

Control Number: 43585



Item Number: 5

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83<sup>rd</sup>  
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.



2003 OCT 29 AM 10:46

43585

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 Hon. Kerry Sullivan 475-4994  
John Carlton/Casey Ware 435-2360  
John Deering/Geoffrey Kirshbaum 239-0626  
Scott Humphrey 239-6377  
LaDonna Castanuela 239-3311

This fax is from Kenneth Ramirez  
and is being transmitted on July 18, 2003 at PM. The length of this fax, (including the cover letter), is  
pages. (Client/Matter #: 016928.000013)

The fax machine number is 512.472.9123. If you do not receive all pages, please call 512.472.7800.

## Message

### CONFIDENTIALITY NOTICE:

This fax from the law firm of Bracewell & Patterson, L.L.P. contains information that is confidential or privileged, or both. This information is intended only for the use of the individual or entity named on this fax cover letter. Any disclosure, copying, distribution or use of this information by any person other than the intended recipient is prohibited. If you have received this fax in error, please notify us by telephone immediately at 512.472.7800 so that we can arrange for the retrieval of the transmitted documents at no cost to you.



July 18, 2003

Kenneth Ramirez  
Partner111 Congress Avenue, Suite 2300  
Austin, Texas 78701-4043  
Phone: 512.494.3611  
Fax: 512.472.9123  
kramirez@bracepatt.comBy Hand DeliveryMs. 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; 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; and 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; Application of Hornsby Bend Utility Company to Amend Certificate of Convenience and Necessity No. 20650

SOAH Docket No. 582-02-3056; Application of Hornsby Bend Utility Company to Amend Certificate of Convenience and Necessity No. 11978

Dear Ms. Wise:

Attached please find the original and one copy of Supplemental Pleading Regarding City of Austin's Motion to Sever and Remand Portions of the City of Austin's Applications for Water and Sewer Certificates of Convenience and Necessity in the above-referenced matter. Please file the original, date-stamp the copy and return the copy to my messenger.

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

Very truly yours,

Bracewell &amp; Patterson, L.L.P.

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



Ms. Holly Wise  
July 18, 2003  
Page 2

KR/jcb  
Enclosure(s)

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

John J. Carlton  
Casey L. Ware  
John Deering  
Geoffrey Kirshbaum  
Scott Humphrey  
The Honorable Kerry Sullivan  
LaDonna Castañuela, TCEQ Chief Clerk

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

§ BEFORE THE STATE OFFICE  
§  
§ OF  
§  
§ ADMINISTRATIVE HEARINGS  
§  
§  
§

APPLICATION OF HORNSBY  
BEND UTILITY COMPANY  
TO AMEND CERTIFICATE  
OF CONVENIENCE AND  
NECESSITY NO. 20650

§ BEFORE THE STATE OFFICE  
§  
§ OF  
§  
§ ADMINISTRATIVE HEARINGS  
§  
§

APPLICATION OF HORNSBY  
BEND UTILITY COMPANY  
TO AMEND CERTIFICATE  
OF CONVENIENCE AND  
NECESSITY NO. 11978

§ BEFORE THE STATE OFFICE  
§  
§ OF  
§  
§ ADMINISTRATIVE HEARINGS  
§

**SUPPLEMENTAL PLEADING REGARDING  
CITY OF AUSTIN'S MOTION TO SEVER AND REMAND  
PORTIONS OF THE CITY OF AUSTIN'S APPLICATIONS FOR  
WATER AND SEWER CERTIFICATES OF CONVENIENCE AND NECESSITY**

TO THE ADMINISTRATIVE LAW JUDGE:

**I. Introduction**

During the Preliminary Hearing on July 14, 2003, Judge Sullivan heard arguments on the City of Austin's ("City") Motion to Sever and Remand Portions of the City of Austin's Applications for Water and Sewer Certificates of Convenience and Necessity, holding his ruling in abeyance until the parties could provide supplemental briefing. In response, the City offers today's pleading.

## **II. Notice Of An Application Is Not Tantamount To Affected Person**

During the Preliminary Hearing on July 14, 2003, Judge Sullivan expressed doubt about granting the City's severance motion because Hornsby Bend Utility Company, Inc. ("Hornsby") would have received mailed notice of the City's CCN applications for those geographic areas we are moving to sever. Judge Sullivan's apparent concern is that Hornsby's receipt of notice is tantamount to maintaining a personal and justiciable interest in the severed area. The City respectfully disagrees.

The regulatory provisions governing notice are separate and apart from provisions that govern party status. Notice provisions are codified at an entirely different section than party status which are found at 30 TAC Chapter 55. Standards a party must meet to qualify for receipt of notice are far more relaxed than standards one must meet to be considered an affected party. An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by an application. 30 TAC § 55.29(a). This standard requires each protestant to show that he will potentially suffer harm or has a justiciable interest that will be affected. United Copper Industries, Inc. v. Grisson, 17 S.W.3d 797, 803 (Tex. App.—Austin, 2000, pet. denied).

Hornsby should not qualify for party status for the severed areas, especially in light of its own admissions. In its answers to the City's request for admissions in this very case, Hornsby acknowledges that it:

- (1) will not be negatively affected if the City is granted a CCN for the portion of its proposed water service area that is south of the Colorado River (Water RA No. 3, 1/8/03 response, *see* Attachment F);
- (2) does not have any water service infrastructure in the portion of the City's proposed water service area that is south of the Colorado River (Water RA No. 3, 10/28/02 response);

- (3) has not received any written requests from landowners for water service to property in the portion of the City's proposed water service area that is south of the Colorado River (Water RA No. 5, 10/28/02 response); and
- (4) has not executed any non-standard or other types of service agreements for water service to property in the portions of the City's proposed water service area that is south of the Colorado River (Water RA No. 7, 10/28/02 response).

The same points made above regarding Hornsby's lack of ties to and interest in the Northern Water and Sewer Areas also apply to the Southern Sewer Area. Hornsby has no competing applications for this area and will not be prejudiced by the severance of issues relating to a sewer CCN for the City in this area.

In addition, in its answers to the City's requests for admissions, Hornsby acknowledges that it:

- (1) will not be negatively affected if the City is granted a CCN for the Southern Sewer Area (Sewer RA No. 5, 1/8/03 response);
- (2) does not have any sewer service infrastructure in the Southern Sewer Area (Sewer RA No. 3, 10/28/02 response);
- (3) has not received any written requests from landowners for sewer service for the Southern Sewer Area (Sewer RA No. 5, 10/28/03 response); and
- (4) has not executed any non-standard or other types of service agreements for sewer service to the Southern Sewer Area (Sewer RA No. 7, 10/28/03 response).

Hornsby's admissions clarify that they do not have a personal justiciable interest in the severed areas, and those admissions are not overcome by the possibility that they would have received notice of the application.

### **III. Hornsby Has No CCN Application For The Severed Areas**

Hornsby has no CCN application that would compete with the City's in the severed areas. The Proposal for Decision in Application of Creedmoor-Maha Water Supply Corporation to Amend Certificate of Convenience and Necessity No. 11029 for Water Service in Travis County (September 18, 2002 by Judge Craven) clarifies that having no competing application and having

no distribution lines in the disputed area can be determinative in deciding which of the competing parties should be awarded the CCN. Judge Craven notes:

The evidence in this proceeding shows: (1) COA is not an applicant in this case; and (2) it did not lay distribution lines to the periphery of these disputed areas with the expectation that service within these areas would pay for that investment, *i.e.*, its efforts and expenditures were not made solely to serve the areas at issue in this case. Significantly, the evidence does not show that certification of these areas to Creedmoor will prevent the City from recovering its investment in its facilities that are currently positioned to the north and west of these tracts and are fully capable of serving other areas not certificated to and not requested by Creedmoor. More importantly, there is no indication that approving Creedmoor's amendments will result either in under-utilization of COA's currently-constructed lines or stranded capacity. Although COA's manager of integrated water resources planning, Craig Bell, indicated the City could serve the areas that Creedmoor seeks by constructing extensions from City facilities located north of FM 1626 in the Manchaca, Slaughter Lane, and South First Street areas, he also testified that "[t]he City does not have any specific planned facilities to provide water to the Creedmoor amendment areas since no requests for service have been received by the City and levels of Utility service not known." (citation omitted) (emphasis added) Dr. Harkins agreed that COA could potentially serve the northern tract but, observing that the City's closest existing lines were roughly two miles from the middle tract and four miles from the southern tract, she testified that COA's facilities were not situated within the service vicinity of either of these other larger tracts (citation omitted).

As applied in this case, the logic found in the excerpted portion is even more compelling. In the Creedmoor case, the City could offer service in the competing area because municipalities can serve in their ETJ's without a CCN, an important component that Hornsby cannot claim. The City argued in Creedmoor that it did not need a CCN application in order to be considered a valid competitor to Creedmoor. As the quoted provision says, the Judge rejected the City's position and held that either a competing CCN application must be on file or the protestant must have distribution lines in the disputed areas. Hornsby can claim neither in this case.

#### **IV. Conclusion and Prayer**

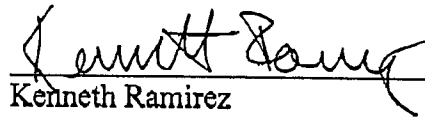
Hornsby Bend would not have standing to qualify for a contested case hearing in the severed areas, has no competing CCN application in those areas, and has no distribution lines



anywhere near the severed areas. For these reasons, the City prays that the requested areas be severed from this application and remanded to the Executive Director. The Executive Director does not oppose the Motion to Sever.

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  
State Bar No. 16502200  
Monica Jacobs  
State Bar No. 24007433

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 18th day of July, 2003, to the following:

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

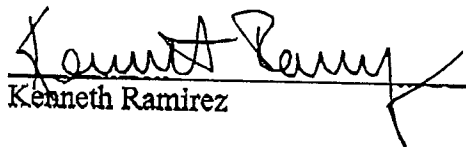
Representing: Hornsby Bend Utility  
Company, Inc.

John Deering  
Geoffrey Kirshbaum  
Legal Services Division  
Texas Commission on Environmental  
Quality  
P.O. Box 13087, MC-173  
Austin, TX 78711-3087

Representing: The Executive Director

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

Representing: Office of Public Interest  
Counsel

  
Kenneth Ramirez

\*\*\*\*\*  
\*\*\* RX REPORT \*\*\*  
\*\*\*\*\*

RECEPTION OK

TX/RX NO	5031
RECIPIENT ADDRESS	512 472 9123
DESTINATION ID	
ST. TIME	07/18 15:41
TIME USE	03'08
PGS.	9
RESULT	OK