

JOHNSON DELUCA KENNEDY & KURISKY
A PROFESSIONAL CORPORATION

4 HOUSTON CENTER
SUITE 1000
1221 LAMAR STREET
HOUSTON, TEXAS 77010

(713) 652-2525 - Telephone
(713) 652-5130 - Telecopier

MILLARD A. JOHNSON
mjohnson@jdkklaw.com

June 5, 2008

TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 JUN - 9 PM 2:40
CHIEF CLERKS OFFICE

Via CMRRR 7007 0710 0000 6748 4661

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087; Mail Code 105
Austin, Texas 78711-3087

Re: Docket No. 2007-0879-UCR; Flagship Hotel, LTD., vs. The City of Galveston; In
the Texas Commission on Environmental Quality Austin, Texas.

Dear Ms. Castañuela:

Please find enclosed an original and one copy of **The Flagship Hotel, Ltd.'s Brief on the SOAH's Certified Question Regarding TCEQ's Jurisdiction** for filing in the above-referenced matter.

Please file-stamp the extra copy and return same to the undersigned in the enclosed self-addressed, postage pre-paid envelope. By copy of this letter, all counsel of record are being notified of this filing.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to call me.

Sincerely,



Millard A. Johnson

MAJ:cec
Enclosures

Ms. LaDonna Castañuela
June 5, 2008
Page 2

cc: *Via CM/RRR & Facsimile*
William S. Helfand
Chamberlain, Hrdlicka,
White, Williams & Martin, P.C.
1200 Smith St., 14th Floor
Houston, Texas 77002

Via CM/RRR & Facsimile
Brian MacLeod
Texas Commission on Environmental Quality
P.O. Box 13087; Mail Code 105
Austin, Texas 78711-3087

Via CM/RRR & Facsimile
Blas J. Coy, Jr.
Office of Public Interest Counsel
Texas Commission on Environmental Quality
P.O. Box 13087; Mail Code 103
Austin, Texas 78711-3087

2008 JUN -9 PM 2: 40

CHIEF CLERKS OFFICE

IN THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
AUSTIN, TEXAS

FLAGSHIP HOTEL, LTD.

§
§
§
§
§
§

vs.

THE CITY OF GALVESTON

**THE FLAGSHIP HOTEL, LTD'S BRIEF ON THE SOAH'S
CERTIFIED QUESTION REGARDING TCEQ'S JURISDICTION**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

FLAGSHIP HOTEL, LTD. (the "Flagship") files this Brief on the State Office of Administrative Hearing's Certified Question Regarding TCEQ's Jurisdiction and in support thereof, would show the Texas Commission on Environmental Quality as follows:

1. Pursuant to Commission Rule 90.131(b), the State Office of Administrative Hearings ("SOAH") has certified the following question to the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"):

Whether the Commission, pursuant to § 13.042(d), has exclusive appellate jurisdiction to review orders of a governing municipality, including those orders pertaining to the municipality's own water and sewer service customers.

2. The SOAH also has recommended that TCEQ answer the certified question in the affirmative on the basis that four appellate courts have "concluded" that TCEQ has exclusive appellate jurisdiction under section 13.042(d). The SOAH concedes that this is **not** the law of the case because TCEQ was not a party to any of the appeals, but claims that the four appellate cases are "authoritative and precedential" and that only the Texas Legislature could revise the Texas Water Code to read, "in no uncertain terms what [TCEQ] argues it does mean."

3. With all due respect to the SOAH and the appellate courts, the Texas Water Code

states in no uncertain terms that TCEQ does **not** have appellate jurisdiction over a rate dispute involving a municipally owned utility. The Texas Legislature has clearly and unambiguously stated this in section 13.043 of the Texas Water Code. Not one of the four appellate courts relied upon by the SOAH has addressed the meaning of section 13.043. Thus, these opinions are not only not “authoritative and precedential,” they are not even instructive when they fail to consider the express provisions of the Texas Water Code.

4. When interpreting a statute, courts consider the entire statute, not simply the disputed portions. *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex.1994); *Berel v. HCA Health Servs. of Texas, Inc.*, 881 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Each provision must be construed in the context of the entire statute of which it is a part. *Bridgestone/Firestone*, 878 S.W.2d at 133. Courts cannot adopt a construction that would render a law or provision absurd or meaningless. *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex.1987); *Mueller v. Beamalloy*, 994 S.W.2d 855, 860 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

5. The Texas Water Code unambiguously sets forth TCEQ’s appellate jurisdiction. Section 13.042(d) of the Texas Water Code establishes TCEQ’s jurisdiction with two limitations:

The commission shall have exclusive appellate jurisdiction to review orders or ordinances of those municipalities as provided in this chapter.

The two stated limitations are:

- a) **“as provided in this chapter”;** and
- b) **“those municipalities.”**

6. The first limitation makes it clear that TCEQ’s appellate jurisdiction only goes as far as is expressly conferred **“in this chapter,”** specifically Chapter 13 of the Texas Water Code. Hence, the TCEQ’s appellate jurisdiction is subject to any limitations established by Chapter 13.

The reference to “*those municipalities*” is a reference to a limited set of municipalities referred to in the previous subsections of 13.042. Both of these limitations work to make it clear that the legislature did **not** intend to confer upon TCEQ appellate jurisdiction over *municipally owned* utilities.

7. Sections 13.043(a) & (b) of the Texas Water Code specifically set forth the appellate jurisdiction for TCEQ. Subsection 13.043(a) specifically excludes the City of Galveston:

Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission. **This subsection does not apply to a municipally owned utility.**

(emphasis added).

8. A municipally owned utility is defined as “any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.” The City of Galveston meets this definition. In fact, the City has never claimed that it does not. *See* Galveston Municipal Code § 36-16, *et. seq.* attached hereto for the Commission’s ease of reference. As such, it is plainly clear that the Flagship cannot make an appeal under subsection 13.043(a).

8. Subsection 13.043(b) only applies to a municipally owned utility when the rate payers reside outside the corporate limits of the municipality. Even though the City has argued that this subsection applies to the Flagship, the City has never made any showing that the Flagship resides outside the corporate limits of the City. This is because it is undisputed that the Flagship is situated in the middle of City on the seawall, well within the corporate limits of the City. Accordingly, neither subsection (a) nor (b) provide the Flagship with the ability to appeal the City’s actions. Thus, chapter 13 does not provide TCEQ with exclusive appellate jurisdiction

over this dispute.

9. Furthermore, the City is **not one of “those municipalities”** as set forth in Section 13.042 of the Texas Water Code. The term “those” does **not** refer to municipally owned utilities. Instead, Section 13.042(a) – (c) speaks of a municipality having exclusive original jurisdiction over services provided by a *water and sewer utility* within its corporate limits and section 13.042(d) grants TCEQ jurisdiction over *those municipalities*, not all municipally owned utilities. **A “water and sewer utility” is not synonymous with a municipally owned utility.** Section 13.002(23) of the Texas Water Code specifically **excludes** a municipally owned utility from the definition of a “water and sewer utility”:

“Water and sewer utility,” “public utility,” or “utility” means any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, **other than a municipal corporation.**

(Emphasis added). Thus, section 13.042 only confers appellate jurisdiction over municipalities that have a “water and sewer utility” and is not intended, especially in light of the specific exclusions in subsections 13.043(a) & (b), to include a “municipally owned utility.” **Accordingly, it is abundantly clear that the Texas Water Code unequivocally does NOT confer appellate jurisdiction over municipally owned utilities to TCEQ.**

10. The SOAH has fallen into the misguided trap the Court of Appeals set in *Flagship Hotel, Ltd. v City of Galveston*, 73 S.W.3d 422 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (hereinafter *Flagship I*). In that case, Court got it completely wrong and adopted a construction of section 13.042 that rendered section 13.043 meaningless. The court’s construction ignored, or failed to comprehend, the distinction between a “water and sewer utility” and a “municipal corporation”. In *Flagship I*, the Court held that section 13.042(d) was dispositive of TCEQ’s jurisdiction:

[W]e conclude exclusive appellate jurisdiction over the City's final disposition of this dispute is vested with the TNRCC.

Flagship contends that, under section 13.042(f) of the Water Code, the TNRCC has no power to reverse a decision by the City to shut off its water. We disagree. Section 13.042(f) provides, as follows:

This subchapter does not give the commission power or jurisdiction to regulate or supervise the rates or service of a utility owned and operated by a municipality, directly or through a municipally owned corporation, within its corporate limits or to affect or limit the power, jurisdiction, or duties of a municipality that regulates land and supervises water and sewer utilities within its corporate limits, *except as provided by this code.*

TEX. WATER CODE ANN. § 13.042(f) (Vernon 2000) (emphasis added). As we hold, and as the City concedes, section 13.042(d) vests appellate authority over this dispute with the TNRCC. Section 13.042(f) merely limits the power of the TNRCC to enforce the legislative purpose of the Water Code “to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities.” See *id.* § 13.001.

Id. at 427 (emphasis added).

11. The fatal flaw in the *Flagship I* opinion is the Court's incorrect linkage of the phrase “except as provided by this code” with the broad legislative purpose stated in section 13.001 of the Texas Water Code. This was wrong. The phrase “except as provided by this code” is a reference to the **operative sections** of the Water Code. Section 13.043(b)(3) is the “**exception**” referred to above in the quoted § 13.042(f):

(b) Ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water, drainage, or sewer rates to the commission:

...

(3) a municipally owned utility, if the ratepayers reside outside the corporate limits of the municipality;

And, as noted above, section 13.043(a) makes it unambiguously certain that TCEQ does not have appellate jurisdiction over a municipally owned utility. The broad legislative purpose set forth in section 13.001 is not an exception to 13.042(f) and does not negate the express instructions of

section 13.043(a). Section 13.001 of the Water Code is merely a broad statement of purpose, but is not substantive and excludes virtually nothing. It is axiomatic that the stated broad legislative purpose of a statute cannot be read to control over specific provisions.

12. Finally, none of the other appellate opinions has addressed the meaning of section 13.043. In *Flagship I*, as discussed above, the Court solely relied on section 13.042 and never made any reference to section 13.043. The opinion is drafted as though section 13.043 does not even exist. In the subsequent appeal, *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552 (Tex. App.—Texarkana 2003, pet. denied) (hereinafter “*Flagship II*”), the Texarkana Court, without any analysis or consideration of section 13.043, merely “parroted” the holding of the First Court of Appeals:

Although the First Court of Appeals’ decision only addressed whether the trial court could issue a temporary injunction, it held that the Texas Water Code granted the City exclusive original jurisdiction over such disputes and the [TCEQ] appellate jurisdiction. See *Flagship Hotel, Ltd.*, 73 S.W.3d at 427. We find the First Court of Appeals’ reasoning persuasive, and *Flagship* must exhaust its administrative remedies through [TCEQ].

Id. at 563. Again, neither court even mentions section 13.043.

13. The other two appellate courts also failed to address the application of section 13.043. In *City of Donna v. Victoria Palms Resort, Inc.*, 2005 WL 1831593 *4 (Tex. App.—Corpus Christi August 4, 2005) (not designated for publication), the Court provided no analysis and simply concluded that “TCEQ has exclusive appellate jurisdiction to review orders or ordinances of the City.” Likewise, in *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 340 (Tex. App.—Fort Worth 2005, no pet.), the Court cited section 13.042 and noted that the water code “confers exclusive original jurisdiction over water service disputes to the municipality and exclusive appellate jurisdiction over such disputes to the Commission.” Neither opinion even mentions section 13.043. **Thus, no Texas court has ever properly**

considered the issue of TCEQ's jurisdiction in light of a complete reading of all the applicable provisions of the Water Code.

14. In fact, *City of Donna* was not published. Legally, it has *no* precedential value. TEX. R. APP. PROC. 47.7. And, in *City of Willow Park*, the issue before the court was whether the district court had jurisdiction for pre-suit discovery under Rule 202 of the Texas Rules of Civil Procedure. *City of Willow Park* 166 S.W.3d at 341 (holding that the district court had jurisdiction under Rule 202 of the Texas Rules of Civil Procedure). As such, the Willow Park court's discussion concerning the TCEQ's jurisdiction under the Texas Water Code was merely *dicta* – unreasoned at that. Thus, it is simply incorrect to say, as the SOAH alludes, that the four appellate opinions are somehow “authoritative and persuasive” when one is unpublished, another is *dicta*, *Flagship II* offers no independent analysis of *Flagship I* and *Flagship I* **completely ignores the meaning of the section 13.043 of the Water Code, which is title “Appellate Jurisdiction.”**

CONCLUSION

15. The Texas Water Code unambiguously denies TCEQ jurisdiction over an appeal of a rate proceeding involving a municipally owned utility. TCEQ is not bound to follow the tortured reading of the Water Code in *Flagship I* because the Court simply failed to consider all the relevant provisions of the Code. Furthermore, subsequent appellate opinions have only parroted *Flagship I* and offered no independent or correct analysis. With all due respect to the SOAH, TCEQ should answer the certified question with a resounding “NO.”

WHEREFORE, the Flagship prays that TCEQ answer the SOAH's certified in the negative and report to the SOAH that TCEQ does not have jurisdiction over this matter because section 13.043 of the Texas Water Code explicitly excludes municipally owned utilities from

TCEQ's appellate jurisdiction and for such other and further relief to which the Flagship may be entitled.

Respectfully submitted,

JOHNSON DELUCA KENNEDY & KURISKY
A Professional Corporation

By: 

MILLARD A. JOHNSON
State Bar No.: 10772500
ANDREW H. SHARENSON
State Bar No.: 24041900
4 Houston Center
1221 Lamar, Suite 1000
Houston, Texas 77010
(713) 652-2525 - Telephone
(713) 652-5130 - Facsimile

CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of June, 2008, a true and correct copy of the above and foregoing instrument has been forwarded by facsimile and certified mail, return receipt requested, to the following counsel of record.

Via Facsimile (713) 658-2553 CM/RRR # 7007 0710 0000 6748 4685

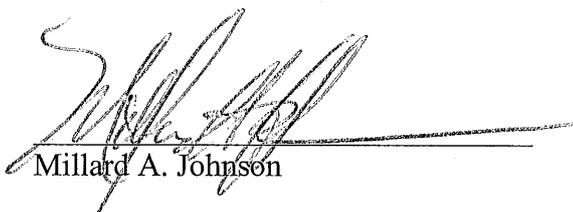
William S. Helfand
Chamberlain, Hrdlicka,
White, Williams & Martin, P.C.
1200 Smith St., 14th Floor
Houston, Texas 77002

Via Facsimile (512) 239-0606 CM/RRR # 7007 0710 0000 6748 4623

Brian MacLeod
Staff Attorney
Texas Commission on Environmental Quality
P.O. Box 13087; Mail Code 105
Austin, Texas 78711-3087

Via Facsimile (512) 239-6377 CM/RRR # 7007 0710 0000 6748 4630

Blas J. Coy, Jr.
Office of Public Interest Counsel
Texas Commission on Environmental Quality
P.O. Box 13087; Mail Code 103
Austin, Texas 78711-3087


Millard A. Johnson

CHIEF CLERKS OFFICE

2008 JUN -9 PM 2:40

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY