Ambrust, Brown, & Davis, L.L.P.
100 Congress Avenue, Suite 1300
Austin, Texas 78701-3087

Representing: Hornsby Bend Utility
Company, Inc.

John Deering
Geoffrey Kirshbaum
Texas Natural Resource Conservation Commission
P.O. Box 13087, MC-173
Austin, TX 78711-3087

Representing: The Executive Director

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

John Condon
405 Beardsley Lane
Austin, Texas 78746

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

Representing: Lower Colorado River
Authority

Blas Coy
Public Interest Counsel
Texas Natural Resource Conservation
Commission
P.O. Box 13087, MC-103
Austin, Texas 78711-3087

Representing: Office of Public Interest
Counsel

TNRCC Docket Clerk
Office of Chief Clerk
Texas Natural Resource Conservation Commission
P.O. Box 13087, MC-105
Austin, Texas 78711-3087



Kenneth Ramirez

SOAH DOCKET NO. 582-02-3056
TNRCC DOCKET NO. 2002-0189-UCR

IN THE MATTER OF THE
APPLICATIONS OF THE CITY OF
AUSTIN FOR A WATER
CERTIFICATE OF CONVENIENCE
AND NECESSITY (NO. 33562-C) AND
A WASTEWATER CERTIFICATE OF
CONVENIENCE AND NECESSITY
(NO. 33563-C)

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BEFORE THE STATE OFFICE

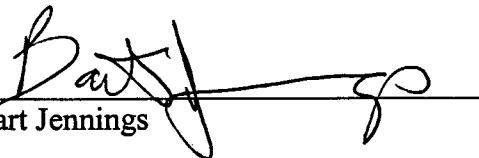
OF

ADMINISTRATIVE HEARINGS

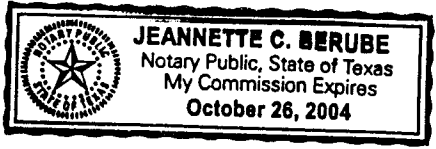
AFFIDAVIT OF BART JENNINGS

BEFORE ME, the undersigned authority, on this day personally appeared, Bart Jennings, who being by me duly sworn on his/her oath stated as follows:

My name is Bart Jennings. I am employed by the City of Austin, Texas, Water and Wastewater Utility. I am familiar with the operations of the City's Water and Wastewater Utility, the City's impact fee service area and extraterritorial jurisdiction, and the City's pending water and sewer applications for Certificates of Convenience and Necessity that were filed at the Texas Natural Resource Conservation Commission. Within my official capacity is the obligation and responsibility to provide water and wastewater utility service and promote and protect the general health, safety and welfare of persons residing within the jurisdiction of the City. I have reviewed the City's Motion to Define the Scope of the Hearing. I have personal knowledge of the facts in Sections I, III, and IV, and those facts are true and correct.


Bart Jennings

SUBSCRIBED AND SWORN TO before me this 1st day of July, 2002, to certify which,
witness by hand and official seal.



Jeannette C. Berube
Notary Public

My Commission Expires: 10/26/04



TEXAS NATURAL
RESOURCE CONSERVATION
COMMISSION

2002 JUL -1 PM 4:05

CHIEF CLERKS OFFICE

Kenneth Ramirez
Partner

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

July 1, 2002

By Hand Delivery

Ms. Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 W. 15th Street
P.O. Box 13025
Austin, TX 78711-3025

Re: SOAH Docket No. 582-02-3056; TNRCC Docket No. 2002-0189-UCR;
Application from City of Austin to Obtain a Water Certificate of
Convenience and Necessity (CCN) in Travis, Hays and Williamson
Counties; Application No. 33562-C

SOAH Docket No. 582-02-3056; TNRCC Docket No. 2002-0189-UCR;
Application from City of Austin to Obtain a Sewer Certificate of
Convenience and Necessity (CCN) in Travis, Hays and Williamson Counties;
Application No. 33563-C

Dear Ms. Wise:

Enclosed for filing please find the original and one copy of the following documents in
the above-referenced matter:

- 1) The City of Austin's Plea to the Jurisdiction;
- 2) The City of Austin's Motion to Define the Scope of the Hearing; and
- 3) The City of Austin's Motion to Deny Party Status.

Please file the original, date-stamp the copy and return the copy to my messenger.



Ms. Holly Wise, Docket Clerk
July 1, 2002
Page 2

If you have any questions, please do not hesitate to contact me at (512) 494-3611.

Very truly yours,

Bracewell & Patterson, L.L.P.

A handwritten signature in black ink, appearing to read 'Kenneth Ramirez', is written over the typed name.

Kenneth Ramirez

KR/jcb
Enclosure(s)

cc: **(Via Hand Delivery)**
Hon. William G. Newchurch
LaDonna Castañuela, TNRCC Chief Clerk

cc: **(Via Facsimile and Regular Mail)**

Christopher Lippe, Director, Water and Wastewater Utility
Andrew P. Covar, P.E., Assistant Director, Water and Wastewater Utility
Bart Jennings, Water and Wastewater Utility
Ronnie Jones, Assistant City Attorney
Mark H. Zeppa, Attorney
John J. Carlton, Attorney
John Deering, Attorney
Geoffrey Kirshbaum, Attorney
Madison Jechow, Attorney
Blas Coy, Attorney
Mr. Gary Bradley
Mr. John Condon