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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 26, 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 AUG 26 PM 3:44  
CHIEF CLERKS OFFICE

**RE: ASPEN POWER LLC  
TCEQ DOCKET NO. 2008-1145-AIR**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Vic McWherter".

Vic McWherter, Senior Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

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**TCEQ DOCKET NO. 2008-1145-AIR**

**APPLICATION OF ASPEN POWER LLC  
FOR PERMITS NOS. 81706, PSD-TX-1089  
AND HAP12**

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§  
§

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

2008 AUG 26 PM 3:44

CHIEF CLERKS OFFICE

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO MOTIONS TO OVERTURN**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of the Public Interest Counsel (OPIC) files this response to the motions to overturn filed by Aaron Hartsfield and Willie Jean Hartsfield and Dr. Dallas Pierre, DDS (collectively the "Movants").

**I. Background**

Aspen Power LLC (Aspen) has applied to the Texas Commission on Environmental Quality (TCEQ) for authorization to construct an electric generating facility in Lufkin, Texas. This new facility would consist of a biomass wood-fired stoking grate boiler and steam turbine which would produce approximately 45 megawatts of electricity. This facility would emit nitrogen oxides, carbon monoxide, particulate matter, volatile organic compounds, sulfur dioxide, hydrogen chloride, sulfuric acid mist, lead, chlorine and ammonia. The application was filed on April 23, 2007. The notice of application and intent to obtain an air quality permit was published in *La Lengua* on June 20, 2007 and in *The Lufkin Daily News* on June 22, 2007.

During the initial comment period, timely hearing requests and letters of opposition were received from approximately 15 neighboring residents. Following completion of the ED's technical review of the application, the notice of application and preliminary decision was published in *The Lufkin Daily News* on March 13, 2008 in *La Lengua* and on March 19, 2008.

Subsequently, on July 9, 2008, Aspen requested that the application be directly referred to the State Office of Administrative Hearings (SOAH).

On July 21, 2008, Aspen filed a motion to remand the application to the TCEQ on the stated basis that all hearing requests had been withdrawn and notice of the contested case hearing at SOAH had not yet been given. On July 22, 2008, Administrative Law Judge Thomas H. Walston granted the motion pursuant to 30 TAC §80.101 and remanded the application to the ED for further processing. The ED then issued final approval of this application as an uncontested matter on July 25, 2008.

The Commission's rules at 30 TAC§ 50.139(a) provide that the applicant, OPIC, or other person may file with the chief clerk a motion to overturn the ED's action on an application. Subsection (b) requires that a motion to overturn be filed no later than 23 days after the date the agency mails notice of the signed permit to the applicant and persons on any required mailing list for the action.

In two separate timely-filed motions to overturn, Aaron and Willie Hartsfield and Dr. Dallas Pierre DDS dispute the legitimacy of their respective hearing request withdrawals which are referenced in Aspen's July 21, 2008 motion to remand and relied upon by Judge Walston in issuing his order of remand. A motion to overturn filed by Aaron and Willie Jean Hartsfield on August 11, 2008 and a separate motion to overturn filed by Dr. Dallas Pierre DDS contend that these requestors have not withdrawn their respective hearing requests. OPIC recommends granting the motions to overturn.

## **II. Discussion**

Mr. Aaron Hartsfield has stated clearly and unambiguously that he did not sign the letter of withdrawal dated July 17, 2008. He alleges that the signature was not legitimate and is therefore also concerned about the legitimacy of the other letters of withdrawal filed in this matter. Dr. Dallas Pierre DDS contends that the withdrawal of his hearing request was “obtained fraudulently.” Clearly, these requestors are still opposed to the issuance of this permit and still intend to challenge it through all available routes of public participation. To ensure protection of due process rights and the full exercise of public participation in permitting under Texas law, OPIC recommends that these motions to overturn be granted. OPIC finds it unnecessary for the Commission to make any findings concerning whether the purported letters of withdrawal were the product of illegal, fraudulent, or otherwise inappropriate conduct. Given the gravity of the questions which have been raised, the significance of the interests at stake, and the clear intention of the Movants to exercise their rights, no compelling reason exists to deny these motions. Aspen would not be prejudiced or harmed by the granting of these motions. The applicant had previously requested a direct referral to SOAH. Until at least July 17, 2008, Aspen had fully expected to proceed through contested case proceedings on this application. The significant due process issues raised by the Movants outweigh any potential prejudice to Aspen.

## **III. Conclusion**

OPIC recommends granting the motions to overturn and remanding the application to the ED so that the hearing requests of Aaron and Willie Jean Hartsfield and Dallas Pierre may be set for the Commission’s consideration. OPIC further notes that upon the granting of the motions to

overturn, both the ED and Aspen have the option of requesting a direct referral to SOAH pursuant to 30 TAC §55.210.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By *Vic McWherter*  
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### CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2008, the original and eleven true and correct copies of this document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

*Vic McWherter*  
Vic McWherter

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