

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 30, 2010

Honorable Katherine L. Smith
State Office of Administrative Hearings
Administrative Law Judge
300 West 15th Street, Suite 504
Austin, Texas 78701-3025

Re: East Cedar Creek; SOAH Docket No. 582-10-1868 and TCEQ Docket No. 2009-1865-UCR

Dear Judge Smith:

Enclosed please find "The Executive Director's Reply to Gun Barrel City's Exceptions to the Proposal for Decision. If you have any questions or comments, please contact me at (512) 239-0750.

Sincerely,

A handwritten signature in cursive script that reads "Brian MacLeod".

Brian MacLeod

Enclosure

cc: Mailing list

SOAH DOCKET NO. 582-10-1868
TCEQ DOCKET NO. 2009-1865-UCR

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|----------------------------------|---|-----------------------------|
| APPLICATION OF EAST CEDAR | § | BEFORE THE TEXAS COMMISSION |
| CREEK FRESH WATER SUPPLY | § | |
| DISTRICT, CERTIFICATE OF | § | |
| CONVENIENCE AND NECESSITY NO. | § | ON |
| 11682, TO ACQUIRE FACILITIES AND | § | |
| TRANSFER OF A PORTION OF CCN | § | |
| NO. 11206 FROM THE CITY OF | § | ENVIRONMENTAL QUALITY |
| MABANK AND TO AMEND ITS CCN | § | |
| NO. 11682, LOCATED IN HENDERSON | § | |
| COUNTY, TEXAS | § | |

**THE EXECUTIVE DIRECTOR'S REPLY TO GUN BARREL CITY'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

COMES NOW, the Executive Director (ED) of the Texas Commission on
Environmental Quality (TCEQ or Commission), and files this reply Gun Barrel City's
Exceptions to the Proposal for Decision (PFD).

OVERVIEW

Simply put, if the application for approval of this sale-transfer-merger (STM) is approved, East Cedar Creek Fresh Water Supply District (ECC) will serve the entire city of Gun Barrel City (GBC) with both water and sewer utility service. If the application is denied, then ECC will provide all the sewer utility service for GBC and over half of the water utility service. Furthermore, if the application is denied, the city of Mabank (Mabank) will spend 8 million dollars in order to meet capacity requirements and will provide the remainder of the water utility service in GBC. GBC has a preliminary plan to

provide water service itself, but has not gone beyond contracting a consultant to estimate what it would cost to put in a water system, making oral offers to buy the system from Mabank (from the mayor only and not supported by a city council resolution), and putting its name on the list of entities that may want to request assistance (intended use plan) from the Texas Water Development Board (TWDB). GBC paints a picture where Mabank will sell its system to GBC if the application is denied. This contention has nearly no support in the record and the amount of time it would take for GBC to either build its own treatment plant, get a supply of raw water to treat, drill its own wells, or to contract for wholesale service, and negotiate a sale with Mabank cannot even be estimated from the state of the record. Mabank presented no testimony supporting the contention that it would sell its system to GBC. In fact, Mabank's witness testified that Mabank will spend 8 million dollars to provide adequate capacity to serve the area if the STM is denied. After an investment of that magnitude, it would seem unlikely that Mabank would sell GBC the service area that necessitated that 8 million dollar expenditure for slightly over a million dollars as GBC suggests. The sale of Mabank's system to GBC is as tentative as a sale of ECC's system to GBC. If buying a system is what GBC wants to do in order to serve its citizens, it would make more sense to buy the system from ECC after ECC serves the entirety of GBC.

The ED will focus on the points raised in GBC's exceptions rather than run down the factors because the PFD adequately explains each of the factors. The ED agrees with the Mabank's exception that corrected a typographical error in finding of fact 18, and it appears that the exceptions noted in ECC's exceptions have all been addressed in the corrected order submitted by the Administrative Law Judge (ALJ).

THE CAPACITY ISSUE

GBC makes misleading statements regarding ECC's ability to meet its .45 gallons per minute (gpm) per connection requirements. First, GBC continues to argue that the alternative capacity requirement (ACR) approved by the TCEQ is somehow wrong and that the real benchmark should be .60 gpm. When the TCEQ approved the ACR, that became the new benchmark for compliance and ECC is entitled to rely on it. While the TCEQ rules do set a default requirement of .60, they also provide for setting an ACR. These rules are entitled to equal dignity. The .60 gpm requirement is a nonissue in this case. In GBC's exceptions it argues that the conditions have changed and that the .45 gpm is no longer appropriate. This assertion found on page 3 of GBC's exceptions contains no citation to the record and seems to be based on passing remarks that may have occurred during the testimony and assumptions based on beliefs held by GBC that are not in the record. Changes to an ACR cannot be based on rumor and conjecture of an advocate in a contested case; they must be based on verifiable observations by the ED's engineers. No such evidence exists in the record. Additionally, GBC asserts that "neither ECC nor Mabank presented any evidence of the water demand associated with the area to be acquired" on page 3 of its exceptions. That assertion is incorrect. Throughout the record there is reference to the fact that 900 connections are to be transferred. The prefiled testimony of Mr. Lock reveals that the application indicated that 898 connections were to be transferred (Prefiled testimony of John Lock, P.E., ED7 page 5 lines 2-6). At trial reference was made to adding 898 connections (TR P 30 L 25) and

that number was used throughout the trial and the number revealed by the inspection reports.

Even if one were to assume that .6 gpm is the proper measure, and ignored the ACR granted by the TCEQ, ECC presented testimony that it could adequately serve its existing area and the area sought to be transferred. On page 5 lines 22 through 36, Christopher Weeks, P.E., testified as follows: “The Brookshire Water Treatment Plant (WTP) currently provides potable water to the District’s North Service Area, and has a current treatment capacity of 3 million gallons per day (MGD), based on the available raw water pumping capacity from Cedar Creek Reservoir. With the installation of a larger water pump to replace an existing smaller one at some point in the future, the treatment capacity of the plant can be increased to 4 MGD. At the minimum supply capacity of 0.6 gallons per minute per meter connection, the Brookshire WTP will be able to provide potable water to a maximum of 4629 meter connections within the service area. At this time the District is providing potable water to approximately 3,500 meter connections within the North Service Area. Thus adequate supply exists to allow for incorporation of the additional water meter connections that can be transferred from the City of Mabank if approval is given as requested.” (Prefiled testimony of Christopher Weeks, P.E.)

The second misleading position taken by GBC involves its attempt to do an enforcement action in this case by taking statements made by the applicant’s witnesses regarding the decrease in the daily production capacity caused when a 1 million gallons per day filter was being refurbished. To begin with, the TCEQ has not instituted any enforcement action regarding GBC’s assertion that the Brookshire Plant has insufficient

capacity and GBC cannot institute and prove an enforcement case in an STM proceeding. GBC's citations to the record in support of its position were unhelpful.¹ The testimony that GBC apparently relied on in closing arguments is found at pages 18-19 and 90-91 of the transcript. The ED cannot locate any place in the transcript that supports GBC's assertion that "half the Brookshire Plant [has been] out of service for at least four years."² Page 90 of the transcript includes testimony from ECC's witness stating "a couple of years ago we completed construction of a second primary clarifier and a second set of new filters which allowed the plant to - - which allowed the operators, and the management to take off one half the plant to do the refurbishing that is underway right now." It can be surmised that this must be the testimony GBC thinks supports its position. It does not.

In GBC's exceptions to the PFD it cites other portions of the record that are equally unhelpful. The clever cross examination confused the witness and taking several answers of his out of context, one might concoct a formula leading to the conclusions GBC drew. However, the very beginning of the cross-examination shows that the general manager wanted to defer to the engineer for the details of plant capacity. Specifically, the beginning of the excerpt reproduced on page 6 of GBC's exceptions includes the following statement: "Q: You indicated that your Brookshire water treatment plant has undergone some expansions and that it is now rated at 3 million gallons per day. Is that correct? A: It is - I believe I'll leave that to my engineer to answer completely..." The

¹ GBC's closing argument on page 4 cites pages 448-449 and 450 of the transcript to support its argument. However, the last page of the transcript is page 301.

² GBC's closing argument page 3. GBC cites page 89 of the transcript as support for this assertion. Nothing is found on that page to support this.

witness testified that the treatment capacity was currently 3 MGD and also testified that the engineer was the more appropriate witness to give the testimony. As shown above, that witness testified in his prefiled testimony that the current capacity of the plant was 3 MGD and that it would increase to 4 MGD and that the capacity would be adequate to meet all current demands and the customers sought to be transferred in this STM application. Furthermore, the transcript excerpt used by GBC on page 7 of its exceptions reaffirms the fact that the plant will have a production capacity of 4 MGD in 2012. GBC tries to make a point by noting that the witness admitted that this would depend on board decisions and funding, but executive managerial approval as well as obtaining financing would be necessary in any STM case where expansion was contemplated. Certainly all such STM applications should not be denied based on this argument.

GBC also makes the untenable assertion that the filters have been in the refurbishing stage since 2008 on page 6 of its exceptions. Presumably this was based on the testimony of Mr. Goheen. A review of that testimony reproduced on page 6-8 of GBC's exceptions shows that the witness did not clearly remember when the older filters were taken out of service. Specifically, the transcript reference found on page 7 of GBC's exceptions reads as follows: "Q: Okay. And how long have the two filters -- the older filters been taken out of service for refurbishing? A: To the best of my knowledge, since that question was just asked to me -- but I believe it was 2009. It could have been fall of 2008. I'm not too sure. I'd have to go back and find when those filters were completed." Furthermore, if more water is needed, the sale allows for Mabank to provide water in the event of such need. (Prefiled Testimony of William Goheen P17 L19-23)

What can be surmised from the testimony is that for some period of time, while the plant was being repaired and improved, capacity decreased to 2 MGD. To state that the testimony proves that this has been ECC's capacity since 2008 is to stretch the evidence too far. As has been shown, there was also testimony that the plant will have a 3 MGD capacity before the beginning of 2011 and will have a 4 MGD capacity in 2012. The ALJ heard the live testimony and decided to give more weight to that testimony and the ED agrees.

GBC's extrapolated capacity predictions are based on the erroneous assumption that the Brookshire Plant can only provide 2 MGD, when the correct number is that it now (2011) can provide 3 MGD and will provide 4 MGD in 2012.

GBC also attempts to make the capacity requirement appear to be a grave violation by attempting to deduct line loss from the plant's capacity. The TCEQ does not subtract line loss when calculating the gpm requirements. Additionally, when an ACR is approved, the TCEQ makes conservative assumptions that include line loss considerations.

The ED's original closing argument at SOAH reveals what the testimony does show regarding the temporary decrease in total plant capacity, and will be summarized here. There is no testimony relating when the plant capacity decreased to 2 MGD while the filter was being refurbished. There is testimony that the plant will provide 3 MGD by the beginning of 2011.³ By 2012, the testimony shows that the Brookshire plant will have a 4 MGD capacity.⁴

³ TR P19 L7-11

⁴ TR P18 L14-16

GBC goes further by stating that ECC has not submitted a plan for what it will do when it exceeds the 85% rule. This is irrelevant. ECC does not have to supply a plan until it reaches the 85% level. Furthermore, it has lined up a supply of more water from the city of Trinidad and plans to increase its production capacity to 4 mgd by 2012. The contract with Trinidad will provide 288 million gallons of raw water per year and ECC has the facilities to treat the additional raw water.⁵ ECC has plans in place that should keep it out of the 85% rule.⁶ Additionally, page 4 lines 22 through 36 of the prefiled testimony of Mr. Weeks reveals that ECC has plans in place that would allow it to serve 4,629 customers even if it were required to provide .6 gpm. While ECC would have to file an 85% rule plan at 0.6 GPM, with its current 0.45 GPM ACR, ECC would have sufficient capacity to stay out of the 85% rule on gpm capacity

In the ED's prefiled testimony all the numbers necessary to determine compliance with the capacity rules of the TCEQ are discussed using the .45 gpm ACR and using the 898 number of new connections and the 3706 number of existing connections for the Brookshire Plant that were revealed in the inspection reports on file with the TCEQ. From page 5 line 1 to page 6 line 8 of the prefiled testimony of ED expert witness John Lock, it is revealed that ECC will be in compliance with all TCEQ minimum capacity requirements. Mr. Lock also stated that the service pumps and elevated storage capacity, while still in compliance, would both exceed the 85% rule necessitating a plan to be submitted at that time.

⁵ TR P30 L10-17.

⁶ TR P31 L1-9

The Disinfectant Byproduct Issue

GBC raises the issue that EEC is having difficulties meeting the requirements for disinfectant byproducts. The ED's expert witness testified that these alleged violations did not cause concern about ECC's ability to provide adequate water service and he was of the opinion that ECC could address these issues. (Prefiled testimony of John Lock, P.E., ED7 P4 L 11-22) At trial, the disinfectant byproduct (DPB) problem was discussed at length. ECC has been collaborating with the EPA and the TCEQ to solve the DBP problem. (TR P21 L 6-11 and P75 L 7-24 and P78 L7-14). ECC has been using new coagulants, which have been working to solve the DPB problem. (TR P21 L12 – P22 L1 and TR P32 L7-25). This is a problem common with other water suppliers in the area who use Cedar Creek Lake as their water source. In fact 10 or 12 water systems are attending the same EPA/TCEQ training relating to the DBP situation that ECC is attending. (TR P 22 L24 – P24 L1 and TR P 92 L14-19 and TR P33 L1-4). Initially, over 100 systems had the same problem because of drought followed by flood. (TR P80 L12-25).

THE FIRE FLOW ISSUE

All the parties agree that fire flow is neither a listed CCN criterion nor a requirement that the TCEQ can enforce except under a new statute that only applies to cities with a population over one million. GBC's own witness stated that it is not a CCN requirement and that in decades of working with the agency he knew of no instance

where an STM or CCN application was denied based on inability to provide fire flow. (TR P 187 L11 – P188 L5). GBC contends that the ability to provide fire flow should be a public interest consideration⁷. Assuming, arguendo, that it is a public interest consideration in an STM case, there is no evidence in the record that ECC could not provide fire flow. The review of the record shows that the fire flow discussion between ECC and GBC did not center on whether ECC could provide fire flow, but instead over who would pay for it. GBC wanted ECC to pay for it and ECC wanted either GBC or the developer to pay for it. (TR P37 L1-15 and P70 L22 – P71 L9 and TR P82 L10-15). If GBC wants to have fire flow within its city limits it can require that by ordinance, however, ECC also has the right to charge the customer for non-standard service. ECC wanted the developer or the GBC to pay for fire flow while GBC wanted ECC to pay for it. It would not be in the public interest to have ECC charge all of its existing customers (whether they get fire flow or not) in order to provide fire flow to a hotel in GBC. Even if GBC were the water provider, it would have to pay for the over-sizing necessary to provide fire flow. GBC would also have to get the money from customers to pay for the fire flow. The customers would not get free fire flow if the application is denied.

GBC has the authority to impose and enforce ordinances under section 51.012 of the Texas Local Government Code. If it wishes to impose an ordinance requiring fire flow, it can do that. What it cannot do is require a retail public utility to pay for providing service and allow the recipient of the service to get such non-standard service at the expense of the utility and ultimately the utility's customers that only require standard service. Section 49.212 of the Texas Water Code makes it clear that the district

⁷ TR P187 L11 – P188 L5

can charge the customer for the provision of fire flow. Specifically it provides as follows: "A district may adopt and enforce all necessary charges, mandatory fees, or rentals, in addition to taxes, for providing or making available any district facility or service, including fire-fighting activities provided under Section 49.351." GBC argues that this only applies to customers and not municipalities. That distinction is not outlined in that law. The law states that a district can adopt and enforce all necessary fees for providing fire protection. If a city requires fire flow, the district can impose a fee for providing such service. Additionally, even if GBC could not require the City to pay for fire flow in advance, it certainly could include it in the connection charges for any customer requesting such service.

Furthermore, there was no indication that Mabank could provide fire flow and no evidence that GBC had even considered fire flow in its preliminary, inchoate aspirations to develop its own water system. Therefore, there is no reason, on balancing the alternatives, that more fire flow would be provided if the application were denied.

GBC contends that the *Texas Citizens for a Safe Future & Clean Water v. R.R. Comm'n of Texas*, 254 S.W. 3d 492 (Tex. App. – Austin 2008, pet. granted, 53 Tex. Sup. Ct. J. 389 (March 12, 2010)) opens the door for a consideration of fire flow in deciding whether to transfer a CCN that only requires the continuous and adequate supply of water for domestic uses to all qualified applicants. To begin with, the case has a negative history. One case, *Berkley v. R.R. Comm'n of Texas*, 254 S.W. 3d 492 (Tex. App. – Amarillo 2009, no writ) declined to follow the example of the Austin Court of Appeals and would not remand a case because it was supported by substantial evidence when presented with the argument that the public safety interest had not been adequately

addressed. Additionally, a petition for review of the decision in *Texas Citizens* was accepted by the Texas Supreme Court and the case is still pending at this time. Moreover, the case included two concurring opinions that both questioned the majority's determination that the public interest could be so broadly defined for several reasons including violation the delegation doctrine and similar legal propositions. The TCEQ's long-standing practice has been to keep fire-fighting requirements out of CCN requirements except where they are specifically required by statute. Finally, even if fire flow was a valid consideration, there is no indication that allowing the STM to proceed would impede the ability to provide fire protection because there was no evidence that any other retail public utility was ready willing and able to immediately provide fire flow at no cost.

THE COST OF SERVICE AND EFFECT ON LAND ISSUE

GBC argues on page 12 of its exceptions that because of the uncertainty of how much it will cost to upgrade the system, there can be no reliable estimate of the effect of these costs on the rates paid by GBC's customers. GBC raised the same issue in argument at SOAH when it stated on page 9 of its closing that the "affected landowners will . . . be subject to great uncertainty as to when any plant, intake, storage and pump facilities will actually occur and how they will be funded, tying up future development plans for the area indefinitely . . . Dramatic rate increases are inevitable." Upon further scrutiny, GBC's argument actually lends further support to approving the STM. If GBC were to become the water supplier for the area, the uncertainty would be much worse.

ECC has plans in place that will increase its production capacity to 4 mgd by 2012. GBC has no wholesale water contract, no pending deal to purchase the system from Mabank, no CCN application for the area, only the most preliminary cost estimate, no plans and specifications for building the infrastructure, and only an intended use plan filed with the TWDB. Mabank will have to spend an additional eight million dollars if it has to continue to supply water to the area. No matter who supplies water to the area, the costs of supplying it will have to be paid whether it is paid by GBC, Mabank or ECC.

ECC is the retail public utility that has made the most concrete plan to serve the area. ECC's ability to serve the area is the most predictable and thus would create the least amount of uncertainty for developers. Furthermore, the ED's prefiled testimony pointed out that the City of Mabank is currently charging a \$29 base rate for a standard residential connection with a gallonage charge of \$3.70 per 1000 gallons for the first 10,000 gallons with higher gallonage charges for consumption over 10,000 gallons. ECC will charge the same \$29.00 base rate with a gallonage charge of \$3.25 per 1000 gallons at all levels of consumption. Additionally, this rate will be even lower when ECC starts charging the rates it charges its existing customers. (Prefiled testimony of John Lock, P.E., ED 7 P8 L2-14). Therefore the STM will lower the costs to customers on their monthly bills. At trial GBC countered with the argument that the initial tap fees charged by Mabank are lower than those charged by ECC. Specifically, for a standard residential 5/8 by 1/2 inch meter, ECC charges a total of \$2027 while Mabank charges \$1702. (GBC1 P3 and GBC2 P1, TR P47-50). It needs to be pointed out that the tap fees are only paid when the connection is first established. None of the existing customers will pay the tap fee. They will only benefit from the lower gallonage charges. Additionally, new

customers will only have to pay the tap fee once. Furthermore, if the STM is not approved and Mabank continues to serve the area, Mabank will have to spend 8 million dollars to be able to keep adequate capacity. Those 8 million dollars will be subsumed in rates and connection charges.

General Public Interest Issues and Delaying the Transfer

On pages 14 and 15 of GBC's exceptions, it argues that the case should be remanded in order to investigate several factors. Such a delay would create havoc for Mabank. It would have to spend \$8 million dollars instead of collecting the price for selling the system in order to come into compliance. This could lead to rate increases as well as financial hardship on Mabank. GBC's suggested reasons for remanding are not persuasive. GBC wants a remand to determine what the difference is between having the 0.45 gpm ACR held by ECC and the 0.53 gpm ACR held by Mabank. To begin with, the testimony of Christopher Weeks and Mr. Goheen referred to earlier illustrates that in 2012 ECC will be able to provide 0.60 gpm to all the customers it currently has and all the customers sought to be transferred. The record reflects that ECC is proactive in planning for future growths in demand. It has been able to obtain funding from the Texas Water Development Board and has a good bond rating. It has insurance that allows it to borrow at the lowest possible rates. (TR P26 L6 – P28 L17 and P123 L20 – P126 L 17). The fact that it has refurbished its filters and clarifiers shows that it deals with problems as they arise rather than reflecting negatively on its capacity as GBC

suggests. A delay will result in a hardship on Mabank, an increase in rates, and makes it no more likely that GBC will be able to buy the system from Mabank.

THE ABILITY OF GBC TO PROVIDE WATER TO ITS OWN CITIZENS ISSUE

While this is not a listed factor in the rules or statute, GBC argues that it is included as a public interest factor. GBC maintained in closing arguments at SOAH that granting the STM will “preclude GBC from ever acquiring the water system serving its customers”⁸ and “forever foreclose GBC from exercising its home rule municipal prerogative of furnishing water directly to its constituents.”⁹ There is no inalienable right of a city to provide water service that can block an STM. Any impediment to taking service area from ECC will continue to exist for over half of GBC if the STM is denied because ECC will still serve those areas. GBC’s suggestion on page 20 of its exceptions that the service in the other half of the city “exists only by virtue of a franchise agreement which will soon expire” defeats its own argument. If the franchise agreement is the only reason why GBC can serve inside of GBC, then GBC can oust ECC entirely from the city when the franchise agreement expires.

GBC cites the *North Alamo WSC v. City of San Juan* case as authority for the proposition that a retail public utility that has federal debt cannot have its territory taken away from it; therefore, GBC argues that it will never be able to oust ECC from within its City limits once it is there. To begin with, no record citation was given to show

⁸ GBC’s closing argument P 14

⁹ GBC’s closing argument P 2

that there was any evidence showing that there was any federal debt until the reply to exceptions. In the hundreds of pages attached to Mr. Goheen's testimony, GBC found a reference to federal debt on page 28 of the independent auditor's report attached as one of several multipage exhibits to Mr. Goheen's testimony. The page references a summary of bond debt held by ECC and states that the total is for long term loans from Rural Development and the Texas Water Development Board. The contention that there was no evidence presented is understandable given the remote location and the lack of reference to it at any stage of the trial. No examination of any witness at trial brought this out and no reference was made by any person at trial to this entry found buried in the exhibits attached to Mr. Goheen's testimony.

However, the fact that ECC may have federal debt is of no consequence in the analysis of whether to approve the STM. The ability of a City to oust a water provider is not a statutory or regulatory consideration in a case of this type unless it can be squeezed through an all encompassing public interest concern. However, assuming it were of consequence, GBC's argument is still unconvincing. In 2010 another case was decided that analyzed the federal law prohibiting the curtailment of a service area of a retail public utility holding federal debt differently than *North Alamo WSC v. City of San Juan*. That case was *Creedmoor Maha WSC v. TCEQ*, 307 S.W.3d 305 (Tex. App.--Austin, 2010, no writ). In that case the court held that in order for federal debt to prohibit a party from taking service area from a retail public utility (RPU), the RPU must be providing sufficient service to the area in question. In that case the Court noted that federal debt did not preclude decertification because the RPU could not provide the service at the level required by the developer. Therefore, federal debt would not preclude

decertifying ECC if GBC is correct in its assertion that ECC can't provide the service that will be required as the area develops. This argument could be expanded, but the limited relevance of the issue merits no more discussion, though more could be provided at the Commission Agenda if necessary.

GBC also argues that it could never oust ECC because it could not use the law allowing annexation and decertification against any RPU except a SUD or a WSC. If GBC can't use the provisions of Texas Water Code section 13.255 to take the area because ECC is neither a WSC nor a SUD, such preclusion will still exist if the STM is denied because Mabank is also neither a WSC nor a SUD. Therefore, granting the STM gives GBC no greater power to oust ECC or Mabank from within its City limits according to its own analysis, and ECC and Mabank will still serve the entirety of GBC if the application is denied.

GBC assumes that if the STM is denied that it will immediately buy the system from Mabank. The record shows no interest on the part of Mabank to sell the system to GBC. In fact, the record reveals that if the sale is not approved, the city will spend eight million dollars to upgrade its capacity and continue to serve the area rather than sell the area to GBC.¹⁰ Furthermore, there is no reason to believe that GBC would have any less success in attempting to buy the system from ECC. Moreover, if GBC wants to serve water to all of its citizens, allowing the STM to be approved would facilitate that plan because, if they could arrange a purchase from ECC, GBC would have the system that served the entire city.

¹⁰ TR P163 L17-20

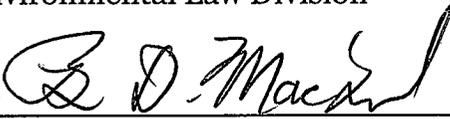
CONCLUSION

The ED's original closing arguments filed with SOAH are sufficient to answer all of the concerns raised by GBC in its exceptions. The PFD is also sufficient. This reply supplements the original closing arguments made by the ED at SOAH and the PFD's refutation of GBC's position by focusing on the issues that GBC relies on most. If the STM is approved Mabank will solve its capacity problem without having to spend eight million dollars and pass that cost on to the customers; ECC will expand its ability to be a regional provider; customers will pay less for their ongoing service; and the parties will be free to consummate their contract. If the STM is not approved, Mabank will suffer the financial hardship of having to spend eight million dollars and the price for the water will reflect that additional investment; ECC will still serve over half of GBC and Mabank will serve the rest; and GBC will still be foreclosed from using section 13.255 in order to serve water in the area.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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CERTIFICATE OF SERVICE

This is to certify that all parties on the attached Mailing List have been sent a copy of the foregoing document in accordance with TCEQ and SOAH rules on December 30, 2010.

A handwritten signature in black ink, appearing to read "B D MacLeod", written over a horizontal line.

Brian D. MacLeod
Staff Attorney
Environmental Law Division

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SOAH DOCKET NO. 582-10-1868
TCEQ DOCKET NO. 2009-1865-UCR

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