

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 20, 2009

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

Re: Application of Bolivar Water Supply Corporation to requesting a Cease-and-Desist Order against the City of Denton, Texas; SOAH Docket No. 582-09-9172; TCEQ Docket No. 20091224-UCR

Dear Ms. Castañuela:

Please find enclosed the Executive Director's Statement of No Exceptions to the Proposal for Decision. Please let me know if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "B MacLeod", with a long horizontal flourish extending to the right.

Brian MacLeod
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

SOAH DOCKET NO. 582-09-6172
TCEQ DOCKET NO. 2009-1224-UCR

PETITION OF BOLIVAR WATER	§	BEFORE THE TEXAS COMMISSION
SUPPLY CORPORATION, CCN NO.	§	
11257, REQUESTING A CEASE-AND-	§	ON
DESIST ORDER AGAINST THE CITY	§	ENVIRONMENTAL QUALITY
OF DENTON	§	

**THE EXECUTIVE DIRECTOR'S STATEMENT OF NO EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

COMES NOW the Executive Director of the Texas Commission on Environmental Quality, by and through a representative of the Commission's Environmental Law Division, and files this statement of no exceptions to the Administrative Law Judges proposal for decision.

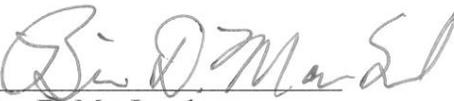
The Executive Director agrees with the result of the proposal for decision and for further support of this decision has attached the Commission's order in TCEQ Docket No. 2003-1518-UCR in which the Commission dismissed a request for a cease and desist order in a similar situation.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

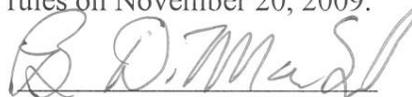
Robert Martinez, Director
Environmental Law Division

By 

Brian D. MacLeod
Staff Attorney
Environmental Law Division
State Bar of Texas No. 12783500
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Fax: (512) 239-0606

CERTIFICATE OF SERVICE

This is to certify that all parties on the attached Mailing List have been served with a copy of the foregoing document in accordance with TCEQ and SOAH rules on November 20, 2009.



Brian D. MacLeod
Staff Attorney
Environmental Law Division

MAILING LIST
BOLIVAR WSC'S PETITION
FOR A CEASE AND DESIST ORDER
AGAINST THE CITY OF DENTON
SOAH DOCKET NO. 582-09-6172
TCEQ DOCKET NO. 2009-1224-UCR

William G. Newchurch

Administrative Law Judge
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City of Denton

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TCEQ Chief Clerk:

Docket Clerk
TCEQ Office of Chief Clerk
P.O. Box 13087 (MC 105)
Austin, Texas 78711-3087
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER denying the request of Wellborn Special Utility District for a TEX. WATER CODE § 13.252 cease and desist order against the City of College Station; TCEQ Docket No. 2003-1518-UCR; SOAH Docket No. 582-04-2840.

On March 9, 2005, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the request of Wellborn Special Utility District (Wellborn) for a cease and desist order against the City of College Station (College Station) pursuant to TEX. WATER CODE § 13.252. Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision which recommended that the Commission grant College Station's Motion for Summary Disposition and dismiss Wellborn's request for a cease and desist order.

FINDINGS OF FACT

1. On September 11, 2003, Wellborn Special Utility District (Wellborn) filed its Original Petition with the Texas Commission on Environmental Quality (TCEQ or Commission), requesting a Cease and Desist Order against the City of College Station (College Station) pursuant to TEX. WATER CODE § 13.252. Wellborn alleged that the City was illegally interfering with its retail water Certificate of Convenience and Necessity (CCN) certificated area.
2. Wellborn filed a First Amended Petition on March 14, 2004, and a Second Amended Petition on September 10, 2004. The amended petitions requested the same relief under § 13.252 but revised some factual allegations.

3. On February 3, 2004, the Commission referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.
4. On March 29, 2004, City of College Station filed an Original Answer to Wellborn's First Amended Petition. The Original Answer denied that College Station has taken any action to interfere with Wellborn's CCN area as prohibited by TEX. WATER CODE § 13.252.
5. On March 31, 2004, SOAH held a preliminary hearing in this matter. As a result of the hearing, the following were designated as parties to the proceeding:

Party	Representative
Wellborn Special Utility District, Applicant	Leonard Dougal, Jackson Walker, LLP, Austin, Texas
City of College Station, Texas, Respondent	Bill Dugat, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, LLP, Austin, Texas
Executive Director, TCEQ	Todd Burkey, TCEQ Attorney, Austin, Texas
Office of Public Interest Counsel, TCEQ	None

6. Wellborn Special Utility District is a political subdivision of the State of Texas, created and operating under TEX. WATER CODE Ch. 65.
7. Wellborn Special Utility District holds retail water Certificate of Convenience and Necessity (CCN) No. 11340.
8. Wellborn Special Utility District and the City of College Station are retail public utilities.

9. City of College Station is a home-rule city.
10. City of College Station holds retail water CCN No. 10169.
11. On October 24, 2002, City of College Station passed and approved Ordinance No. 2590, by which the City annexed certain lands within the service area of Wellborn Special Utility District.
12. City of College Station has not constructed a line, plant, or system that extends into Wellborn Special Utility District's CCN area.
13. City of College Station has not furnished, made available, or rendered retail water service to any portion of Wellborn Special Utility District's CCN area annexed by College Station under Ordinance No. 2590.
14. On or before May 2003, City of College Station issued a request for qualifications to obtain consulting services to design and plan for municipal services within the Wellborn Special Utility District service area.
15. City of College Station plans to offer retail water service in the future to the portion of Wellborn Special Utility District's CCN area annexed by the City under Ordinance No. 2590.
16. In 1992, Wellborn Water Supply Corporation and the City of College Station entered into an agreement entitled "Agreement for Bulk Sale and Purchase of Water" (1992 Agreement).
17. 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 agrees to allow the 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."

18. In 1998, Wellborn Water Supply Corporation converted to the Wellborn Special Utility District and all assets and debts of Wellborn Water Supply Corporation were transferred to Wellborn Special Utility District.
19. On August 14, 2003, City of College Station informed Wellborn Special Utility District that it had initiated planning to serve its newly annexed areas with the expectation that Wellborn would comply with the 1992 Agreement, but that City of College Station had no facilities and provided no services in Wellborn's CCN area.
20. The actions taken by City of College Station to plan for water service within its newly annexed areas are preliminary actions that have caused no physical interference with Wellborn Special Utility District's operations.
21. On September 24, 2004, City of College Station filed a Motion for Summary Disposition requesting dismissal of Wellborn's complaint because College Station had taken no action that interferes with Wellborn's CCN area within the scope of TEX. WATER CODE § 13.252.
22. On September 24, 2004, Wellborn Special Utility District filed a Motion for Partial Summary Disposition requesting a ruling that the 1992 Agreement does not satisfy the requirements of TEX. WATER CODE §§ 13.248 or 13.255.
23. On October 15, 2004, Wellborn, College Station, and Commission Staff filed responses to the respective motions for summary disposition. Commission Staff recommended granting College Station's motion and denying Wellborn's motion.

CONCLUSIONS OF LAW

1. If a retail public utility furnishes, makes available, renders, or extends retail water utility service to any portion of the service area of another retail public utility that has been granted a CCN, the commission may issue an order prohibiting the construction, extension, or provision of service or prescribing terms and conditions for the provision of the service. TEX. WATER CODE § 13.252.
2. Based on the above Findings of Fact and Conclusions of Law, the Commission has jurisdiction to consider and rule on Wellborn Special Utility District's complaint against the City of College Station.
3. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. (Gov't Code) ch. 2003 (West 2000).
4. The Commission will grant a summary disposition of a case if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the summary disposition hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion. 80 TEX. ADMIN. CODE § 137(c).
5. The actions taken by City of College Station to plan for water service within its newly annexed areas that are within Wellborn Special Utility District's CCN area are preliminary actions that do not support a cease-and-desist order under TEX. WATER CODE § 13.252.
6. Insufficient basis exists to issue a cease-and-desist order against City of College Station under TEX. WATER CODE § 13.252.

7. Based on the above Findings of Fact and Conclusions of Law, City of College Station is entitled to summary disposition and dismissal of Wellborn's complaint, because College Station had taken no action that has interfered with Wellborn's CCN area within the scope of TEX. WATER CODE § 13.252.
8. Based on the above Findings of Fact and Conclusions of Law, Wellborn Special Utility District's complaint should be dismissed.
9. The granting of City of College Station's motion for summary disposition renders Wellborn Special Utility District's motion for summary disposition moot. Therefore, Wellborn's motion for summary disposition should be denied.

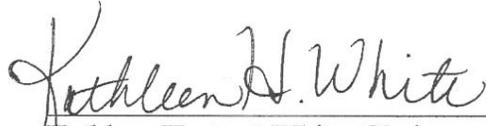
NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The City of College Station's Motion for Summary Disposition is GRANTED.
2. Wellborn Special Utility District's Motion for Summary Disposition is DENIED.
3. Wellborn Special Utility District's complaint against City of College Station under TEX. WATER CODE § 13.252 is DISMISSED.
4. 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.
5. The Chief Clerk of the Commission shall forward a copy of this Order to all parties.

6. 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.
7. 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: **MAR 11 2005**

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY


Kathleen Hartnett White, Chairman