

**TCEQ DOCKET NO. 2004-0049-AIR
SOAH DOCKET NO. 582-05-0593**

APPLICATION OF ASARCO INCORPORATED FOR RENEWAL OF AIR QUALITY PERMIT NO. 20345	§ § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**PROTESTANT'S, THE CITY OF EL PASO'S,
SUPPLEMENT TO MOTION FOR REHEARING**

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

COMES NOW, Protestant, the City of El Paso ("El Paso" or the "City") and presents this its *Supplement to Motion for Rehearing* in the above-referenced proceeding. For the reasons identified below, in addition to those reasons previously identified in the City's *Motion for Rehearing*,¹ the City respectfully requests that the Commissioners of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") grant the requested hearing, and thus reopen the above-referenced matter for additional consideration, allowing the Commission to revise previous determinations that are contradictory to applicable law and policy. Based on the information identified in this *Supplement to Motion for Rehearing*, the City requests that the Commission deny Asarco's application to renew Air Quality Permit No. 20345 and require Asarco to file a new application, if it chooses to move forward with the restart of operations of the Asarco El Paso Plant.

I. INTRODUCTION AND BACKGROUND

On February 13, 2008, the Commission considered Asarco's renewal application, the *Executive Director's Report to the Commission on Renewal of ASARCO Incorporated's Air Quality Permit No. 20345* ("ED Report"),² and other related filings. The Commission voted to

¹ Protestant's, the City of El Paso's, Motion for Rehearing, *Application of Incorporated for Renewal of Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593 (Apr. 16, 2008). The City's *Motion for Rehearing* and this *Supplement to Motion for Rehearing* also should be considered the City of El Paso's Motion for Reconsideration and to Overturn the Commission's final decision in this proceeding, as memorialized in the Final Order, insofar as any non-Administrative Procedures Act ("APA") proceedings are concerned.

² Executive Director's Report to the Commission on Renewal of ASARCO Incorporated's Air Quality Permit No. 20345, *Application of Asarco Incorporated to Renew Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR (May 1, 2007).

adopt the ED Report and the *Executive Director's Response to Comments on Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345* ("ED's Response to Comments")³ and approved issuance of the revised Air Quality Permit No. 20345. On March 27, 2008, the TCEQ Office of the Chief Clerk issued *An Order Concerning the Application by ASARCO Incorporated for Renewal of Air Quality Permit No. 20345 and All Related Filings, Including the Executive Director's Report and Schedule Prepared Pursuant to the Commission's Interim Order of March 10, 2006* (the "Final Order").⁴ The Final Order was mailed to all parties by the Office of the Chief Clerk on April 1, 2008. On April 16, 2008, the City filed its *Motion for Rehearing* with the Commission pursuant to Texas Administrative Code Title 30, Section 80.272(b).

II. ARGUMENTS AND AUTHORITIES

Texas Administrative Code Title 30, Section 80.272(b) governs the filing of Motions for Rehearing, stating, in part:

The motion shall be filed with the chief clerk within 20 days after the date the party or his attorney of record is notified of the decision or order. For purposes of this section, a party or attorney of record is presumed to have been notified on the third day after the date that the decision or order is mailed by first-class mail.⁵

Because the Office of the Chief Clerk mailed notice of the Final Order on April 1, 2008, Motions for Rehearing must be filed with the Commission no later than April 24, 2008. The Commission rules applicable to Motions for Rehearing do not limit the ability of any party to supplement a previously-filed Motion for Rehearing. Any such supplement must simply meet the filing

³ Executive Director's Response to Comments on Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345, *Application of Asarco Incorporated to Renew Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR (July 27, 2007).

⁴ *An Order Concerning the Application by ASARCO Incorporated for Renewal of Air Quality Permit No. 20345 and All Related Filings, Including the Executive Director's Report and Schedule Prepared Pursuant to the Commission's Interim Order of March 10, 2006*, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593 (Mar. 27, 2008).

⁵ 30 TEX. ADMIN. CODE § 80.272(b).

deadline as established by Section 80.272(b). As such, this *Supplement to Motion for Rehearing* is timely filed under TCEQ's rules.

Section 2001.061 of the Texas Government Code prohibits ex parte communications, stating, in relevant part:

(a) Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact or conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate.⁶

Similarly, Texas Administrative Code Title 30, Section 80.15 provides, in relevant part:

(a) No ex parte communications. Unless required for the disposition of an ex parte matter authorized by law, during the pendency of a contested case either at SOAH or before the commission, no party, person, or their representatives shall communicate directly or indirectly with any commissioner or the judge concerning any issue of fact or law relative to the pending case, except on notice and opportunity for all parties to participate.⁷

In recent days it has come to the City's attention that representatives of Asarco have stated, in writing, that they had met, apparently ex parte, with one or more Commissioners of TCEQ regarding this air permit proceeding prior to the Commissioners' Agenda meeting of February 13, 2008. Baker Botts L.L.P. ("Baker Botts") recently filed a fee application with the Bankruptcy Court as part of Asarco's ongoing bankruptcy case. Such application included Baker Botts' invoices to Asarco for professional services rendered and the associated legal fees incurred from November 1, 2007, through February 29, 2008. While the City just received these documents, it appears that the time entries on Baker Botts' invoices identify that Baker Botts has sought payment from Asarco for services that included an employee of Baker Botts (and thus a representative of Asarco) meeting with one or more Commissioners of TCEQ regarding the subject matter of this air permit proceeding, while the matter was pending and before the

⁶ TEX. GOV'T CODE ANN. § 200.061(a).

⁷ 30 TEX. ADMIN. CODE § 80.15(a).

Commissioners' February 13, 2008 Agenda meeting at which the Commission voted to approve Asarco's application to renew Air Quality Permit No. 20345.⁸

While many of the time entries on Baker Botts' invoices raise concerns regarding undue influence with Commission staff, three entries specifically identify that an employee of Baker Botts met with one or more Commissioners of TCEQ. The following Baker Botts time entries are included and attached as Exhibit 1:

11/19/2007	T A Castaneda Jr.	4.00	Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed setting of permit hearing, air quality monitoring and reaction to plant re-opening; reported to Giblin.
12/03/07	T A Castaneda Jr.	2.00	Preparation and participation in an event for the Senate Hispanic Caucus; discussed TCEQ agenda for ASARCO permit with Chairman Garcia and EA Womack; reported to P. Giblin.
01/21/08	T A Castaneda Jr.	4.00	Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed permit hearing, recent filings by the City of El Paso concerning bankruptcy, response briefs from the parties and reaction to plant re-opening; reported to P. Giblin and B. Faulkner. ⁹

It appears that "T A Castaneda Jr." is Tristan "Tris" Castañeda, Jr., a Government Relations Manager at Baker Botts,¹⁰ and P. Giblin and B. Faulkner are attorneys for Baker Botts, Pam Giblin, lead Asarco attorney in this TCEQ permitting matter, and Brian Faulkner.

⁸ The Baker Botts invoices became available for review only after the Commission's final decision in this proceeding. Hence, there has been no opportunity for discovery or other disclosures on the three time entries detailing Baker Botts' contact with one or more Commissioners.

⁹ See Selected Pages of Cover Sheet to Eighth Interim Fee Application of Baker Botts L.L.P., *In re: ASARCO LLC*, et al., Document 7420, Case No. 05-21207 (S.D. Tex. Bankr Ct. Apr. 15, 2008), including Document 7420-9 at page 57 of 71 (time entries for Nov. 19, 2007), Document 7420-10 at page 30 of 79 (time entries for Dec. 3, 2007), and Document 7420-11 at page 61 of 79 (time entries for Jan. 19-21, 2008), attached hereto and incorporated herein for all purposes as Exhibit 1.

¹⁰ See information regarding Tristan Castañeda Jr., available at http://www.bakerbotts.com/file_upload/documents/Tris.pdf.

Because Asarco was billed for these meetings with one or more Commissioners of TCEQ, there is the appearance that the air permit application, hearing, and other related Asarco issues then-pending before the TCEQ were discussed at these meetings. The descriptions of services provided to Asarco in meeting with one or more Commissioners of TCEQ are related to issues of fact or law in this proceeding. For example, the time entry for November 19, 2007, identifies that Mr. Castañeda discussed the setting of the permit hearing (apparently the Commissioners' Agenda meeting), air quality monitoring, and reaction to the reopening of the Asarco El Paso Plant with a Commissioner. As previously identified in the City's *Motion for Rehearing*, numerous issues have been raised by Protestants regarding the lack of air quality monitoring required by Air Quality Permit No. 20345. The air quality monitoring requirements were, and continue to be, a significant, contentious issue in this proceeding. In addition, air quality monitoring was specifically addressed at the February 13, 2008 Commissioners' Agenda meeting. All of these discussion items appear directly related to the facts and law in this proceeding, and as such would be prohibited ex parte communications.

Baker Botts' own representations to its client raise the inference that an ex parte contact has occurred that is improper under the Texas Government Code Section 2001.061(a) (*i.e.*, the Administrative Procedures Act ("APA")) and Texas Administrative Code Title 30, Section 80.15(a), and under administrative law principles governing any non-APA aspects of this proceeding.

In *City of Stephenville v. Texas Parks and Wildlife Department*,¹¹ the Court of Appeals—Austin considered the appropriate remedy in light of acts which tainted the impartiality of an

¹¹ *City of Stephenville v. Texas Parks and Wildlife Dep't*, 940 S.W.2d 667 (Tex. App.—Austin 1996, rehearing overruled). While the City understands that the alleged misconduct in the *City of Stephenville* case was particularly severe, including allegations of bribery, the City is not suggesting that similar misconduct occurred in this matter. The City is referencing the case here because of the Court's broad discussion regarding appropriate remedies where there is actual impropriety and where there is an appearance of impropriety.

administrative hearing, as for example, prohibited ex parte communications. In that case, where there was clear evidence of actual impropriety on the part of representatives of an applicant for permit, the trial court determined that the appropriate remedy was to require the applicant to start the permitting process over with the filing of a new application. The trial court stated:

The taint on the decision-making process in this case so permeates the final order that the final decision simply cannot stand, and *there must be some consequence to the applicants for their misconduct*. The principle utilized by the Court is that because the applicants tainted the permitting and decision-making process by attempting to obtain a permit unfairly and outside the rules, they should be required to start the permitting process all over again by filing a new application, should they desire to do so, and obtaining a new hearing.¹²

The Court of Appeals upheld this remedy, and in doing so noted that a similar remedy had also been deemed appropriate where there was simply an *appearance of impropriety* as opposed to actual impropriety.¹³

Based on an initial review of these documents, there is at least the appearance of impropriety. Such ex parte communications would be a violation of state law, TCEQ rules, and the City's due process rights as a protestant in this proceeding, and would undermine the impartiality required for the final determination in this proceeding.

III. CONCLUSION AND PRAYER

For the reasons identified above, as well as the reasons identified in the City's *Motion for Rehearing*, the City of El Paso respectfully requests that the Commissioners of the Texas Commission on Environmental Quality grant the City's *Motion for Rehearing* and thus reopen the above-referenced matter for additional consideration allowing the Commission to revise previous determinations that are contradictory to applicable law and policy. Based on the

¹² *Id.* at 679 (emphasis added).


¹³ *See id.* at 679 (citing to *Lewis v. Guaranty Fed. Savings & Loan Assoc.*, 483 S.W.2d 837 (Tex. App.—Austin 1972, writ ref'd n.r.e.). In *Lewis*, the trial court, as upheld by the Court of Appeals, found that ex parte communications tainted the integrity of the proceedings and affronted the protestants' due process rights to an impartial administrative hearing. *See id.* (citing to *Lewis*, 483 S.W.2d 837).

information identified in this *Supplement to Motion for Rehearing* regarding improper ex parte communications, the City requests that the Commission deny Asarco's application to renew Air Quality Permit No. 20345 and require Asarco to file a new application, if it chooses to move forward with the restart of operations of the Asarco El Paso Plant.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF EL PASO

CERTIFICATE OF SERVICE

I certify that an original and eleven true and correct copies of the foregoing document have been filed with the Office of the Chief Clerk of the TCEQ. I also certify that a true and correct copy of the foregoing document has been served upon all required individuals and entities as identified on the General Counsel's Mailing List for this docket via facsimile, certified mail return receipt requested, hand delivery, overnight delivery, or electronic mail addressed to:

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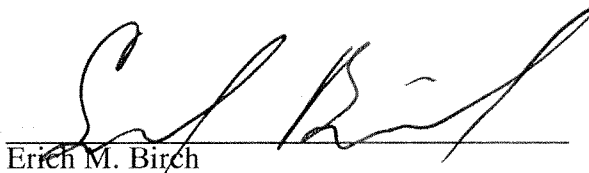
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On this the 24th day of April, 2008


Erich M. Birch

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

In re:	§	Case No. 05-21207
	§	
ASARCO LLC, et al.,	§	Chapter 11
	§	
Debtors.	§	Jointly Administered
	§	

**COVER SHEET TO EIGHTH INTERIM FEE APPLICATION
OF BAKER BOTTS L.L.P.**

Name of Applicant:	Baker Botts L.L.P.
Authorized to provide professional service to:	Chapter 11 Debtors
Date Order of appointment signed:	August 12, 2005
Date Rule 2016(b) statement filed:	August 10, 2005
Application period for which compensation and reimbursement is sought:	November 1, 2007 through February 29, 2008
Total professional service fees requested in this application, after voluntary reduction:	\$10,862,734.50
Total professional hours requested in this application:	30,667.7
Total voluntary professional fee reductions:	\$173,757.00
Professional rates:	High: \$750.00 Low: \$215.00
Paraprofessional / Staff rates:	High: \$380.00 Low: \$50.00
Blended hourly rate:	\$354.21
Total reimbursable expenses sought in this application:	\$697,079.63
Retainer amount:	\$0.00

DAL02:510434.3

Exhibit 1

BAKER BOTTS LLP.

ASARCO LLC, Debtor-in-Possession

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11/19/07 T A Castaneda Jr.	4.00	Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed setting of permit hearing, air quality monitoring and reaction to plant re-opening; reported to Giblin.
11/19/07 K D Collins	1.10	Conferenced with team to discuss documents, progress, and strategy for unowned sites.
11/19/07 T M Davis	4.20	Review and comment on Selby draft (.6); review and comment on E. Helena draft (.5); read and comment on various 9019 drafts (1.3); organize meeting with DOJ (.9); attend call re veto hearing (.9).
11/19/07 M C Droz	5.20	Obtain and review expert report of Mr. Hansen (1.9); obtain and review LECG reports relating to IBWC site (2.3); obtain and review additional documents relating to IBWC site (1.0).
11/19/07 M L Farley	.80	Began preparing for interview of R. Marcus.
11/19/07 B J Faulkner	.60	Review media reports of Government Accountability Office report and discuss with El Paso advocacy team members.
11/19/07 A N Garrison	2.60	Researched regarding issues for El Paso Smelter.
11/19/07 A N Garrison	5.50	Researched regarding issues for El Paso Smelter.
11/19/07 P M Giblin	2.10	Work on TCEQ strategy for obtaining El Paso permit renewal.
11/19/07 M M Gregory	.60	Review email from T. Davis regarding East Helena (.1); exchange emails with M. Heister regarding sample 9019 motion (.2); attention to phone mail message from B. Reck regarding Selby stipulation (.1); exchange email messages with B. Reck regarding same (.2).
11/19/07 J T Gross	7.00	Update case files and indices (2.3); update expert materials tracking charts (0.5); organize and index expert reports for various parties (ASARCO LLC, ASARCO, Inc., and others) (1.8); gather materials from the file relating to ASARCO non-scheduled sites (0.5); assemble

BAKER BOTTS LLP.

ASARCO LLC, Debtor-in-Possession

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12/03/07 O J Alaniz	5.80	Gather exhibits and prepare same for filing and preparation of hearing notebooks, analyze which exhibits are necessary for hearing on motion to expunge claims (2.8); attention to publication of bar date notice issues (.7); multiple conferences with J. Prince, C. Haynes and I. Kundawala regarding hearing on motion to expunge claims (1.2); review and analyze comments regarding settlement agreements for J. Fabry's and T. Jack's clients and revise same (.7); create execution copy of settlement agreement with Ledford's clients (.4).
12/03/07 S M Burgin	4.50	Continued development of settlement strategy for PRP only sites; continued review of background material regarding same.
12/03/07 T A Castaneda Jr.	2.00	Preparation and participation in an event for the Senate Hispanic Caucus; discussed TCEQ agenda for ASARCO permit with Chairman Garcia and EA Womack; reported to P. Giblin.
12/03/07 K D Collins	1.00	Prepared for and participated in meeting to discuss non-owned sites update and strategy.
12/03/07 T M Davis	11.00	Read El Paso order (.1); read and exchange emails regarding settlements (.7); read B & L comments (.7); review latest Taylor Springs draft (.8); complete and circulate agenda for call with States (1.3); exchange email and telephone conference with G. Mack re same (.6); review IBWC materials and discuss with T. Aldrich and S. Janoe (1.3); review Arizona Board authority memo and emails re same (.7); telephone conference with A. Tenenbaum and M. Gregory regarding mediation (.4); review revised memo re liability transfers (.5); review precedents re same (1.3); telephone conference with D. Steinway regarding Houston (.3); call with T. Aldrich, S. Janoe re IBWC (.4); read proffers for IBWC (1.2); telephone conferences with J. McCarroll and A. Tenenbaum (.7).
12/03/07 B J Faulkner	2.70	Preparation for CNN visit to El Paso.

BAKER BOTTS LLP.

ASARCO LLC, Debtor-in-Possession

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01/19/08 I Kundawala	.80	Revise motion to approve settlement per C. Haynes' comments (.4); draft proposed order and submit same to C. Haynes for review (.4).
01/19/08 K K Linville	.60	Work on the identification of documents for production to employee's counsel.
01/19/08 M G Paulson	1.00	Continue to draft settlement agreements.
01/20/08 K D Collins	.80	Drafted summary of litigation issues at Band 2 site.
01/20/08 C J Haynes	.20	E-mail correspondence regarding settlement issues (.2).
01/21/08 T A Castaneda Jr.	4.00	Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed permit hearing, recent filings by the City of El Paso concerning bankruptcy, response briefs from the parties and reaction to plant re-opening; reported to P. Giblin and B. Faulkner.
01/21/08 T M Davis	4.20	Board call (1.3); telephone conference with T. Aldrich regarding Hayden issues (.2); telephone conference with S. Janoe regarding the same (.2); study Houston letter (.8); call with B. Little and S. McMillen regarding the same (.3); study City of El Paso pleading and exchange emails regarding the same (1.4).
01/21/08 B J Faulkner	3.20	Complete research on proposed revisions to federal lead standard (1.4); conduct research (0.6); add revisions to draft brief to TCEQ on El Paso permit renewal (1.2).
01/21/08 P M Giblin	4.30	El Paso: Prepare for and work on briefs to be filed with TCEQ regarding renewal of El Paso Smelter permit.
01/21/08 M M Gregory	.40	Review emails from T. Davis, P. Giblin and B. Faulkner regarding City of El Paso's motion for relief from stay (.2); review emails from T. Davis regarding toxic tort claims (.1); review email from R. Mulloy regarding penalty claims (.1).