

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

<b>IN THE MATTER OF THE APPLICATION OF CITY OF COLLEGE STATION TO DECERTIFY PORTION OF CERTIFICATE OF CONVENIENCE &amp; NECESSITY (CCN) No. 11340 OF WELLBORN SPECIAL UTILITY DISTRICT AND TO AMEND CCN No. 10169 IN BRAZOS COUNTY, TEXAS, (APPLICATION NO. 35717-C)</b>	<b>§ § § § § § § § § §</b>	<b>BEFORE THE STATE OFFICE          OF          ADMINISTRATIVE HEARINGS</b>
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**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

This contested case was referred to the State Office of Administrative Hearings (SOAH) based on the protests of the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) and Wellborn Special Utility District of Brazos County (Wellborn). The City of College Station (College Station) proposes to decertify a portion of the certificate of public convenience and necessity (CCN) of Wellborn, and to amend the CCN of College Station.

On March 3, 2008, a preliminary hearing was held in this case. Several issues were considered at the hearing including the designation of parties as set forth in the Order dated March 4, 2008. On March 3, 2008, Wellborn filed a Plea to the Jurisdiction. All parties subsequently filed briefs regarding that plea, with the ED agreeing with the result but not the grounds of Wellborn's plea and College Station opposing it.

**II. PLEA TO THE JURISDICTION**

**A. Background**

On October 22, 1992, College Station and Wellborn Water Supply Corporation (WSC) entered into an Agreement for Bulk Sale and Purchase of Water (Agreement). Pursuant to that

Agreement, College Station agreed to furnish treated potable water to delivery points in the area served by WSC. As part of the consideration for the Agreement, WSC agreed to allow College Station “to provide the water service to any area annexed by City without separate charge.” It was further provided that “any prohibition of the transfer of water utility customers upon annexation by the City” would result in the “automatic termination” of the Agreement. The term of the Agreement was for an initial term of six years, after which it automatically renewed and continued in full effect “until termination by either party.” Upon notice of termination by either party, College Station would “continue water service for Wellborn for three (3) years from the date of such notice.” Notice of termination could be given by either party after the third anniversary date of the Agreement.

In July 1997, College Station and WSC executed an Agreement to transfer to College Station water service areas within the certificated service area of WSC that had been annexed by College Station, and to the transfer or assignment of the Agreement to Wellborn after its creation. On March 11, 1998, TCEQ issued an Order in Docket No. 97-1133-DIS converting WSC to Wellborn Special Utility District of Brazos County, and providing for the subsequent transfer of WSC’s CCN to Wellborn. On May 5, 1998, the Board of Directors of WSC resolved to transfer all assets and debts of WSC to Wellborn.

On January 21, 2000, Wellborn notified College Station of its intent to terminate the Agreement effective January 21, 2003. On October 24, 2002, College Station annexed land located in the certificated service area of Wellborn. On September 11, 2003, Wellborn filed a petition with TCEQ requesting a Cease and Desist Order against College Station for interfering with its CCN. On March 11, 2005, TCEQ issued an Order in Docket No. 2003-1518-UCR concluding that College Station’s actions to plan for water service within the newly annexed area were “preliminary actions that do not support a cease-and-desist order.”

College Station then proceeded to file a lawsuit against Wellborn seeking enforcement of the Agreement. The district court granted Wellborn’s plea to the jurisdiction, and that decision

was upheld by the Waco Court of Appeals. *City of College Station v. Wellborn Special Utility District*, 2006 WL 2067887 (Tex. App.—Waco, 2006). In its memorandum of opinion, the Appellate Court held that TCEQ had exclusive, original jurisdiction of the city's claims. At that point, College Station filed its application that is the subject of this contested case on June 5, 2007. College Station solely relied on the provisions of Code § 13.255(a) as the basis for its application.

### **B. Applicable Law**

TEX. WATER CODE ANN. (Code) § 13.242 requires a utility to secure from TCEQ a CCN before it can provide retail water or sewer utility service directly or indirectly to the public. Code § 13.255(a) provides that if an area within the CCN of a retail public utility is annexed by a municipality, the municipality and the utility may “agree in writing that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility.” The agreement “may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on.” The executed agreement “shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.”

### **C. Arguments of the Parties**

Wellborn's Plea to the Jurisdiction consists of three issues:

1. The validity of the 1992 Agreement between College Station and WSC, predecessor to Wellborn, and whether the TCEQ has jurisdiction to consider the validity of the 1992 Agreement
2. Whether the 1992 Agreement meets the requirements of a contract controlled by Texas Water Code § 13.255(a).
3. Sovereign immunity as it applies to TCEQ's jurisdiction in this proceeding.

### 1. Validity of the Agreement.

In regard to the first issue, Wellborn argues that the TCEQ has authority to undertake a basic review of the Agreement to determine if it involves a retail public utility and CCN, if it is signed by the subject parties, if it contains terms that are consistent with the requisite statutory provision, and if it remains valid and has not terminated. Based on that authority, Wellborn argues that the Agreement is not valid because it terminated in 2003, well prior to the filing of the City's application in 2007. Because no subsequent agreement was entered into between College Station and Wellborn regarding service to the annexed areas, Wellborn asserts that there is no valid agreement to be considered by TCEQ.

ED argues that TCEQ does not have jurisdiction to determine the validity of the Agreement because to do so would require it to adjudicate common law contract claims and defenses. ED points out that TCEQ is not bound by the decision of the Waco Court of Appeals, citing a Proposal for Decision written by Administrative Law Judge William Newchurch,<sup>1</sup> which held that the TCEQ is bound neither by the doctrines of *res judicata* or *stare decisis* to follow decisions of courts other than the Travis County District Court, the Austin Appeals Court, and the Supreme Court. In addition, ED points out that not only is there no legislative delegation of exclusive jurisdiction to TCEQ to adjudicate common law contract claims, it has no expertise in handling such claims, and the rights and obligations of College Station and Wellborn under the Agreement are what is at issue, not the merits of the application.<sup>2</sup>

In response, College Station argues that TCEQ does have authority pursuant to Code § 15.255(a) to decide whether the Agreement is or is not a Code § 15.255(a) contract, which necessarily requires it to decide if there is a valid, executed agreement between the parties.

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<sup>1</sup> *Las Palmas Resorts, Inc. v. City of Donna*, SOAH DOCKET No. 582-04-025, TCEQ DOCKET NO. 2003-0697-UCR.

<sup>2</sup> *City of San Antonio v. BSR Water Co.*, 190 S.W.3d 742 (Tex. App.—San Antonio [4<sup>th</sup> Dist.], 2005).

College Station argues that a hearing should be held to determine the fact question of whether the Agreement has expired.

In effect, both College Station and Wellborn assert that TCEQ has the implied authority to determine if the Agreement is valid although they contend that such a determination would require a different result, while ED asserts that TCEQ does not such authority.

**2. Code § 13.255(a) contract.**

Wellborn argues that, in order for the Agreement to meet the requirements of a Code § 13.255(a) contract, there must be a specific, defined area annexed followed by the execution of an agreement between College Station and Wellborn to allow College Station to serve the annexed areas, the agreement must be filed with TCEQ, the agreement must sufficiently define the annexed areas so that its terms can be incorporated into the CCNs, and the agreement must memorialize the transfer of service areas and customers following the annexation. Wellborn argues that because the Agreement was executed and terminated years prior to the annexation, in order for there to be an agreement as contemplated by the statute, that agreement can only be executed after the annexation. In addition, Wellborn points out that the Agreement fails to indicate any specific or defined area annexed that could be incorporated into the CCNs, nor does it memorialize the transfer of service areas and customers.

ED argues that there are only three ways a contract could be considered under Code § 13.255(a): 1) approve a contract under Code § 13.248, 2) have a court of competent jurisdiction issue a final order declaring the contract valid, or 3) if the parties jointly present the contract and express no objections to its validity. ED points out that none of these options are present in this case.

College Station argues that the Agreement is a Code § 13.255(a) contract because it is a written agreement executed by the parties, the specific land at issue is that included in the annexation, and the Agreement relates to the provision of water service to the annexed territory.

### **3. Sovereign immunity.**

Wellborn asserts that it is immune from suit by College Station because waiver of immunity has not been made in this case, and the issue has been decided by the Waco Court of Appeals. ED argues that sovereign immunity should have no impact on this case because TCEQ has jurisdiction to hear disputes over CCNs, and Code § 155.255(a) acts as a waiver of immunity because it specifically gives TCEQ authority to enforce valid agreements. College Station essentially agrees with ED on this point.

### **D. Analysis and Recommendation**

It is clear that before a determination can be made as to whether the Agreement qualifies as a Code § 13.255(a) contract the validity of the agreement must be considered. Both Wellborn and College Station argue that TCEQ can decide that question, but both argue that such a consideration would require totally different results. Wellborn argues that the Agreement is not valid because it is not binding on Wellborn, is not effective for transferring territory and is not sufficiently certain as to the area to be transferred, and that it terminated by its own terms well prior to College Station's application, all of which cause the Agreement to not be a valid contract. College Station responds that the Agreement is a written agreement executed by the parties, involves service to territory located in the service area of Wellborn that has been annexed, which areas can be deduced from the annexation ordinance, and relates to the provision of service to the annexed territory, which is sufficient to provide jurisdiction to TCEQ pursuant to Code § 13.255(a).

ED's position that TCEQ has no jurisdiction to determine the validity of the contract is the most persuasive. This is clearly a contract dispute between Wellborn and College Station involving common law contract issues such as failure of consideration, rescission, the statute of frauds, and the parol evidence rule. These are all issues that are clearly not within the special expertise of TCEQ, but rather are outside the jurisdiction of TCEQ, and these issues must be decided before TCEQ can make a determination regarding College Station's application pursuant to Code § 13.255(a). Accordingly, the Plea to the Jurisdiction should be granted and the application of College Station should be dismissed.

**SIGNED May 5, 2007**

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**ROY G. SCUDDAY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE**

## TEXAS COMMISSION ON THE ENVIRONMENT



**AN ORDER granting the Plea to the Jurisdiction of Wellborn Special Utility District regarding the Application of City of College Station; TCEQ Docket No. 2008-1833-UCR; SOAH Docket No. 582-08-0990**

On, \_\_\_\_\_, 2008, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Plea to the Jurisdiction of Wellborn Special Utility District of Brazos County (Wellborn) regarding the Application of the City of College Station (College Station) pursuant to TEX. WATER CODE § 13.255(a) to Decertify a Portion of Certificate of Convenience and Necessity (CCN) No. 11340 of Wellborn and to amend CCN No. 10169 in Brazos County, Texas (Application No. 35717-C). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision which recommended that the Commission grant Wellborn's Plea to the Jurisdiction and dismiss College Station's Application

### FINDINGS OF FACT

1. On June 5, 2007, City of College Station (College Station) filed its Application to Decertify a Portion of Certificate of Convenience and Necessity (CCN) No. 11340 of Wellborn Special Utility District of Brazos County (Wellborn) and to amend CCN No. 10169 of College Station, Brazos County, Texas (Application No. 35717-C).
2. On September 24, 2007, Wellborn filed its opposition to College Station's application.
3. On November 20, 2007, TCEQ notified College Station that Executive Director of the TCEQ (ED) was protesting the application on its own motion.

4. On November 20, 2007, the Commission referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
5. On March 3, 2008, the ALJ held a preliminary hearing in this matter. As a result of the hearing, the following were designated as parties to the proceeding: College Station, Wellborn, and ED.
6. Wellborn is a political subdivision of the State of Texas, created and operating under TEX. WATER CODE Ch. 65.
7. Wellborn holds retail water CCN No. 11340.
8. Wellborn and College Station are retail public utilities.
9. College Station is a home-rule city.
10. College Station holds retail water CCN No. 10169.
11. On October 22, 1992, College Station and Wellborn Water Supply Corporation (WSC) entered into an Agreement For Bulk Sale And Purchase of Water (Agreement).
12. Pursuant to that Agreement, College Station agreed to furnish treated potable water to delivery points in the area served by WSC. As part of the consideration for the Agreement, WSC agreed to allow College Station “to provide the water service to any area annexed by City without separate charge.” It was further provided that “any prohibition of the transfer of water utility customers upon annexation by the City” would result in the “automatic termination” of the Agreement. The term of the Agreement was for an initial term of six years, after which it automatically renewed and continued in full effect “until termination by either party.” Upon notice of termination by either party, College Station would continue water service for WSC for three years from the date of

such notice. Notice of termination could be given by either party after the third anniversary date of the Agreement.

13. In July 1997, College Station and WSC executed an agreement to transfer water to College Station water service areas within the certificated service area of WSC that had been annexed by City and to the transfer of the Agreement to Wellborn after its creation. On March 11, 1998, TCEQ issued an Order in Docket No. 97-1133-DIS converting WSC to Wellborn Special Utility District of Brazos County and providing for the subsequent transfer of WSC's CCN to Wellborn. On May 5, 1998, the Board of Directors of WSC resolved to transfer all assets and debts of WSC to Wellborn.
14. On January 21, 2000, Wellborn notified College Station of its intent to terminate the Agreement effective January 21, 2003.
15. On October 24, 2002, College Station passed and approved Ordinance No. 2590, by which College Station annexed certain lands within the service area of Wellborn.
16. On September 11, 2003, Wellborn filed a petition with TCEQ requesting a Cease and Desist Order against College Station for interfering with its CCN.
17. On March 11, 2005, TCEQ issued an Order in Docket No. 2003-1518-UCR concluding that College Station's actions to plan for water service within the newly annexed area were "preliminary actions that do not support a cease-and-desist order."
18. College Station filed a lawsuit against Wellborn in Brazos County District Court seeking enforcement of the Agreement. The district court granted Wellborn's plea to the jurisdiction, and that decision was upheld by the Waco Court of Appeals. *City of College Station v. Wellborn Special Utility District*, 2006 WL 2067887 (Tex. App.—Waco, 2006).

19. In its memorandum of opinion, the Waco Court of Appeals held that TCEQ had exclusive, original jurisdiction of the city's claims.
20. On March 3, 2008, Wellborn filed a Plea to the Jurisdiction requesting dismissal of College Station's application on the basis that there was no valid contract under TEX. WATER CODE (Code) § 13.255(a).
21. As directed by the ALJ, all parties filed briefs and replies regarding the issues raised by the Plea of Jurisdiction. ED recommended granting Wellborn's plea, although not for the reasons asserted by Wellborn.

#### **CONCLUSIONS OF LAW**

1. If an area within the certificate of convenience and necessity (CCN) of a retail public utility is annexed by a municipality, the municipality and the utility may agree in writing that all or part of the area may be served by a municipally owned utility, or by the retail public utility. The agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on. The executed agreement shall be filed with the Commission, and the Commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement. TEX. WATER CODE (Code) § 13.255(a).
2. In order to determine whether the Agreement between WSC and College Station is an agreement contemplated by Code § 13.255(a), there first must be a determination whether there is a valid agreement between College Station and Wellborn. Consideration of that issue necessarily involves common law contract issues such as failure of consideration, rescission, the statute of frauds, and the parol evidence rule, none of which are within the special expertise of the Commission.

3. Based on the above Findings of Fact and Conclusions of Law, the Commission does not have jurisdiction to consider and rule on the validity of the Agreement, and the application of College Station should be dismissed.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. Wellborn Special Utility District's Plea to the Jurisdiction is GRANTED.
2. City of College Station's application under TEX. WATER CODE § 13.255(a) is DISMISSED.
3. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
4. The Chief Clerk of the Commission shall forward a copy of this Order to all parties.
5. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.
6. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code §2001.144.

Issue Date: \_\_\_\_\_

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Buddy Garcia, Chairman