



JACKSON WALKER L.L.P.  
ATTORNEYS & COUNSELORS

Leonard H. Dougal  
(512) 236-2233 (Direct Dial)  
(512) 391-2112 (Direct Fax)  
ldougal@jw.com

June 5, 2008

**VIA HAND DELIVERY**

Ms. LaDonna Castañuela (MC-105)  
Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JUN - 5 PM 4: 04  
CHIEF CLERKS OFFICE

RE: **TCEQ Docket No. 2007-1833-UCR**; SOAH Docket No. 582-08-0990;  
Application of City of College Station Pursuant to Water Code 13.255(a) to  
Decertify a Portion of Certificate of Convenience and Necessity No. 11340 of  
Wellborn Special Utility District (Application No. 35717-C)

Dear Ms. Castañuela:

Enclosed please find an original and twelve (12) copies of Wellborn Special Utility District's Reply Brief to City of College Station's Exceptions to the Proposal for Decision and Order to be filed in the above-captioned matter. Please file mark the remaining copy and return it to with our courier delivering same.

A copy of this letter and attached document is being served on all parties.

Sincerely,

Leonard H. Dougal

LHD:pjs  
Enclosure

cc: **VIA HAND DELIVERY**  
Hon. Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

Ms. LaDonna Castañuela

June 5, 2008

Page 2

---

**VIA HAND DELIVERY**

Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

**VIA HAND DELIVERY**

Mr. Brian MacLeod (MC-173)  
Texas Commission on Environmental Quality  
Legal Division  
12100 Park 35 Circle, Building A  
Austin, Texas 78753

**VIA HAND DELIVERY**

Mr. Bill Dugat  
Bickerstaff, Heath, Smiley, Pollan,  
Keever & McDaniel, LLP  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701

**VIA HAND DELIVERY**

Mr. Blas Coy (MC-103)  
Office of Public Interest Council  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

SOAH DOCKET NO. 582-08-0990  
TCEQ DOCKET NO. 2007-1833-UCR

2008 JUN -5 PM 4: 04

CHIEF CLERKS OFFICE

IN THE MATTER OF THE §  
APPLICATION OF CITY OF §  
COLLEGE STATION PURSUANT TO §  
WATER CODE 13.255(A) TO DECERTIFY §  
PORTION OF CERTIFICATE OF §  
CONVENIENCE AND NECESSITY (CCN) §  
NO. 11340 OF WELLBORN §  
SPECIAL UTILITY DISTRICT AND TO §  
AMEND CCN NO. 10169 IN BRAZOS §  
COUNTY, TEXAS §  
(APPLICATION NO. 35717-C) §

BEFORE THE

TEXAS COMMISSION

ON ENVIRONMENTAL QUALITY

**WELLBORN SPECIAL UTILITY DISTRICT'S REPLY TO  
CITY OF COLLEGE STATION'S EXCEPTIONS**

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

Wellborn Special Utility District ("Wellborn") files this Reply to the City of College Station's Exceptions to the Proposal for Decision ("PFD") and in support states as follows:

**I.  
INTRODUCTION**

The Administrative Law Judge ("ALJ") recommends that the Commission dismiss the City of College Station's (the "City") 13.255(a) application ("Application"), which is based on a 1992 Agreement for the Bulk Sale and Purchase of Water (the "1992 Agreement") between the City and a predecessor entity to Wellborn. Wellborn agrees with the ALJ that dismissal is the only appropriate remedy in this case, but Wellborn further believes that the City's Application is so deficient and the 1992 Agreement is so clearly not a Section 13.255(a) agreement that the Commission can also declare the 1992 Agreement invalid and insufficient to constitute a 13.255(a) agreement. By its Exceptions to the PFD, the City once again seeks to perpetuate this

dispute for purposes of encroaching upon Wellborn's CCN by attempting to breathe new life into a long-expired agreement that fails on its face to meet the statutory requirements of Section 13.255(a). The Commission now has the opportunity to say "No" once and for all and dismiss the City's Application. Wellborn respectfully requests that the Commission overrule the City's Exceptions, adopt the ALJ's PFD dismissing the City's Application and declare that the 1992 Agreement is not a Section 13.255(a) agreement.

**II.**  
**REPLY TO CITY OF COLLEGE STATION'S EXCEPTIONS**

**A. Exception No. 1 Should be Overruled Because it Applies the Wrong Analysis to the 1992 Agreement Under Section 13.255(a), a Determination of Contract Validity is Necessary in This Case, and the 1992 Agreement Fails on its Face to Qualify as a Valid 13.255(a) Agreement Because it Expired.**

The City takes exception to Conclusion of Law Nos. 2 and 3 as well as Ordering Provision Nos. 1 and 2 that grant Wellborn's Plea to the Jurisdiction and deny the City's 13.255(a) Application. The ALJ concluded that a determination of whether an agreement is a 13.255(a) agreement requires an initial determination concerning the validity of the contract, which is beyond the expertise of the Commission. The City contends that the Conclusions of Law and Ordering Provisions are in error for three reasons: 1) the City's Application does not seek a determination by TCEQ of common law claims; 2) TCEQ has authority to interpret and settle disputes over the 1992 Agreement to the extent necessary to exercise its non-discretionary authority under Section 13.255(a); and 3) a judicial decree as to the validity of a contract is not required prior to filing it with TCEQ under Section 13.255(a). In essence, the City's argument can be boiled down into one basic premise: TCEQ has authority to amend a CCN by any "agreement" filed under Section 13.255(a), whether disputed or undisputed, and therefore, the 1992 Agreement is sufficient to trigger the TCEQ's authority to transfer Wellborn's customers to

the City. Wellborn strongly disagrees with the City and would note that such a process would make a mockery out of the TCEQ's regulatory role in CCN matters. Wellborn believes that the City's Exception No. 1 is unfounded and unnecessarily confuses the issues.

1. Section 13.255(a) requires an initial determination of contract validity in disputed cases.

Section 13.255(a) was implemented as a means by which municipalities and retail public utilities could voluntarily reach agreements to transfer customers without the need for unnecessary and costly processes and procedures. The plain meaning of Section 13.255(a), therefore, presupposes that an agreement filed pursuant to that section is a valid, voluntary and existing agreement between the parties.<sup>1</sup> In cases where the validity of the agreement is undisputed, TCEQ has no difficulty in exercising its authority to amend the CCNs by the terms of the agreement, and no special determinations concerning common law contract issues are generally necessary. The City attempts to subject the 1992 Agreement to this uncontested mechanism, claiming that TCEQ's authority under Section 13.255(a) is "nondiscretionary" and that no detailed inquiry regarding contract validity is necessary or appropriate in this case. Attempting to cast the 1992 Agreement as a 13.255(a) agreement, however, is like forcing a square peg into a round hole. The end result is the same—it does not work.

Under the City's absurd analysis, any document filed by a city and alleged to be a Section 13.255(a) agreement would invoke the "nondiscretionary" authority of the TCEQ and cause the agency to amend the subject CCN. Nothing in Section 13.255(a), however, makes the TCEQ's jurisdiction or authority automatic or nondiscretionary in disputed cases until it is first

---

<sup>1</sup> TEX. WATER CODE ANN. § 13.255(a).

determined that the agreement filed is the type of agreement contemplated by Section 13.255(a).<sup>2</sup> Inherent within this determination is that the agreement be a valid and existing written agreement.<sup>3</sup> The ALJ's PFD does not state that the TCEQ lacks jurisdiction or authority to determine whether an agreement is a 13.255(a) agreement, but rather, it states that in order to exercise this authority, an initial determination must be made that the subject agreement is valid. Where the validity of an agreement is disputed, the ALJ correctly recommends that the Commission should not act to amend the disputed CCN area.

2. Regardless of who makes the determination, the 1992 Agreement is not a 13.255(a) agreement because it expired prior to the City's filing of its 13.255(a) Application.

In this case, the 1992 Agreement fails on its face to qualify as a 13.255(a) agreement because it expired over four years prior to the City's filing of its 13.255(a) Application.<sup>4</sup> Regardless of whether TCEQ or the district court makes the determination, the outcome is the same in this case—there is no valid, existing agreement to support the City's 13.255(a) Application and dismissal was proper. Paragraph 3 of the 1992 Agreement provides:

The parties understand and agree that as a part of the consideration for the execution of this Agreement WELLBORN [Water Supply Corporation] agrees to allow CITY to provide the water service to any area annexed by CITY without separate charge. It is the intent of the parties that *any prohibition of such transfer of water utility customers upon annexation by City shall result in the automatic termination of this Agreement.*<sup>5</sup>

---

<sup>2</sup> To do otherwise would encourage municipalities to force involuntary transfers of customers and to avoid the procedures of 13.255(b) requiring payment of just compensation for any forced transfer of customers.

<sup>3</sup> TEX. WATER CODE ANN. § 13.255(a) (stating that “the municipality and a retail public utility...*may agree in writing*” and that the *executed* agreement shall be filed with TCEQ).

<sup>4</sup> See Ex. 2, City of College Station's Application to Amend a Water Certificate of Convenience and Necessity Under Water Code Section 13.255.

<sup>5</sup> 1992 Agreement, ¶ 3 (emphasis added).

The 1992 Agreement provides one self-effectuating remedy to the City for any prohibition of the transfer of Wellborn's customers to the City after an annexation—automatic termination of the Agreement. According to Exhibit 2 to the City's 13.255(a) Application, after the 2002 annexation, Wellborn would not allow the City to provide water utility service to the newly annexed area.<sup>6</sup> There could be no clearer admission by the City that the automatic termination provision of the 1992 Agreement was in fact triggered following the annexation in 2002, years before the City filed its 13.255(a) Application. Section 13.255(a) expressly contemplates the filing of a valid and subsisting agreement between the parties at issue—there is no provision in the statute that will breathe new life into a terminated agreement.<sup>7</sup> Having terminated by its own terms, the 1992 Agreement can be of no further force and effect. If anything is “nondiscretionary” in this case, therefore, it is that the 1992 Agreement automatically terminated and cannot qualify as a 13.255(a) agreement in this case.<sup>8</sup>

By its 13.255(a) Application and Exception No. 1, the City seeks to impose a process applicable to undisputed agreements onto the present case where the agreement at issue is strongly contested. Regardless of who makes the determination—the TCEQ or the district court—Section 13.255(a) necessarily requires a threshold determination that a contract is a valid

---

<sup>6</sup> See Ex. 2, City of College Station's Application to Amend a Water Certificate of Convenience and Necessity Under Water Code Section 13.255.

<sup>7</sup> See § 13.255(a).

<sup>8</sup> Additionally, the City's attempt to use a 1997 agreement between the City and Wellborn Water Supply Corporation to suggest that the parties intended for the 1992 Agreement to apply to all future annexations rings hollow. If anything, the 1997 agreement further confirms Wellborn's position that the 1992 Agreement was insufficient to effectuate the transfer of customers from Wellborn to the City after each annexation. Clearly, in this instance, the City felt that the 1992 Agreement alone was insufficient to transfer customers as it entered into the 1997 agreement and then, after the 2002 annexation, requested by letter that Wellborn enter into a separate agreement to effectuate the transfer of customers. Despite the City's attempt to rewrite history in its Exceptions, the only proof that may be gleaned from the 1997 agreement is that the City did not believe the 1992 Agreement alone was sufficient to transfer Wellborn's customers after an annexation.

and existing agreement.<sup>9</sup> Where the validity of the subject agreement is contested, no authority to amend a CCN under Section 13.255(a) may be exercised until the agreement is determined to be in existence and valid. Accordingly, the ALJ's PFD was proper and the City's Exception No. 1 should be overruled.

**B. Exception No. 2 Should be Overruled Because Wellborn Has Sovereign Immunity and The ALJ Has Discretion to Dismiss the City's Application for Lack of Jurisdiction Based on Multiple Factors.**

The City takes exception to Ordering Provision No. 1 granting Wellborn's Plea to the Jurisdiction and claims that the Order wrongly suggests that Wellborn has sovereign immunity and that the true basis for the ALJ's recommendation to dismiss the City's Application is the Executive Director's jurisdictional plea concerning TCEQ's lack of jurisdiction to determine common law contract issues. Wellborn urges the Commissioners to overrule Exception No. 2 because Wellborn has sovereign immunity against a 13.255(a) action, and the ALJ may dismiss a case based on reasons outside of those expressly pled by the parties so long as the parties have an opportunity to respond.<sup>10</sup>

1. Wellborn has sovereign immunity in 13.255(a) proceedings.

The City points to Section 13.255(j) as the provision that constitutes an express waiver of immunity as to 13.255(a) actions because it provides that Section 13.255 applies only to certain types of entities, including Chapter 65 special utility districts, such as Wellborn. The City's construction of Section 13.255(j), however, glosses over one significant word—"only." Subsection (j) provides that 13.255 applies *only* to certain retail public utilities, not that it *always*

---

<sup>9</sup> See *id.*

<sup>10</sup> Further, Wellborn reiterates that it initially raised the issue of sovereign immunity in a Plea to the Jurisdiction filed in the previous Brazos County District Court action. The district court granted Wellborn's Plea to the Jurisdiction in that case, and the Tenth Court of Appeals affirmed the decision. Therefore, the issue of Wellborn's sovereign immunity has already been decided.

applies to certain retail public utilities. The Texas Supreme Court requires that waivers of immunity be stated in clear and unambiguous language.<sup>11</sup> Section 13.255(j) wholly lacks the clear and unambiguous language necessary to constitute a waiver of immunity, making no mention whatsoever of either “waiver” or “immunity.”

Further, any suggestion that Section 13.255(a) itself constitutes a waiver of immunity is similarly misplaced. Although a party may waive immunity by voluntarily entering into a valid 13.255(a) agreement, nothing in the plain meaning of Section 13.255(a) can be construed as an automatic, clear and unambiguous waiver of sovereign immunity irrespective of any dispute against the subject agreement. Exception No. 2 should therefore be overruled.

2. The ALJ may dismiss on grounds other than those stated in a formal jurisdictional plea as long as parties have notice of the issue and have an opportunity to respond.

The ALJ is not required to have a formal jurisdictional plea before him in order to dismiss the City’s Application. SOAH rules allow an ALJ to dismiss a case for lack of jurisdiction over a matter on his own initiative so long as the parties have an opportunity to respond.<sup>12</sup> In this case, the reasons articulated by Judge Scudday for dismissing the City’s Application were heavily briefed by the parties, and all parties had ample opportunity to respond. Therefore, Ordering Provision No. 1 is not inconsistent with the PFD, and the City’s Exception No. 2 should be overruled.

**C. Exception No. 3 Should be Overruled Because Wellborn Argued Numerous Reasons for Dismissal of the City’s Application.**

The City excepts to Finding of Fact No. 20 as a misstatement of Wellborn’s Plea to the Jurisdiction. Wellborn does not agree with the City’s Exception because Wellborn argued

---

<sup>11</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006); see also *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

<sup>12</sup> See 1 TEX. ADMIN. CODE § 155.56.

numerous reasons for dismissal of the City's Application, not merely sovereign immunity.<sup>13</sup> Specifically, Wellborn argued that the City's Application could not continue because the 1992 Agreement is not a valid agreement, Wellborn is not bound by the 1992 Agreement and the 1992 Agreement does not qualify as a 13.255(a) agreement. If any revision should be made to Finding of Fact No. 20, (and Wellborn is not suggesting that any revision is necessary), the Finding of Fact should be revised as follows:

On March 3, 2008, Wellborn filed a Plea to the Jurisdiction requesting dismissal of College Station's application on the basis that Wellborn had sovereign immunity and also asserted that there was no valid contract under TEX. WATER CODE § 13.255(a).

The change as proposed by the City in Exception No. 3 is not necessary. Accordingly, Wellborn requests that Exception No. 3 be overruled or alternatively, that Finding of Fact No. 20 be revised as indicated herein.

### **III. CONCLUSION**

The ALJ's Proposal for Decision properly recommends that the Commission dismiss the City's 13.255(a) Application. The City's Application is flawed in many ways, but the most significant failing is that the 1992 Agreement fails to conform to the statutory requirements. The City should not be allowed to encroach upon Wellborn's CCN without paying proper compensation by seeking to breathe new life into a long-expired and unenforceable agreement. Accordingly, Wellborn respectfully requests that the Commission overrule the City's Exceptions, adopt the ALJ's PFD dismissing the City's Application and declare that the 1992 Agreement is not a Section 13.255(a) agreement.

---

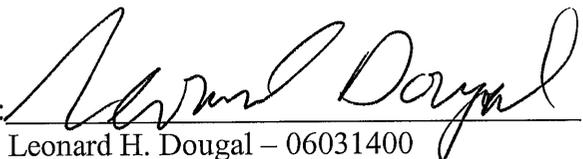
<sup>13</sup> Additionally, Wellborn filed a Plea to the Jurisdiction and First Amended Answer on April 25, 2008, setting forth additional defects with the City's Application and requesting dismissal of the Application.

**IV.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Wellborn Special Utility District respectfully prays that the Commissioners overrule the City of College Station's Exceptions to the Proposal for Decision filed by Judge Roy Scudday on May 5, 2008, adopt Judge Scudday's Proposal for Decision dismissing the City's Application, declare that the 1992 Agreement is not a Section 13.255(a) agreement and grant such other and further relief to which Wellborn may show itself justly entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
512-236-2000  
Fax No. 512-391-2112

By:   
Leonard H. Dougal – 06031400  
Philip D. Mockford – 14244100  
Courtney E. Cox – 24045711

ATTORNEYS FOR WELLBORN SPECIAL  
UTILITY DISTRICT

**CERTIFICATE OF SERVICE**

This is to certify that on this 5th day of June, 2008, a true and correct copy of the foregoing document was served on the following parties via the manner indicated below:

Ms. LaDonna Castañuela (MC-105) *Hand Delivery*  
Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

Honorable Roy Scudday *Hand Delivery*  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

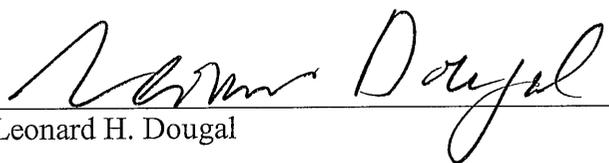
Docket Clerk *Hand Delivery*  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

Mr. Brian MacLeod (MC-173) *Hand Delivery*  
Texas Commission on Environmental Quality  
Legal Division  
12100 Park 35 Circle, Building A  
Austin, Texas 78753

Mr. Bill Dugat *Hand Delivery*  
Bickerstaff, Heath, Smiley, Pollan,  
Kever & McDaniel, LLP  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701

Mr. Blas Coy (MC-103) *Hand Delivery*  
Office of Public Interest Council  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JUN -5 PM 4:05  
CHIEF CLERKS OFFICE

  
Leonard H. Dougal