

# Bickerstaff Heath Delgado Acosta LLP

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April 13, 2009

VIA HAND-DELIVERY

La Donna Castañuela  
Office of the Chief Clerk - MC 105  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

CHIEF CLERKS OFFICE  
2009 APR 13 PM 1:44  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

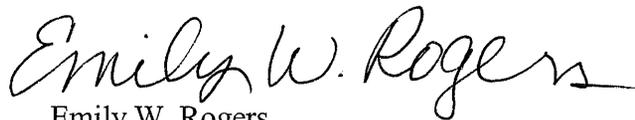
Re: SOAH Docket No. 582-06-2663; TCEQ Docket No. 2006-0631-UCR;  
*Application of the City of McKinney to Amend Certificate of Convenience and Necessity No. 20071 in Collin County*

Dear Ms. Castañuela:

Enclosed for filing is an original and eight copies of the City of McKinney's Reply to Exceptions in connection with the above-referenced matter. Please file the original and have the copy filed-stamped and returned to me via our runner.

Should you have questions or need to reach me, please call (512) 472-8021.

Sincerely,



Emily W. Rogers  
Attorney for the City of McKinney

EWR/dfb  
Enclosures

cc: All Parties of Record

SOAH DOCKET NO. 582-06-2663  
TCEQ DOCKET NO. 2006-0631-UCR

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APPLICATION OF THE CITY OF  
MCKINNEY TO AMEND SEWER  
CERTIFICATE OF CONVENIENCE  
AND NECESSITY NO. 20071  
IN COLLIN COUNTY, TEXAS  
APPLICATION NO. 35035-C

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BEFORE THE STATE OFFICE CLERKS OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**CITY OF MCKINNEY'S REPLY TO EXCEPTIONS**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, the City of McKinney ("City"), and files this Reply to Exceptions filed by the Protestant Landowners and the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ"). The Administrative Law Judge's ("ALJ") Proposal For Decision ("PFD") correctly recommends that the TCEQ approve the City's Application to Amend its Sewer Certificate of Convenience and Necessity ("CCN") No. 20071. No new issue of law or correction of fact in the record has been raised by the Protestant Landowners or the ED. The Exceptions to the PFD should be denied.

**I. LANDOWNERS' EXCEPTIONS**

A. Information outside the Record

The Landowners' Exceptions 2, 3, and 5 should be disregarded as they contain information that is not part of the record. Moreover, these exceptions contain alleged facts that would not be admissible under the Texas Rules of Evidence. Most of the information is hearsay and is unsubstantiated opinions and conclusions. These exceptions should be denied.

B. Burden of Proof

The Protestant Landowners claim in Exceptions 1, 2, and 3 that the City did not meet its burden of proof and did not comply with any of the requirements of state law. This argument is

without merit. The record clearly shows that the City filed a complete application and further supported that application with testimony from qualified and credible witnesses. Landowners would have TCEQ simply ignore the evidence provided by the City of its financial, technical, and managerial capabilities based on the bald and unsupported allegations of the Landowners. The City met its burden of proof and should be issued its application for an amendment to its sewer CCN. The Landowners' Exceptions 1, 2, and 3 should be overruled.

C. Landowner Opt-Out

The Protestant Landowners misstate the law regarding a landowner's right to opt out of a CCN. Section 15 of House Bill 2876 clearly states that the legislation is applicable only to applications filed after January 1, 2006. McKinney's application was filed in 2005. Moreover, even if the legislation applied, Mr. Powell failed to provide a written notice of his election to opt out of the CCN to TCEQ before the 30<sup>th</sup> day after the date the landowner received notice of the application. *See* 30 TEX. ADMIN. CODE § 291.102(h). The Protestant Landowners' Exception 4 should be overruled.

**II. EXECUTIVE DIRECTOR'S EXCEPTION**

The ED requests that TCEQ include an additional finding and conclusion of law that states that the Landowners clearly want to be excluded from the CCN, but that other factors outweighed the Landowners' desires. While the City does not dispute that the Landowners wish to be excluded from the CCN, although the Landowners resisted the ED's efforts (*see* Tr. at 390), the proposed finding of fact and conclusion of law add nothing legally to the proposed Order or otherwise add support to the ultimate conclusion to grant the City's CCN application. For this reason, the ED's exceptions should be overruled.

**III. CONCLUSION**

The City of McKinney respectfully requests that TCEQ overrule all of the proposed Exceptions to the PFD and grant the City's CCN Application, as amended.

Respectfully submitted,

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BY:   
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ATTORNEYS FOR CITY OF MCKINNEY

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and correct copy of the above and foregoing was forwarded via First Class Mail, hand delivery or facsimile on April 13, 2009 to the following parties of record:

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The Honorable Lilo Pomerleau  
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