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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 18, 2008

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

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JAN 18 PM 4:23  
CHIEF CLERK'S OFFICE

Re: **TCB RENTAL, INC.**  
**TCEQ DOCKET NO. 2007-1765-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eli Martinez".

Eli Martinez  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

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**TCEQ DOCKET NO. 2007-1765-MWD**

<b>IN THE MATTER OF THE</b>	§	<b>BEFORE THE</b>
<b>APPLICATION BY</b>	§	
<b>TCB RENTAL, INC.</b>	§	<b>TEXAS COMMISSION ON</b>
<b>FOR TPDES PERMIT NO.</b>	§	
<b>WQ0014725001</b>	§	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUESTS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter.

**I. INTRODUCTION**

TCB Rental, Inc. (Applicant) has applied for a new TPDES permit authorizing the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility will be located on the west side of Farm-to-Market Road 50, approximately 1.5 miles south of the intersection of Farm-to-Market Road 50 and Farm-to-Market Road 1361 in Burleson County, Texas. The wastewater treatment facility will be an activated sludge processing plant operated in the extended aeration mode. Treatment units will include bar screens, flow equalization basin, activated sludge aeration basin, final clarifier, aerobic sludge digester and a chlorine contact chamber. The facility has not yet been constructed.

The effluent limitations in the draft permit, based on a 30-day average, are 10 mg/l CBOD<sub>5</sub> (five-day Carbonaceous Biochemical Oxygen Demand), 15 mg/l TSS (Total Suspended

Solids), 3 mg/l NH<sub>3</sub>-N (Ammonia-Nitrogen), 4.0 mg/l DO (Minimum Dissolved Oxygen) and the pH shall not be less than 6.0 standard units nor greater than 9.0 standard units. The effluent shall be chlorinated in a chlorine contact chamber to a residual of 1.0 mg/l with a minimum detention time of 20 minutes based on peak flow. This Category C facility must be operated by a chief operator or an operator holding a Category C license or higher. The facility must be operated a minimum of five days per week by the licensed chief operator or an operator holding the required level of license or higher. The licensed chief operator or operator holding the required level of license or higher must be available by telephone or pager seven days per week.

The application for a major permit amendment was received on June 29, 2006 and declared administratively complete on July 20, 2006. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on August 3, 2006 in the *Burleson County Tribune*. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on December 21, 2006 in the *Burleson County Tribune*. A public meeting was held on April 17, 2007 and the comment period was extended from April 17, 2007 to May 17, 2007. The Executive Director's decision and Response to Comments was mailed October 1, 2007, extending the deadline for requests for reconsideration or contested case hearing thirty calendar days to October 31, 2007<sup>1</sup>. Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

## II. REQUIREMENTS OF APPLICABLE LAW

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<sup>1</sup> 30 TAC §55.201(a)

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;
- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- 4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- 5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- 6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a hearing if:

- 1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Any group or association which meets all of these criteria shall be considered an "affected person."

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- 1) whether the requestor is an affected person;
- 2) which issues raised in the hearing request are disputed;
- 3) whether the dispute involves questions of fact or law;
- 4) whether the issues were raised during the public comment period;
- 5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- 6) whether the issues are relevant and material to the decision on the application; and
- 7) a maximum expected duration for the contested case hearing.

### III. DISCUSSION

#### A. Determination of Affected Person Status

The Office of the Chief Clerk received timely filed requests for a contested case hearing on the issuance of Applicant's permit from Koontz Bayou Old River Group (KBOR) via attorney Amy Rickers of Munsch Hardt Kpft & Harr, P.C., Jean and Leonard Kilgore, Douglas Kettler, William H. Tonn III, and W.H. Giesenschlag. Each of the above requests included relevant contact information and raised disputed issues outlining why the requestor would be adversely affected by the proposed activity in a manner not common to members of the general public. KBOR included a statement indicating the interest of the Group as the protection of the usability of KBOR properties as ranching and farming lands.

I. Koontz Bayou Old River Group (KBOR), Jean and Leonard Kilgore, and Petitioners

Koontz Bayou Old River Group (KBOR) asserts that each of its 26 members would have affected person standing in their own right due to concerns relating to plant operations as well as periodic flooding in the area that may affect each member's health and safety, as well as the use, enjoyment, and economic utilization of their respective property.

Because only one member need have standing for a group to qualify for a contested case hearing<sup>2</sup>, KBOR identifies Jean and Leonard Kilgore as members who qualify as affected persons because of their proximity to the proposed plant and concerns over the permitted activity's effects on their life, land, and livelihood. KBOR further develops the affected person status of its members by stating that the permitted activity will affect the use, enjoyment, and economic utilization of their property by aggravating the frequency and consequences of flooding that periodically scourges their land. KBOR argues that the applicant fails to plan for reasonable plant accessibility in emergency situations; will have a negative impact on traffic

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<sup>2</sup> 30 TAC § 55.205(a)(1)

safety by commissioning trucks with toxic payloads to travel along the sparse and narrow roads in the region; would exacerbate damage to land and contamination of water; negatively impact the health and safety of human, plant, and animal life—a danger in itself and also to cattle and farming operations; and present an odor nuisance. Many of these problems, KBOR asserts, are the result of a lack of planning by Applicant, whose application fails to demonstrate how they will operate safely in a flood-prone region. The stated purpose of the KBOR organization, to protect the use of association members' property as farming and ranching lands, presents a purpose that is germane to the interests it seeks to protect in its hearing request.<sup>3</sup>

Jean and Leonard Kilgore<sup>4</sup> are located approximately three hundred yards from the plant site,<sup>5</sup> a physical adjacency that argues in favor of finding that a reasonable relationship exists between the interests stated and the activity regulated.<sup>6</sup> The aforementioned concerns are protected by the law under which the application will be considered.<sup>7</sup> The petition submitted by the Kilgore's includes signatures from petitioners Mr. and Mrs. Charles Janner, Helen Landry, Camilla Godfrey, Henry and Lydia Hilton, and Concerned Citizen. Although these petitioners apparently have similar interests to the Kilgore's, it is not clear whether or not the petitioners intend to be treated as a group, or establish individual eligibility for a hearing. Because these petitioners do not include information that relates their distance to the proposed facility and discharge point, OPIC cannot recommend at this time that the petitioners be determined affected

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<sup>3</sup> § 55.205(a)(2)

<sup>4</sup> See Jean and Leonard Kilgore's "Request for Contested Case Hearing" dated August 6, 2006. The Kilgore's also represent Mr. and Mrs. Charles Janner, Helen Landry, Camilla Godfrey, Henry and Lydia Hilton, and "Ag Lesee" (signature indiscernible).

<sup>5</sup> Id.

<sup>6</sup> 30 TAC § 55.203(c)(3).

<sup>7</sup> 30 TAC § 55.203(c)(1).

persons without further information demonstrating that a reasonable relationship exists between the Applicant's activities and their respective properties.

Conversely, OPIC recommends to the Commission that both KBOR and Jean and Leonard Kilgore are determined affected persons.

## II. Douglas Kettler

Requestor Kettler states in his request for a contested case hearing that his property borders the proposed wastewater treatment site.<sup>8</sup> This is confirmed by the Applicant's inclusion of Mr. Kettler on its "Adjacent & Downstream Land Ownership Table." There is, therefore, a reasonable relationship, between the interests stated and the activity regulated.<sup>9</sup> Mr. Kettler's concern that his grain crops and dairy cows will be detrimentally impacted by the Applicant's operation is an issue protected by the law under which the application will be considered.<sup>10</sup> To these concerns, Mr. Kettler adds the danger and wastefulness of long-haul trucks on a small farm-to-market road. Mr. Kettler also argues that the waste should be treated on site, where it is created, rather than transported for treatment. OPIC recommends to the Commission that Mr. Kettler be found an affected person.

## III. William H. Tonn III

Requestor Tonn states in his request for a contested case hearing that his property is as close as 1750 feet north of the proposed wastewater treatment site, and that Koontz Bayou—the proposed discharge route—crosses his property at the southwest and north sides.<sup>11</sup> Mr. Tonn indicates his concern that his water wells, property, and existing structures will be adversely

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<sup>8</sup> See "RE: TCB Rental, Inc. Proposed Permit No. WQ0014725001" composed by Mr. Kettler on May 22, 2007.

<sup>9</sup> 30 TAC § 55.203(c)(3).

<sup>10</sup> 30 TAC § 55.203(c)(1).

<sup>11</sup> See "RE: TCB Rental, Inc. Proposed Permit No. WQ0014725001" composed by Mr. Tonn on October 22, 2007.

affected by increased discharge into a poorly-draining waterway—and contaminated by the dissemination of toxins handled at the plant. Mr. Tonn further believes that he will suffer economic loss as a result of such contamination by virtue of losing the renters which are a source of income for his household. Requestor Tonn is also concerned about potential odor nuisance. Furthermore, Tonn argues that Applicant is inexperienced, that the facility will be prone to collecting types of waste not contemplated in its permit, that the facility will be inaccessible in times of emergency flooding, and that it is wasteful to haul waste from remote sites for processing at the proposed facility.

Due to the proximity of Mr. Tonn's property to the proposed site, a reasonable relationship exists between the interests stated and the activity regulated.<sup>12</sup> Contamination, odor nuisance, and interference with economic activities are interests protected by the law under which the application will be considered.<sup>13</sup> OPIC therefore recommends to the Commission that Mr. Tonn be found an affected person.

#### IV. W.H. Giesenschlag

Requestor Giesenschlag argues that the location of the proposed facility is one that is especially prone to flooding, that the region has undergone such flooding in the past, and that the addition of contaminants from a water treatment facility such as the one proposed by Applicant would have devastating implications for the surrounding property. Giesenschlag also contends that existing measures, which assumedly have been proffered by Applicant or the Executive Director's Office as effective in controlling future flooding, are ineffectual and may actually contribute to regional flooding. While OPIC appreciates Mr. Giesenschlag's concerns about the

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<sup>12</sup> 30 TAC § 55.203(c)(3).

<sup>13</sup> 30 TAC § 55.203(c)(1).

geographic anomalies of the region and fear that future floods will act as a vehicle for the spread of plant-related toxins, OPIC must recommend at this time that the Commission find Mr. Giesenschlag is not an affected person. Requestor Giesenschlag is not listed on the "Adjacent and Downstream Land Ownership Table," and he does not state his proximity to the proposed plant or discharge route in his request. Review of the U.S. Geological Survey Maps show that the approximate distance from the discharge point to the beginning of the road on which Mr. Giesenschlag resides is four miles. Furthermore, the discharge route runs in the opposite direction of his residence. Without further information to the contrary, OPIC must conclude that Requestor Giesenschlag's apprehensions about flooding and possible contamination are interests common to the general public, and not grounded in a specific impact to his property.

#### **B. Issues Raised in the Hearing Request**

##### Flooding

Each Protestant raises the concern that increased discharge of effluent into the Koontz Bayou will result in increased flooding in the region due to geologic characteristics that slow waterway efficiency and already present drainage problems.

##### Dissemination of Pollutants Harmful to Life

Each Protestant raises the concern that Applicant's discharge will pose a health risk to human, animal, and vegetative life in the region.

##### Pollution of Water Sources

Each Protestant raises the concern that the water may be contaminated by the Applicant's activities, to include the Koontz Bayou, Brazos River, and individual water wells.

Use and Enjoyment of Property

Each Protestant raises the concern that the Applicant's activities will affect the use and enjoyment of their property by damaging their lands and existing structures.

Economic Interests

Each Protestant raises the concern that their economic interests will be negatively impacted by the Applicant's activities, including farming and ranching operations, as well as leasing agreements.

Odor Nuisance

Each Protestant raises the concern that Applicant's activities will present an odor nuisance.

Increased Traffic and Fuel Inefficiency

Each Protestant raises the concern that increased traffic along the narrow and sparse roads in their region will present a road hazard as well as foster inefficient, wasteful behavior.

Plant Accessibility and Emergency Response

Each Protestant raises the concern that Applicant will be unable to access the facility in case of flooding, both because an all-weather road has not been properly provided for the in the applications materials, and because such a road would be useless if completely submerged under water during a characteristic deluge.

Operator Inexperience and Handling of Wastes not Authorized by Permit

Protestant Tonn raises the concern that Applicant has no demonstrated experience operating a facility like the one proposed, and that wastes not authorized in the permit may be handled through inadvertence or chicanery and pose additional pollution hazards.

**C. Issues raised in Comment Period**

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

**D. Disputed Issues**

There is no agreement between the Applicant, the Executive Director, and the Requestors on the issues presented above. The Executive Director's Response to Comments states that the Executive Director has changed the permit in response to public comment to ensure compliance with various statutory requirements prior to construction of the facility. These requirements include 30 TAC §317.1 regarding design criteria for sewerage systems, and 30 TAC §312, Subchapter G relating to registration of persons who transport sewage sludge, water treatment sludge, domestic septage, chemical toilet waste, grit trap waste, or grease trap waste.

The additional measures do not completely address the underlying concern of the Requestors. Specifically, the Executive Director's additional requirements of the Applicant have not yet been complied with, so it is unknown whether the Protestants would agree that such plans, after they have been produced, in fact sufficiently address regional geologic anomalies and potential contamination. To dismiss these issues as agreed upon at this juncture would effectively deny the Protestants' legal right to investigate, analyze, and dispute a facility they feel will be a significant danger to their property, health, and safety. OPIC therefore finds that there

is no agreement on this issue, albeit one or more concerns regarding the deficiencies in the Applicant's application and design criteria have been stipulated.

**E. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues concerning flooding, dissemination of pollutants harmful to life, pollution of water sources, use and enjoyment of property, interference with economic interests, odor nuisance, increased traffic danger, and plant accessibility in case of emergency are all issues of fact. However, OPIC is of the opinion that the issues regarding inefficiency or waste in trucking waste to a distant plant rather than treating it in on-site, operator inexperience, and potential handling of wastes not authorized by permit are all issues of policy or conjecture, and inappropriate for referral.

**F. Relevant and Material Issues**

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>14</sup> In order to refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>15</sup>

<sup>14</sup> See 30 TAC §55.209(e)(6)

<sup>15</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

Flooding, as a separate issue standing alone, is not within the Commission's jurisdiction. However, the issues raised by the Requestors concerning improper functioning of the discharge route due to poor drainage is material and relevant to the Commission's permitting decisions governed by the substantive law under which this permit is to be issued. Pursuant to Texas Water Code sections 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit's effectiveness in maintaining the water quality of the state. The Commission may consider whether the effluent will actually flow through the proposed discharge route as modeled, or instead overflow the boundaries of Koontz Bayou due to waterway aberrations. The proper identification and functioning of the discharge route as modeled by the ED is relevant to assessing the potential water quality and environmental impacts of the proposed activities. This point is particularly crucial here, where the facility will be located in a 100-year flood plain, additionally regulated by 30 TAC §309.13(a).

If the route has been modeled improperly or flooding otherwise occurs due to natural circumstances—inundating a facility constructed under improper standards given its location on a flood plane—dissemination of toxins may run onto the property of the Protestants. This contamination may impact the use and enjoyment of Protestants' property<sup>16</sup>; their health, as well as the health of their cattle and vegetation<sup>17</sup>; and their economic interests such as farming, ranching, and leasing of property.<sup>18</sup>

Other concerns are also material and relevant under the applicable statutes. Potential contamination of groundwater may adversely affect the use of impacted natural resources and

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<sup>16</sup> 30 TAC § 55.203(c)(4).

<sup>17</sup> See Water Code §26.003.

<sup>18</sup> 30 TAC § 55.201(d)

this danger is addressed by the Code.<sup>19</sup> The possibility of odor nuisance is also specifically addressed by 30 TAC section 309.13(e) and (g). Accessibility of the plant is material and relevant in that the Code requires at least one all-weather road with a driving surface situated above the 100-year flood plain or "an alternate method of access approved by the commission."<sup>20</sup> For the above reasons, it is therefore the opinion of OPIC that the foregoing questions are appropriate for referral to State Office of Administrative Hearings.

Conversely, OPIC agrees with the Executive Director's opinion that Requestor's remaining concern over increased traffic congestion and road danger falls outside of the scope of TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26. Vehicular traffic is not addressed by the substantive law governing this application and therefore cannot be considered relevant and material to the Commission's decision. On this issue, it is further noted that the Executive Director's Response to Comments specifically orders that the Applicant comply with 30 TAC §312, Subchapter G relating to registration of persons who will transport the waste, and thereby guaranteeing as much safety on the surrounding roads relating to this issue as can be garnered under Code provisions. OPIC therefore finds that the issue as articulated by Protestants is inappropriate for referral to the State Office of Administrative Hearings.

**G. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

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<sup>19</sup> 30 TAC § 55.203(c)(5).

<sup>20</sup> 30 TAC §317.7(e)

- 1) Is the discharge route adequately functioning to receive and convey the proposed discharge of effluent?
- 2) Does the permit protect against the spread of pollutants that would pose a health risk to human, animal, and vegetative life in the region?
- 3) Does the permit protect Koontz Bayou, the Brazos River, and private water sources from contamination?
- 4) Will the permitted activity endanger the use and enjoyment of Requestors' property by damaging their lands and existing structures?
- 5) Will the permitted activity interfere with Protestant's economic interests, such as farming, ranching, and leasing abilities?
- 6) Will the permitted activity pose an odor nuisance?
- 7) Will the all-weather road permit access to the plant in case of emergency?

#### **H. Maximum Expected Duration of Hearing**

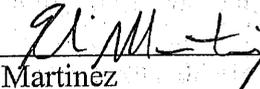
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

**IV. CONCLUSION**

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of nine months.

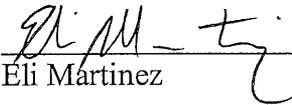
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Eli Martinez  
Assistant Public Interest Counsel  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2008 the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Eli Martínez

**MAILING LIST**  
**TCB RENTAL, INC.**  
**TCEQ DOCKET NO. 2007-1765-MWD**

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FOR ALTERNATIVE DISPUTE

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