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July 30, 2012

Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

VIA E-FILED
2012 JUL 30 PM 4:45
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: Use Determination Application No. 07-11914
TCEQ Docket No. 2008-0830-MJS-U
Tenaska Gateway Generation Station
Appeal of Purported Negative Use Determination

Dear Ms. Bohac:

We represent Tenaska Gateway Partners, Ltd. (Tenaska), the applicant in the above-referenced matter. Our client is in receipt of the July 10, 2012 letter from Chance Goodin in which he purports to issue a negative use determination on behalf of the Executive Director for either the entirety of Tenaska's application or partially for the three heat recovery steam generators (HRSGs) included in the application. This July 10, 2012 letter was served without an accompanying document signed by the Executive Director.

Pursuant to 30 Tex. Admin. Code § 17.25(a)(2)(A), Tenaska files this appeal of the purported negative use determination, and it does so without waiving its right to contest whether or not the Executive Director's presumed agent has in fact issued a lawful negative use determination. The information required under 30 Tex. Admin. Code § 17.25(b) is as follows:

- (1) **provide the name, address, and daytime telephone number of the person who files the appeal:**

The undersigned is filing this appeal on behalf of Tenaska. All correspondence for this appeal should be sent to the following:

Edward Kliwer
Fulbright & Jaworski L.L.P.
300 Convent Street, Suite 2100
San Antonio, Texas 78205-3792
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(2) give the name and address of the entity to which the use determination was issued;

Tenaska Gateway Partners, Ltd.
1044 N. 115th Street, Suite 400
Omaha, NE 68154-4446

(3) provide the use determination application number for the application for which the use determination was issued;

Use Determination Application 07-11914

(4) request commission consideration of the use determination; and

This letter is a formal request to the Commission for consideration of the purported negative use determination.

(5) explain the basis for the appeal.

In 2008, Tenaska applied for a pollution control use determination for an enhanced steam turbine combined with three HRSGs at its Gateway facility, which is a natural gas-fueled, combined-cycle electric generating station. Tenaska's equipment meets or exceeds regulations issued by environmental agencies to control or reduce air pollution. *See, e.g.,* 30 Tex. Admin. Code § 117.3010; § 106.512; 40 CFR 60.44 subpart DA & DB; 40 C.F.R. § 50.11.

Specifically, the equipment's increased thermal efficiency, as compared to a traditional steam boiler unit, reduces the fuel needs for the same power output, while emitting no additional air emissions such as nitrogen oxides (NOx). In addition, the duct burners inside the HRSGs, as designed, may further reduce plant air emissions with additional NOx controls, but such air emissions reductions occur in addition to the efficiency-based reductions.

In 2008, the Executive Director granted a 100% positive use determination for Tenaska's HRSGs while issuing a negative use determination for its steam turbines.

However, Rusk County Appraisal District appealed to the Commission regarding the positive use determination issued for the Gateway facility, and that appeal eventually resulted in the July 10, 2012 letter that purports to issue a negative use determination on Tenaska's application.

In 2008, the Executive Director correctly applied the law to Tenaska's facility, as well as to many other similar facilities. In 2012, the Executive Director failed to correctly interpret the controlling statute and applicable regulations. Among other things,

- The Executive Director has not lawfully issued a negative use determination.
- The Executive Director misunderstands the nature, function, and pollution control benefits of Tenaska's HRSGs. The Executive Director has failed to offer a reasoned and timely

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explanation for finding 0% pollution control and for rejecting Tenaska's justifiable expectations that its equipment was 100% pollution control property as properly determined in 2008.

- The HRSGs at Tenaska's facility satisfy the statutory definition of 100% pollution control and otherwise fully comply with applicable regulations. Alternatively, the HRSGs are entitled to a partial use determination.
- The Executive Director has applied the wrong administrative rules. On January 1, 2008, Tenaska was entitled to a 100% positive use determination under Tier II. Alternatively, the appropriate administrative rules were those in effect when Tenaska filed its application. The 2010 rules are invalid and have no force or effect relative to Tenaska's application. As applied to Tenaska, the 2010 rules are unconstitutional because they are an unconstitutional retroactive application of law and violate both due process and equal protection.
- The Executive Director has acted arbitrarily and capriciously, has treated similar property in conflicting ways despite statutory and constitutional prohibitions to the contrary, and has deprived Tenaska of due process and equal protection.

We look forward to briefing this matter in full and would greatly appreciate the opportunity to address the Commission in person.

Please note that we are providing copies of this notice of appeal to the individuals and entities identified on the Commission's mailing list from Docket No. 2008-0830-MIS-U.

Very truly yours,

Edward Kliever III

Edward Kliever III

EK/sbc

*with permission
Bernadette Karushky*

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FACSIMILE TRANSMISSION

DATE: July 30, 2012

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RE: Appeal of Purported Negative Use Determination
Tenaska Gateway Generation Station

NUMBER OF PAGES INCLUDING COVER PAGE: 4

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CHIEF CLERKS OFFICE

TEXAS COMMISSION
ON ENVIRONMENTAL
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MESSAGE:

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