

Control Number: 43943



Item Number: 28

Addendum StartPage: 0

CCN 110015/2005 100750  
TCEQ DOCKET NO. 2004-1384-UCR  
SOAH DOCKET NO. 582-05-1005

IN RE PETITION OF  
BEXAR METROPOLITAN  
WATER DISTRICT TO  
COMPEL RAW WATER  
COMMITMENT FROM  
GUADALUPE-BLANCO  
RIVER AUTHORITY

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BEFORE THE  
STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

CHIEF CLERK'S OFFICE

2005 APR -4 PM 3:10

FILED  
TCEQ DOCKET NO. 2004-1384-UCR  
SOAH DOCKET NO. 582-05-1005

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EXHIBITS TO BEXAR METROPOLITAN WATER DISTRICT'S RESPONSE  
TO THE GUADALUPE-BLANCO RIVER AUTHORITY'S MOTION TO DISMISS

---

- A. Exhibit A to Original Petition of Bexar Metropolitan Water District to Compel Raw Water Commitment from Guadalupe-Blanco River Authority.
- B. Act of May 15, 1997, 75<sup>th</sup> Leg., R.S., Ch. 91, §1.
- C. Proposal for Decision in SOAH Docket Nos. 582-01-3633 & 582-02-0432; TCEQ Docket Nos. 2001-0697-UCR & 2001-0951-UCR.
- D. BexarMet's CCN Transfer Application.
- E. June 23, 2004 letter from Michelle Abrams, TCEQ, to Mark Zeppa regarding public hearing.
- F. Senator Frank Madla March 24, 2004 letter to TCEQ.
- G. Senator Frank Madla April 1, 2004 letter to TCEQ.
- H. TCEQ Approval of BexarMet's CCN Amendment Application #34354-C.
- I. GBRA's Reply to the Application for Writ of Error.
- J. Reply of GBRA to Reply of City of San Antonio on GBRA's Motion to Dismiss.
- K. TEX. WATER CODE 11.041.



100

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## ADMINISTRATIVE HEARINGS

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- B. Act of May 15, 1997, 75<sup>th</sup> Leg., R.S., Ch. 91, §1.
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- K. TEX. WATER CODE 11.041.



AN ACT

relating to the authority of the Bexar Metropolitan Water District to issue bonds and to enter into certain agreements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 306, Acts of the 49th Legislature, Regular Session, 1945 (Article 8280-126, Vernon's Texas Civil Statutes), is amended by adding Sections 15A and 15B to read as follows:

Sec. 15A. Sections 49.181 and 49.183, Water Code, do not apply to the issuance or sale of District bonds.

Sec. 15B. The District shall take all action, including issuing bonds for facilities, deemed necessary and desirable by the Board to conserve and protect the water in the Edwards Aquifer, including the development of alternate water supplies to its customers such as surface water sources and reuse or retreatment of water owned by the District. In that connection, the District may issue bonds and may acquire, construct, purchase, improve, renovate, or take any other similar action to provide facilities designed to achieve such purposes, including, but not limited to, entering into installment purchase or sale agreements, lease purchase agreements, leases, construction contracts, or similar agreements with any person upon the terms and containing the provisions determined by the Board, in its sole discretion, to be advantageous to the District.

EXHIBIT C

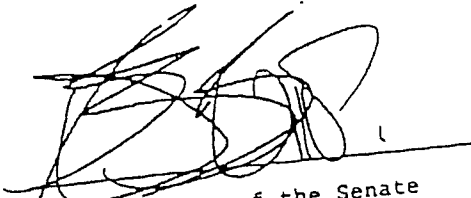
1           SECTION 2. (a) The proper and legal notice of the intention  
2 to introduce this Act, setting forth the general substance of this  
3 Act, has been published as provided by law, and the notice and a  
4 copy of this Act have been furnished to all persons, agencies,  
5 officials, or entities to which they are required to be furnished  
6 by the constitution and other laws of this state, including the  
7 governor, who has submitted the notice and Act to the Texas Natural  
8 Resource Conservation Commission.

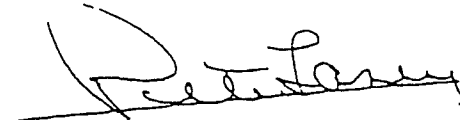
9           (b) The Texas Natural Resource Conservation Commission has  
10 filed its recommendations relating to this Act with the governor,  
11 lieutenant governor, and speaker of the house of representatives  
12 within the required time.

13           (c) All requirements of the constitution and laws of this  
14 state and the rules and procedures of the legislature with respect  
15 to the notice, introduction, and passage of this Act are fulfilled  
16 and accomplished.


17           SECTION 3. The importance of this legislation and the  
18 crowded condition of the calendars in both houses create an  
19 emergency and an imperative public necessity that the  
20 constitutional rule requiring bills to be read on three several  
21 days in each house be suspended, and this rule is hereby suspended,  
22 and that this Act take effect and be in force from and after its  
23 passage, and it is so enacted.

H.B. No. 376

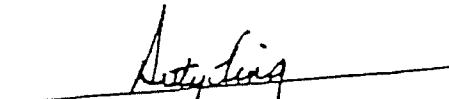
  
President of the Senate

  
Speaker of the House

I certify that H.B. No. 376 was passed by the House on April 11, 1997, by the following vote: Yeas 132, Nays 0, 2 present, not voting.

  
Chief Clerk of the House

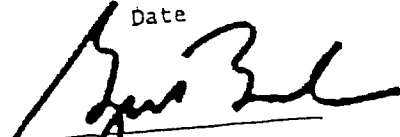
I certify that H.B. No. 376 was passed by the Senate on May 5, 1997, by the following vote: Yeas 31, Nays 0.

  
Secretary of the Senate

APPROVED:

5-15-97

Date

  
Governor

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE

4:57pm O'CLOCK

MAY 15 1997

  
Secretary of State







**Frank Madla**

Texas State Senate  
District 19

1319 S.E. Military Dr., Suite 101  
San Antonio, Texas 78214-2850  
(210) 927-9464  
FAX (210) 922-9621  
P.O. Box 12068  
Austin, Texas 78711  
(512) 463-0119  
FAX (512) 463-1017  
Dist 191 For Relay Calls

OPA  
IGK  
MH  
CB  
file

March 25, 2004

Ms. Margaret Hoffman  
Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

RECEIVED BY OPA  
TRACKING # 13615  
ASSIGNED TO: OLS

MAR 29 2004

DUE DATE: 4-5-04

Dear Ms. Hoffman:

At the request of Bexar Metropolitan Water District (BexarMet), I introduced and passed Senate Bill 1494 relating to the powers of BexarMet, during the 78<sup>th</sup> Legislative Session. My intent, among other things (see enclosure), was to repeal antiquated expansion provisions in BexarMet's enabling act that were inconsistent with the Federal Court's decision in the 1996 court case, *Rios v. BexarMet, et al*, and to remove BexarMet's ability to regulate groundwater.

It is my understanding that some confusion has arisen in a pending certification-related application, specifically TCEQ CCN Amendment Application #34354-C, concerning the effect of this bill on BexarMet's ability to expand in the future. I understand the pending application has been deemed administratively complete and was uncontested. Finally, it is also my understanding the application is for land located within Bexar County.

Based on the above, please accept this letter to clarify that it was not my intent to restrict or abridge certain powers of BexarMet existing in BexarMet's enabling statute or general law, especially the power to expand or acquire additional certificates of convenience and necessity.

Should you need additional information regarding the legislative intent of SB 1494, please do not hesitate to contact me.

Yours truly,

*Frank Madla*

Frank Madla

FM/ja

enclosure

cc: Ms. Stephanie Bergeron, Environmental Law Division  
Mr. Robert Martinez, Environmental Law Division

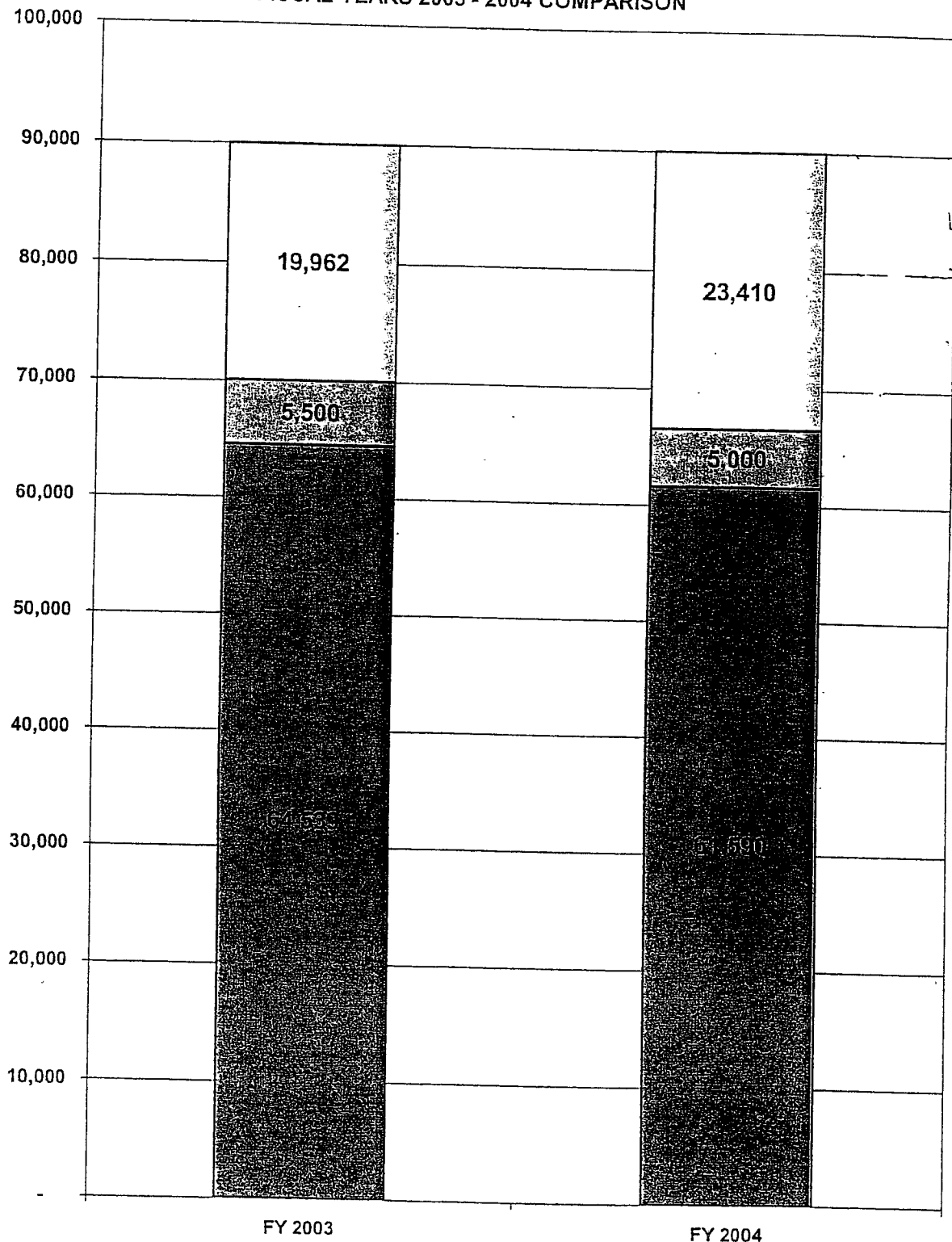
STATE OF TEXAS §  
COUNTY OF TRAVIS § MAY 10 2004  
I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document which is filed in the Records of the Commission. Given under my hand and the seal of office.  
*Robert D. Cadenhead*  
Robert D. Cadenhead, Custodian of Records  
Texas Commission on Environmental Quality

**STATEMENT OF LEGISLATIVE INTENT****SB 1494****by Frank Madla**

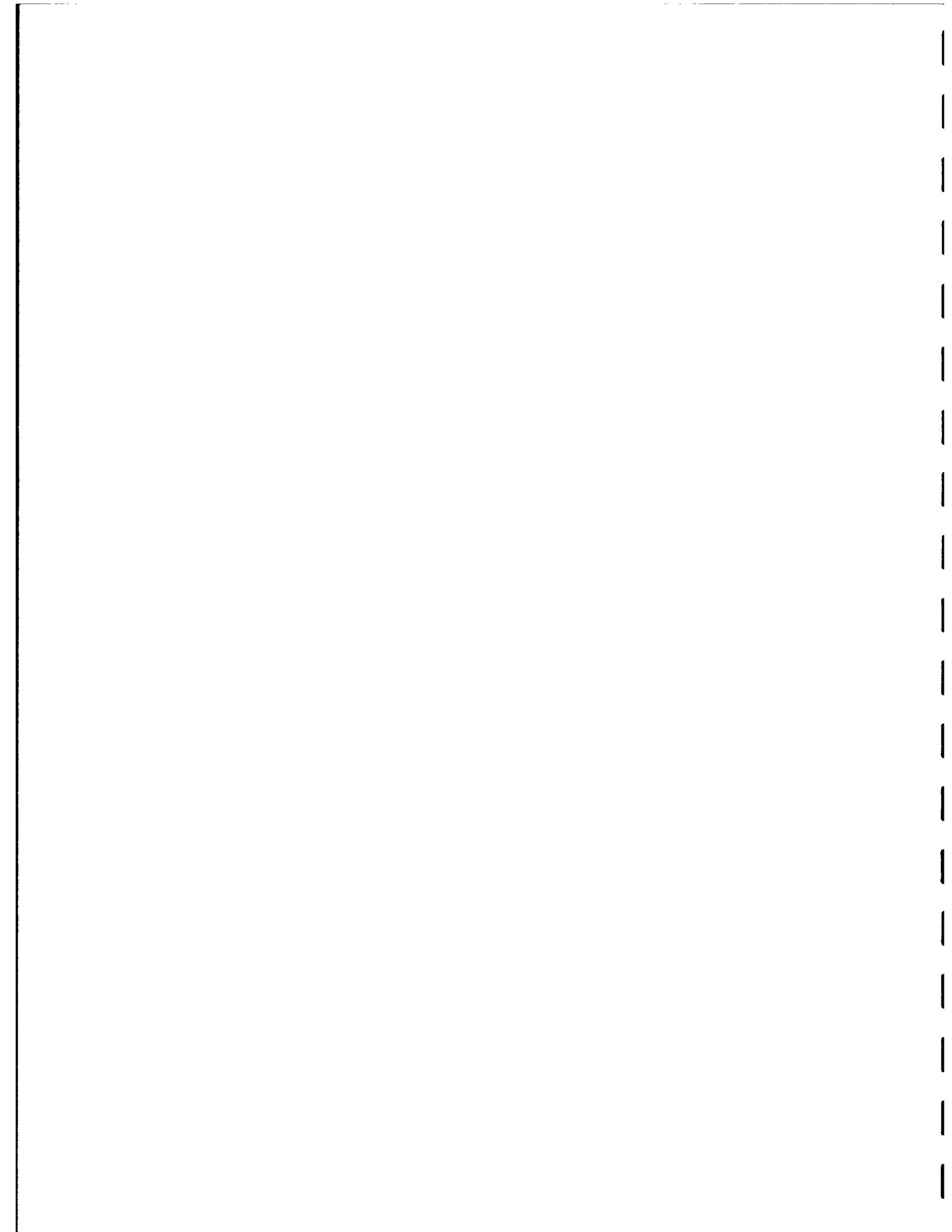
It is the intent of the Committee Substitute for Senate Bill 1494 to clarify the powers and duties within, and only within, the boundaries of the Bexar Metropolitan Water District.

Nothing contained in the Committee Substitute for Senate Bill 1494 shall be interpreted to diminish, or in any other manner affect, the Springhills Water Management District or the Bandera County River Authority, nor restrict, modify, or affect in any manner or to any extent the authority, powers and functions of the Springhills Water Management District or Bandera County River Authority nor amend any law or statute relating thereto.

GUADALUPE-BLANCO RIVER AUTHORITY  
 FIRM WATER COMMITMENTS FROM CANYON RESERVOIR (Acre-Feet)  
 FISCAL YEARS 2003 - 2004 COMPARISON



☒ Actual Commitments  
 ☐ Projected New Commitments  
 ☐ Remaining in Canyon Reservoir



# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

November 20, 2002

Duncan Norton  
General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket Nos. 582-01-3633 & 582-02-0432; TCEQ Docket Nos. 2001-0697-UCR & 2001-0951-UCR, In Re: The Application of The City of Bulverde to Obtain a Water Certificate of Convenience and Necessity (Application No. 33194-C) & The Application of Bexar Metropolitan Water District to Amend its Water Certificate and Convenience and Necessity No. 10678 (Application No. 33309-C)

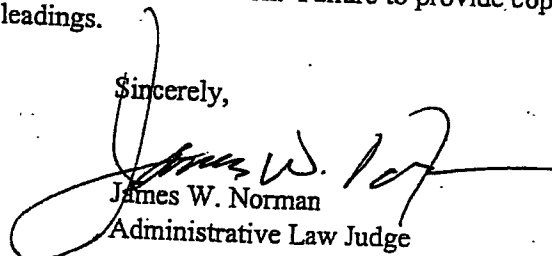
Dear Mr. Norton:

The above-referenced matter is set to be considered by the Texas Commission on Environmental Quality (TCEQ) at 1:00 p. m. on February 5, 2002 in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas. Enclosed are copies of the Proposal for Decision and Order which have been recommended to the Commission for approval.

Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the TCEQ no later than December 18, 2002. Any replies to exceptions or briefs must be filed in the same manner no later than January 2, 2002.

This matter has been designated TNRCC Docket No. 2001-0697-UCR & 2001-0951-UCR; SOAH Docket Nos. 582-01-3633 & 582-02-0432. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and eleven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

  
James W. Norman  
Administrative Law Judge



JN/cle  
Enclosures  
cc: Mailing List

Post Office Box 13025 ♦ William P. Clements Building  
(512) 475-4003 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025  
Docket (512) 475-2445 ♦ Fax (512) 475-4004

Service List  
SOAH DOCKET NO. 582-01-3633  
TNRCC DOCKET NO. 2001-0697-UCR  
Application from the City of Bulverde to Obtain a Water Certificate  
of Convenience and Necessity in Comal County;  
Application Number 33194-C

Mark H. Zeppa  
Attorney  
4833 Spicewood Springs Road #202  
Austin, Texas 78759-8436  
Tel: 512/346-4011  
Fax: 512/346-6847

Representing Bexar Metropolitan Water District

John Deering & Geoffrey P. Kirshbaum  
Staff Attorneys  
Environmental Law Division  
Texas Natural Resource Conservation Commission  
P. O. Box 13087; ML-173  
Austin, Texas 78738  
Tel: 512/239-6257  
Fax: 512/239-3434

Representing the Executive Director of the Texas Natural  
Resource Conservation Commission

John O. Houchins  
Attorney at Law  
13738 Kingsride  
Houston, Texas 77079  
Tel: 713/464-3205  
Fax: 713/461-8711

Representing Canyon Lake Water Supply Corporation

Mayo J. Galindo  
Attorney at Law  
7718 Broadway  
San Antonio, Texas 78209  
Tel: 210/828-6777  
Fax: 210/822-8009

Representing City of Bulverde

Bob Barton  
Mayor City of Bulverde  
2962 Barton Hill Drive  
Bulverde, Texas 78163  
Tel: 830/980-2972  
Fax: 830/438-4867

Representing City of Bulverde



SOAH DOCKET NO. 582-01-3633  
TNRCC DOCKET NO. 2001-0697-UCR

SERVICE LIST

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Mike Howell, Engineer Specialist  
Legal Services Division - MC 175  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087  
Ph: 512/239-6960  
Fax: 512/239-6145

Representing the Executive Director of the  
Texas Natural Resource Conservation  
Commission

Blas Coy, Attorney  
Public Interest Counsel - MC-103  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087  
Ph: 512/239-6363  
Fax: 512/239-6377

Charles Ahrens, Water Resources  
Bexar Metropolitan Water District  
P. O. Box 245994  
San Antonio, Texas 78224-5994  
Tel: 210/357-5710  
Fax: 210/922-5152

David L. Wallace  
P. O. Box 421  
Bulverde, Texas 78163  
Tel: 830/980-3774  
Fax: 830/438-2721

Representing Water Services, Inc. and Diamond Water Co.

Kathleen B. Ciliske, President  
Comal Water Company  
1402 Chestnut Grove Lane  
Kingwood, Texas 77345  
Tel: 281/360-4855  
Fax: 281/360-1938

Bruce Wasinger  
Bickerstaff, Heath, Smiley, Pollan, Kever  
& McDaniel, L.L.P.  
816 Congress Avenue  
Austin, Texas 78701-2443  
Tel: 512/472-8021  
Fax: 512/320-5638

Representing Guadalupe Blanco River Authority





SOAH DOCKET NO. 582-01-3633  
TNRCC DOCKET NO. 2001-0697-UCR

SERVICE LIST

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◆Docket Clerk  
Office of Chief Clerk - MC-105  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

◆TNRCC Docket Clerk



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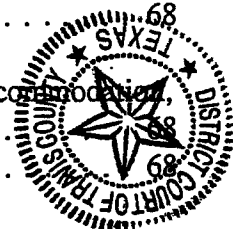


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PROPOSAL FOR DECISION

SOAH DOCKET NOS.: 582-01-3633 & 582-02-0432

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TQEC DOCKET NOS.: 2001-0697-UCR & 2001-0951-UCR

III. Recommendations

The Texas Commission on Environmental Quality (TCEQ or Commission) Executive Director recommended denying Bulverde's application primarily on the basis of her belief that Bulverde does not have the financial, managerial, and technical capability to provide continuous and adequate service. She also argued that Bulverde has not demonstrated a need for the CCN except in areas where there has been a specific request for service.

The Executive Director recommended approving BexarMet's application in areas where it has received specific requests for service and where it currently provides service within the requested area.

The Administrative Law Judge (ALJ) agrees with the Executive Director's recommendation that Bulverde's application should be denied because it has not shown that it has the financial, managerial, and technical capability to provide continuous and adequate service. The ALJ agrees with the Executive Director's recommendation that the BexarMet application should be approved in part, but disagrees that it should be limited to the extent the Executive Director contended. He recommends that BexarMet's application be granted for the requested service area south of Highway 46, except that it be permitted to serve within Bulverde's corporate limits only if it obtains Bulverde's consent to do so or its district boundaries are expanded to include Bulverde's corporate limits. He recommends approval of BexarMet's application north of Highway 46 only where it has specific requests for service and in its two existing service areas.<sup>1</sup>

---

<sup>1</sup>Attachments 1 and 2 are maps of the BexarMet and Bulverde requested service areas. The overlapping area is shown in green on the Bulverde map (Attachment 2).



PROPOSAL FOR DECISION

SOAH DOCKET NOS.: 582-01-3633 & 582-02-0432

TQEC DOCKET NOS.: 2001-0697-UCR & 2001-0951-UCR

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IV. Procedural History

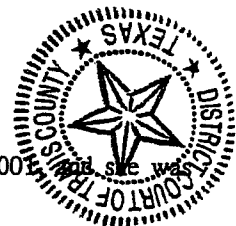
On June 28, 2000, Bulverde filed its application for a CCN. Notice of the application was mailed on October 13, 2000, to persons within the requested service area and to cities and neighboring retail public utilities providing the same utility service whose corporate limits or CCN boundaries are within two miles of the requested area. On October 19, 2000, the same notice was published in the BULVERDE COMMUNITY NEWS, a newspaper regularly published and generally circulated in Comal County, Texas.

On July 12, 2001, the Commission referred Bulverde's application to the State Office of Administrative Hearings (SOAH). Notice of the preliminary hearing was mailed on August 16, 2001, to all parties requesting a hearing on the application. A preliminary hearing was held on September 10, 2001, at which time the following were admitted as parties:

- Bulverde, represented by Mayo J. Galindo, subsequently also represented by Bruce Wasinger and Emily Rogers
- The Executive Director, represented by Fread Houston<sup>2</sup>
- BexarMet, represented by Mark H. Zeppa
- Comal Water Company (Comal), represented by Kathleen B. Cileske, subsequently represented by Mr. Zeppa

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<sup>2</sup>The Executive Director filed a notice of substitution of counsel on November 13, 2001, and she was subsequently represented by Todd Galiga and John Deering.





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- Water Services, Inc. (WSI), represented by David L. Wallace, subsequently represented by Mr. Zeppa
- Diamond Water Company (Diamond), represented by David L. Wallace, subsequently represented by Mr. Zeppa
- San Antonio Water System (SAWS), represented by Martin Rochelle
- Canyon Lake Water Supply Corporation (Canyon Lake WSC), represented by John O. Houchins

On November 20, 2001, SAWS withdrew as a party, and was removed as a party.

On November 3, 2000, BexarMet filed its application to amend its CCN. Notice of BexarMet's application was mailed on May 1, 2001, to persons within the service area and to cities and neighboring retail public utilities providing the same utility service whose corporate limits or CCN boundaries were within two miles of the requested service area. On May 13, and 20, 2001, the same notice was published in the SAN ANTONIO EXPRESS NEWS, a newspaper regularly published in Bexar County and generally circulated in Comal County.

On August 22, 2001, the Commission referred BexarMet's application to SOAH. Notice of the preliminary hearing was mailed on October 23, 2001, to all parties who had requested a hearing on the application. A preliminary hearing was held on December 4, 2001, at which time the Executive Director moved to consolidate the two applications. All of the parties present supported the motion and it was granted. Guadalupe Blanco River Authority (GBRA), represented by Bruce Wasinger, was admitted as a party.



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On December 11, 2001, BSR Water Company requested party status. BexarMet opposed the request in a filing dated December 17, 2001. In an order dated December 20, 2001, the request was denied.

Comal initially opposed the BexarMet application, but reached a settlement with BexarMet before the hearing on the merits and withdrew its opposition. It continued to oppose Bulverde's application.

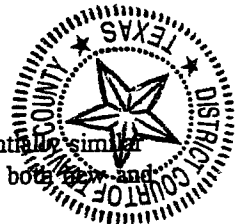
The hearing on the merits convened on June 11, 2002, and concluded on June 13, 2002. Canyon Lake WSC initially opposed both applications, but reached a settlement with both applicants during the hearing and withdrew its opposition and withdrew as a party during the hearing. BexarMet, Comal, WSI, and Diamond (Protestants) opposed Bulverde's application. Bulverde and GBRA opposed BexarMet's application. The record was left open until August 9, 2002, for the presentation of post-hearing briefs and until September 11, 2002, for the presentation of reply briefs. All the parties submitted initial and reply briefs. The record was reopened on October 16, 2002, and October 18, 2002, for the receipt of additional documentation and arguments. The record finally closed on October 18, 2002.

V. Statutory Standards

The parties cited WATER CODE §§ 13.241 and 13.246 as containing the controlling standards for judging the Bulverde and BexarMet applications.<sup>3</sup>

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<sup>3</sup>The Commission's rules at 30 TEX. ADMIN. CODE (TAC) § 291.102 (a)-(d) contain substantially similar standards, but also specify which standards apply to new CCN applications only and which apply to both new and CCN amendment applications.



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The Executive Director argued that § 13.246(b) states the "overarching command" that the Commission may issue a CCN only after it "finds that a certificate is necessary for the service, accommodation, convenience, or safety of the public."<sup>4</sup>

Section 13.241(a) requires the Commission to ensure that the applicant "possesses the financial, managerial, and technical capability to provide continuous and adequate service."

Section 13.241(b)(1) says the Commission must ensure that the applicant "is capable of providing drinking water that meets the requirements of Chapter 341, Health and Safety Code, and the requirements of . . . [the Water Code]."

Section 13.241(b)(2) provides that the Commission must ensure that the applicant "has access to an adequate supply of water."

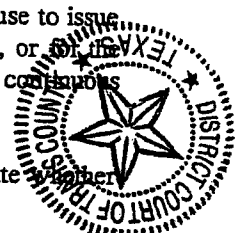
Section 13.241(d) states that before the Commission grants a new CCN "for an area which would require construction of a physically separate water or sewer system, the applicant must demonstrate that regionalization or consolidation with another retail public utility is not economically feasible."<sup>5</sup>

Section 13.246<sup>6</sup> lists the following criteria for the Commission to consider in deciding whether to grant a CCN:

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<sup>4</sup>Section 13.246(b) also provides, "The commission may issue a certificate as requested, or refuse to issue it, or issue it for the construction of only a portion of the contemplated system or facility or extension, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided."

<sup>5</sup>Rule 30 TAC § 291.102(b) lists specific information an applicant must submit to demonstrate whether regionalization or consolidation with another retail public utility is economically feasible.



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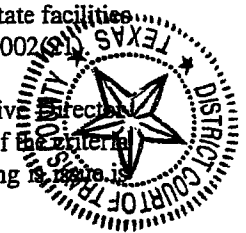
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- the adequacy of service currently provided to the requested area;
- the need for additional service in the requested area;
- the effect of the granting of a certificate on the recipient of the certificate and on any retail public utility<sup>6</sup> of the same kind already serving the proximate area;
- the ability of the applicant to provide adequate service;
- the feasibility of obtaining service from an adjacent retail public utility;
- the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;
- environmental integrity; and
- the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate.<sup>7</sup>

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<sup>6</sup>"Retail public utility" is defined as "any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation." WATER CODE § 13.002.

<sup>7</sup>Although each of the WATER CODE § 13.246<sup>6</sup> elements must be duly considered, the Executive Director and Protestants argued there is nothing in their language that states or implies that a failure to prove one of the criteria should result in an automatic denial of a CCN or CCN amendment. Protestants contended the overriding issue is whether there is a need and an ability to meet that need.



VI. Bulverde Application

A. General Description

Bulverde's<sup>8</sup> requested service area is approximately 57,500 acres in Comal County, Texas, about 18 miles northwest of New Braunfels. It is generally bounded by a line approximately 3640 feet north of State Highway 46, on the east by a line approximately 1000 feet east of FM 3009, on the south by Cibolo Creek extending to the Kendall County line, and on the west by the Kendall/Comal Counties line. It includes Bulverde's city limits and ETJ.<sup>9</sup> To settle the Canyon Lake WSC protest, Bulverde amended the requested service area during the hearing to remove an area north of the north right-of-way of Highway 46.<sup>10</sup> Bulverde does not seek to include in its CCN contiguous areas that are presently certified to other utilities, including BexarMet, Lomas Water Co., Berry Oaks Water Co., WSI, Diamond, Comal, BSR Water Co., Canyon Lake WSC and SAWS.<sup>11</sup>

Bulverde alderman Barton testified Bulverde filed its application after concluding that the Trinity Aquifer, the only source of groundwater in western Comal County, is not capable of supplying water that will be needed on a long-term basis for expanding population in the City's requested area. He indicated the City wants to ensure the adequacy of water service within its city limits, its ETJ and adjacent area, and protect its infrastructure. Bulverde is also concerned over the development of many small CCNs by new subdivisions—it believes an integrated single utility

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<sup>8</sup>Bulverde was created in January 2001, when several incorporated cities, Bulverde North, Bulverde South, Bulverde East, Bulverde West, and Bulverde Northwest, consolidated. It has a population of about 4400. Bulverde alderman and former mayor Bob Barton's testimony, Bulverde Exhibit A at 3.

<sup>9</sup>Barton testimony, Bulverde Exhibit A at 9-10, Attachment 7. GBRA director of project development David Welsch's testimony, Bulverde Exhibit D at 6.

<sup>10</sup>Bulverde Exhibit C; Barton testimony, Tr. at 13-14.

<sup>11</sup>Barton testimony, Bulverde Exhibit A at 14; Welsch testimony, Bulverde Exhibit D at 6.



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covering the requested area could more efficiently and better manage limited groundwater in conjunction with surface water than numerous small systems.<sup>12</sup> Mr. Welsch testified that groundwater in the requested area is inadequate to serve a large population—the 2002 South Texas Regional Water Plan (Region L) clearly identifies Comal County as an area in need of additional water.<sup>13</sup>

Mr. Barton said he expects substantial growth, at about four to seven per cent per year, in the Bulverde area over the next 10 to 15 years. He based this estimate on a review of projections of the Texas Water Development Board and growth rates experienced by Pedernales Electric, local schools, and an indicated increased rate of requests for septic tanks; he has also reviewed records from WSI and BexarMet.<sup>14</sup> Bulverde has received requests for water service and has concluded it is in the best interests of its citizens' health and welfare to plan for a municipal water system.<sup>15</sup>

Mr. Barton testified the City had discussions with GBRA and SAWS for over a year in an attempt to obtain help for its CCN application. He said the City ultimately decided to seek help from GBRA because it believes that entity has the best prospects for near and long-term water supply.<sup>16</sup> It has entered into a water supply contract with GBRA under which GBRA plans to deliver water through a pipeline from Canyon Lake to Bulverde as part of GBRA's Western

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<sup>12</sup>Bulverde Exhibit A at 9; Tr. at 87.

<sup>13</sup>Bulverde Exhibit D at 13, 15.

<sup>14</sup>Bulverde Exhibit A at 12; Tr. at 18-20, 23-25, 33. Mr. Barton's estimates of growth in the area varied between four and seven percent at different places in his testimony. *Id.*

<sup>15</sup>Bulverde Exhibit A at 14; Tr. at 18-20.

<sup>16</sup>The original application was prepared by SAWS and later amended to substitute GBRA in its place. Barton testimony, Bulverde Exhibit A at 6-8.



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Canyon Treated Water Project (Western Canyon Project).<sup>17</sup> GBRA will provide 400 acre-feet of water annually to Bulverde under the terms of three contracts it has entered into with the city: a water supply contract, an Operating Agreement, and an Inter-local Agreement.<sup>18</sup>

The Bulverde/GBRA Operating Agreement obligates GBRA to design, construct, finance, operate, and maintain the water distribution system to provide treated water on Bulverde's behalf; GBRA also agreed to assist Bulverde in obtaining a water CCN.<sup>19</sup> GBRA will own the water distribution system except that Bulverde will have an exclusive option to purchase the portion of the system within the Bulverde service area on the later of 20 years after the effective date of the Operating Agreement or full payment of all debts issued to finance the Western Canyon Project. GBRA may transfer title to all or a portion of the water distribution system with Bulverde having the first right of refusal on the same terms and conditions as being offered by GBRA or that have been agreed to with a third party.<sup>20</sup>

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<sup>17</sup>The Western Canyon Project is a regional treated water supply system developed to meet increasing demands for water in Comal and Kendall Counties and portions of Bexar County which have traditionally relied on the Trinity and Edwards Aquifers to meet their water supply needs. GBRA intends initially to pump approximately 10,000 acre-feet of raw water per year and convey it in a thirty-inch pipe to a regulatory and storage tank from which it will treat the water at a new treatment plant and supply it to several communities. The 40 mile-long transmission line will pass through much of the requested service area and Bulverde will have access at numerous delivery points.

The Bulverde/GBRA contract is for an initial 35 years. The Western Canyon Project is to be completed in approximately April 2004 and is expected to serve about 800 connections, or 2400 persons, in the Bulverde service area. Bulverde will receive water from the system at a delivery point on the treated water line. The water will be delivered through a water main connected to the primary treated water transmission line. Welsch testimony, Bulverde Exhibit D at 6-7, 9-10; GBRA deputy general manager Fred Blumberg testimony, Bulverde Exhibit E at 11, 13; Tr. at 174.

<sup>18</sup>Barton testimony, Bulverde Exhibit A at 5-8, 12-13. The three agreements are included in the application at Bulverde Exhibit D, Attachments 18-20.

<sup>19</sup>Welsch testimony, Bulverde Exhibit D at 5, 11 and Attachment 19 § 3.2.

<sup>20</sup>*Id.*, Attachment 19 § 3.3.



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B. Brief Overview of Party Positions and Recommendations

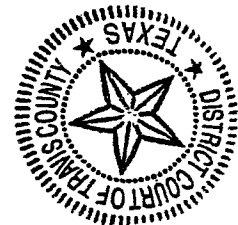
Bulverde contended it met the requisite criteria for receiving a CCN and urged approval of its application.

The Executive Director contended the application should be denied because:

- Bulverde does not have the financial, managerial, and technical capability to provide continuous and adequate service;
- the CCN is not necessary for the service, accommodation, convenience, of safety of the public;
- Bulverde does not have the ability to provide adequate service;
- Bulverde did not demonstrate adequate financial stability to obtain a CCN;
- Bulverde did not present sufficient evidence to determine whether it is feasible to obtain service from an adjacent utility; and
- there is not a need for additional service in the entire requested area.

Protestants contended the application should be denied for the same reasons as the Executive Director except they agreed with Bulverde that there is a need for additional service in the requested area. They also maintained the application should be denied because:

- Bulverde does not have access to an adequate water supply;





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- it is feasible to obtain water from other utilities in parts of the requested area;
- there would be an adverse effect on several utilities in the area if the application is granted;
- Bulverde did not provide evidence of what its rates will be;
- Bulverde will not be able to provide drinking water meeting Health and Safety Code and WATER CODE requirements; and
- granting the CCN to Bulverde is not necessary for the service, accommodation, and safety of the public.

The ALJ concludes that Bulverde's application should be denied because it did not demonstrate that it has the financial, managerial, and technical capability to provide continuous and adequate service.

C. Financial, Managerial, Technical Capability to Provide Continuous and Adequate Service

Much of the dispute focuses on the language in WATER CODE § 13.241(a)—the Commission must ensure "that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service."

1. Bulverde

Bulverde contended it will have the managerial ability to provide continuous and adequate service because GBRA will operate and maintain the water system and will provide all



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management functions on Bulverde's behalf. GBRA will select employees to provide daily operations and maintenance and customer service.

GBRA serves about 72,000 persons and has been operating water systems since 1970. It handles accounts, billing, collections, and customer service for about 3,000 wholesale and retail customers. It currently owns and/or operates five water treatment plants. It has implemented policies to ensure that facilities are operated in compliance with good management practices and TCEQ regulations.<sup>21</sup> Bulverde cited evidence that GBRA has an excellent service and compliance record. It has 27 certified operators holding Class A, B, C, and D licenses. The water system will be operated and maintained like other GBRA operated water systems.<sup>22</sup>

Bulverde pointed out that GBRA has agreed to finance and build the water system. It has a history of obtaining funding and can obtain favorable financing through volume purchasing power.<sup>23</sup>

According to Mr. Schuerg, Bulverde itself has the financial capability of serving the requested area and could finance a water system itself. He said Bulverde might take advantage of the Water Development Board state participation program permitting it to own and finance approximately half with the state purchasing the other half over a period of years.<sup>24</sup>

Bulverde contends the critical issue is whether a new city will be permitted to obtain a CCN when it has contracted with another utility to provide utility service on its behalf. It argued that the Executive Director's and Bulverde's reading of § 13.241(a) is unnecessarily narrow. It

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<sup>21</sup>Bulverde/GBRA Operating Agreement, Bulverde Exhibit D, Attachment 19, § 3.2 ; Blumberg testimony, Bulverde Exhibit E at 2, 4, 6-7, 9-10.

<sup>22</sup>Blumberg testimony, Bulverde Exhibit E at 4, 7, 9-10.

<sup>23</sup>Bulverde Exhibit D, Attachment 19; GBRA director of finance and accounting Alvin Schuerg testimony, Bulverde Exhibit F at 8; Tr. at 247.

<sup>24</sup>Bulverde Exhibit F at 8-9; Tr. at 255-256.



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cited WATER CODE § 13.241(a) requiring an applicant to have the "capability" of providing service and § 13.246(c), requiring the Commission to consider an applicant's "ability" to provide adequate service. It pointed to dictionary definitions of capability—to have the attributes or potential to perform or accomplish a task, and ability—to have sufficient power, skill, or resources to accomplish an object, and contended it has the ability and capability to provide water service through an Inter-local Agreement, a water supply agreement, and an Operating Agreement with GBRA. It said it is tapping into the resources and talents of GBRA, including GBRA's financial, managerial, and technical expertise to operate a water system. It asserted there is no doubt GBRA will be able to operate and maintain the Bulverde water system in compliance with applicable law.

Bulverde argued that a denial of its application would be poor public policy. It would undermine its ability to control the water service provided to its citizens and its ability to pay for and maintain the necessary infrastructure by ensuring a current and future customer base. In Bulverde's view, this control is consistent with § 402.001 of the Texas Local Government Code, which provides that a municipality may purchase, operate, or construct a utility system inside or outside its boundaries and may regulate the system in a manner that protects the interests of the municipality.

Bulverde maintained a denial of the CCN would undermine the Inter-local Cooperation Act, TEX. GOV'T CODE ANN. § 791.026, which authorizes a municipality, district, or river authority to contract with another municipality, district, or river authority to obtain or provide water supply facilities and to prohibit obtaining the service from any other source. It contended the Executive Director urges denial of the CCN because of the very features this statute protects—a municipality's exclusive right to serve its citizens and own its facilities. It argued her position is at odds with the enacted policy of the legislature.

Bulverde asserted it clearly will have control over GBRA and the provision of water service in its requested service area. It cited the following examples of its oversight of and



over the water system: it will own the water GBRA will distribute through the Bulverde distribution system;<sup>25</sup> GBRA will develop a water system master plan and will submit the plan to Bulverde for approval;<sup>26</sup> GBRA is contractually required to operate the system in compliance with applicable legal standards;<sup>27</sup> Bulverde has the right to avail itself of all legal and equitable remedies to pursue and protect its interests under its Operating Agreement with GBRA;<sup>28</sup> GBRA must comply with Bulverde's ordinances in constructing the water system and serving Bulverde customers;<sup>29</sup> Bulverde will have the exclusive right and option to purchase the water system at any time during the Operating Agreement option period and the right of first refusal if GBRA decides to sell the water system;<sup>30</sup> Bulverde has enacted a subdivision ordinance placing restrictions and requirements on subdividers in relation to obtaining water;<sup>31</sup> Bulverde may regulate its water utility system in a manner that protects the interests of the municipality;<sup>32</sup> and Bulverde may enact ordinances, rules, or police regulations necessary for the proper carrying out of a power granted to it by law.<sup>33</sup>

Bulverde disputed the Executive Director's contention that it is necessary for a CCN holder to control a water system. It argued that WATER CODE provisions, §§ 13.241, 13.242, and 13.246, which state standards to judge a CCN application, do not say control is a criteria for

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<sup>25</sup>Bulverde Exhibit D, Attachment 18 and Attachment 19 § 3.10.

<sup>26</sup>*Id.*, Attachment 19 § 3.2(b).

<sup>27</sup>*Id.*, Attachment 19 § 5.1.

<sup>28</sup>*Id.*, Attachment 19 at § 8.2.

<sup>29</sup>Bulverde Exhibit D, Attachment 5 at 42-44; Attachment 19 at § 3.2(a).

<sup>30</sup>*Id.*, Attachment 19 § 3.3.

<sup>31</sup>Bulverde Exhibit A, Attachment 5 at 42-44.

<sup>32</sup>TEX. LOCAL GOV'T CODE ANN. § 402.001(b).

<sup>33</sup>*Id.* § 51.001.



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obtaining a CCN. It pointed out that the ability to provide continuous and adequate service does not equate to ownership.

Bulverde contended the Executive Director's position that ownership and control is required to obtain a CCN presumes that the contractual relationship between GBRA and Bulverde will fail and GBRA will violate TCEQ regulations. It maintained this is not supported by any evidence--to the contrary, the evidence shows that Bulverde and GBRA have worked closely together to ensure an adequate water supply to the area, the contractual relationship requires ongoing cooperation between the parties, and GBRA has an excellent track record as an owner and operator in other cities.<sup>34</sup>

Bulverde asserted that any concern about GBRA walking out on its deal with Bulverde is misplaced and should not serve as a basis for denying the application. It contended that, as political subdivisions, neither Bulverde nor GBRA is permitted to abandon a project or the people they serve. GBRA's goal and statutory mandate are to ensure an adequate water supply within its statutory boundaries.<sup>35</sup> As the initial owner of the water system and entity obligated to pay bonds used to construct it, GBRA would not and could not simply walk away from the system.<sup>36</sup> Moreover, with the CCN in Bulverde's name, GBRA could not sell water to any other party without Bulverde's approval.<sup>37</sup>

Bulverde cited the fact that the Bulverde/GBRA contract requires GBRA to comply with Bulverde's ordinances and TCEQ statutes and rules. Bulverde can take action against GBRA in

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<sup>34</sup>Bulverde Exhibit D, Attachments 18, 19, and 20; Blumberg testimony, Bulverde Exhibit E at 5-8; Welsch testimony, Tr. at 170, 906-908.

<sup>35</sup>Bulverde Exhibit F, GBRA Comprehensive Audit, Attachment 26; Guadalupe-Blanco River Authority Act, 43<sup>rd</sup> Leg., R.S., ch 75, 1933 Tex. Gen. Law 198.

<sup>36</sup>Bulverde Exhibit D, Attachment 19; Welsch testimony, Tr. at 906-908.

<sup>37</sup>TCEQ representative and engineering specialist Mike Howell's testimony, Tr. at 760.



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court to cause it to come into compliance, and in an unlikely worse case scenario, TCEQ could revoke Bulverde's CCN.

2. Executive Director

The Executive Director's primary objection to the application is based on WATER CODE § 13.241(a). She emphasized the word "applicant" in the statute and argued that Bulverde, rather than a third party such as GBRA, must meet the statutory standards. She cited the following evidence: the cover letter submitted with Bulverde's application stated Bulverde "does not personally have the resources to develop and manage a water utility;"<sup>38</sup> Bulverde does not have a water department with technical staff dedicated to maintaining, operating, and providing Bulverde's water service;<sup>39</sup> Bulverde does not have its own groundwater supply or hold any water rights in its own name;<sup>40</sup> Bulverde has not budgeted funds for operating a water utility;<sup>41</sup> Bulverde will not have any day-to-day responsibility for operating the water system;<sup>42</sup> Bulverde has no plans to designate city employees to handle requests for service;<sup>43</sup> and Bulverde did not indicate it will have the financial or managerial responsibility for the proposed utility.<sup>44</sup>

The Executive Director cited her staff's financial review of the application, which concluded that Bulverde did not demonstrate it will have financial or managerial responsibility for

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<sup>38</sup>Bulverde Exhibit A, Attachment 7 at 1.

<sup>39</sup>Howell testimony, ED Exhibit F at 4.

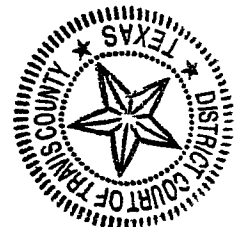
<sup>40</sup>Barton testimony, Tr. at 66.

<sup>41</sup>*Id.* at 68.

<sup>42</sup>*Id.* at 69.

<sup>43</sup>*Id.* at 80.

<sup>44</sup>Memorandum from TCEQ certification and rate analyst Dan Smith, ED Exhibit G.



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the proposed utility and did not provide such information as the projected relationship between capital expenditure and the timing of connections and revenue, projected profit and loss statements, projected cash flows, and the availability of reserves.<sup>45</sup>

To illustrate the deficit in the application, the Executive Director cited Mr. Barton's testimony that GBRA has committed to "work with Bulverde" on such matters as how complaints will be handled, how many employees will be designated to handle complaints, and what rates will be charged.<sup>46</sup> She cited the emphasis on cooperation in Bulverde's closing brief.<sup>47</sup> She asserted, because Bulverde has not shown an ability to provide service without the cooperation of GBRA, it has not shown it possesses the capability to provide continuous and adequate service.

Responding to Bulverde's argument that its contract with GBRA will likely succeed because there is no evidence it will fail, the Executive Director argued that problems do not often arise before a contractual relation begins and that problems can arise despite the best intentions. For this reason, the Executive Director believes an arrangement whereby one entity holds a CCN and another is responsible for designing, building, operating, and maintaining the system is inconsistent with WATER CODE § 13.241(a).

In response to Bulverde's claims that it could provide its own service without GBRA's assistance, the Executive Director pointed out that Bulverde elected not to do so and argued the claim is irrelevant.

The Executive Director discounted Bulverde's argument that it could seek to legally enforce GBRA's contractual obligations. She said the claim presumes Bulverde could stand on

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<sup>45</sup>*Id.*

<sup>46</sup>Tr. at 70, 82, and 92.

<sup>47</sup>Bulverde's August 9, 2002, Closing Brief at 5 and 10.



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an equal legal footing with GBRA and ignores the fact that problems would continue during the pendency of legal proceedings.

The Executive Director disagreed with Bulverde's arguments that denying the Bulverde application would somehow undermine the Inter-local Cooperation Act. She agreed the Act allows governmental entities to enter contracts for water supply facilities, but asserted the legislation is not meant to be in derogation of WATER CODE requirements for obtaining a CCN.

In summation, the Executive Director argued Bulverde's inabilities may not be overcome by arrangements with GBRA, pursuant to which GBRA agrees to fund, design, permit, finance, construct, operate, and maintain the system for Bulverde.<sup>48</sup> She contended the agreements do not overcome the fundamental flaw in Bulverde's application, that it will be the CCN holder, but another entity will provide the necessary qualifications for running the utility. She argued that the "disconnect" between the party responsible for providing lawful service and the entity that will actually operate the system is not compatible with the Commission's statutory duty to ensure that CCN applicants have the ability to provide continuous and adequate service.

3. Protestants

Protestants also cited the CCN application cover letter from Mr. Barton acknowledging that Bulverde does not have the resources to manage a water utility and that Bulverde has attempted to address this deficit through contracts with GBRA. They maintained Bulverde, not GBRA, must meet the statutory criteria. It cited additional evidence from Mr. Barton that: neither the Bulverde city manager nor other city employees will be involved in the day-to-day operation

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<sup>48</sup>Tr. at 68; Executive Director Exhibit F-1 at 6; Mr. Barton acknowledged that Bulverde could not provide water service to the requested area without GBRA assistance. Tr. at 128.





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of the water system;<sup>49</sup> in fiscal year 2000, Bulverde had total combined assets of \$1,155,300, with roughly \$250,000 dedicated to the street and road fund, no money budgeted to construct a water utility, and only \$23,000 to \$27,000 per year budgeted to pay GBRA under its water supply contract;<sup>50</sup> it is premature to know the cost of the utility;<sup>51</sup> the construction of the distribution system inside the Bulverde corporate limits will not begin until March or April of 2004.<sup>52</sup>

Protestants argued Bulverde has not demonstrated its financial stability as a CCN holder. It has a very limited asset base for calendar year 2000 with close to one-quarter of its assets committed to its road and street fund and no money budgeted for the water utility district other than its annual payment to GBRA for raw water in Canyon Lake.<sup>53</sup> Its net income for December 2001 was \$2,665.67,<sup>54</sup> and it has not demonstrated where it will develop the independent financial resources to be responsible for a public water system. Although Bulverde has other options for raising revenues, there is no evidence that any of these options have been explored.

Protestants maintained GBRA witness Alvin Schueberg's testimony that Bulverde could finance a water distribution system and might obtain funding from the Texas Water Development Board<sup>55</sup> was not supported by analyses of Bulverde's financial condition or eligibility for the Texas Water Development Board program.

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<sup>49</sup>*Id.* at 69.

<sup>50</sup>Bulverde Exhibit A, Attachment 3; Tr. at 66-68.

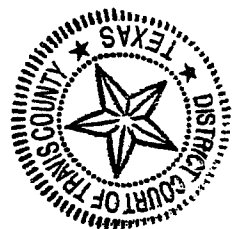
<sup>51</sup>Tr. at 72.

<sup>52</sup>*Id.* at 63-64.

<sup>53</sup>Barton testimony, Tr. at 66-68.

<sup>54</sup>Bulverde Exhibit A, Attachment 2.

<sup>55</sup>Tr. at 255-256.



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Bulverde claimed GBRA will obtain financing for the water distribution system from developers who are required to pay by Bulverde ordinances, but Protestants noted that Bulverde did not address how the distribution system for its present residents will be paid. They argued there was no evidence that any revenues will be generated for the benefit of Bulverde. Rather, the rate-making criteria for the Bulverde-GBRA contracts look at GBRA's costs for the water system only, with GBRA entitled to keep all money collected from Bulverde's water users.<sup>56</sup>

Protestants maintained Bulverde has not shown that it will control anything. It cannot direct or manage GBRA's actions in the design, construction, or operation of the system to any greater degree than it could if another water utility were operating within the lawful jurisdiction of its ordinances. It may consult with GBRA, but all management and decision-making is vested solely in GBRA. The Western Canyon Project transmission line, GBRA treatment plant, and water distribution system will be owned and operated by GBRA. Protestants asserted that Bulverde will be totally dependent on GBRA and has no means to deliver the water.

Protestants maintained if GBRA cannot or will not deliver, Bulverde will fail in its duties to its customers and the Commission. Under WATER CODE § 13.411(a) and WATER CODE, ch. 13, sub. ch. K., the Attorney General and TCEQ are authorized to take strong enforcement measures against a CCN holder, but not against a party in GBRA's position.

Protestants argued whether or not the Bulverde/GBRA contracts are likely to fail is beside the point because Bulverde will have no means of self-help in a contract dispute. It will be forced to rely on the courts to enforce its contracts. They contended that contractual relationships cannot substitute for inadequate financial, managerial, and technical capability to provide continuous and adequate water utility service because personal relationships and unwritten understandings change. Disagreements can and will arise. Even if contracts are legally enforceable, legal proceedings are

<sup>56</sup>Bulverde Exhibit D, Ex. 19, §§ 6.1 and 6.2(e).



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time consuming and Bulverde may not have the resources to oppose GBRA in a contract dispute. The Bulverde\GBRA Operating Agreement says GBRA will own title and control of the water system during the pendency of a dispute.<sup>57</sup>

Protestants agreed that ownership may not be a requirement or element of control, but asserted that the power to substantially influence or cause the directional management and policies of another are the type of control the legislature contemplated that one entity assert over another.<sup>58</sup> According to Protestants, municipal ordinances are only enforceable against a publicly owned, non-municipal water utility.<sup>59</sup>

Contrary to Bulverde's arguments, Protestants contended that granting control to Bulverde over its water system is not authorized under TEX. LOCAL GOV'T CODE 402.001 because the statute authorizes control over municipally owned water systems, not water systems owned by third parties. Thus, a municipality may prescribe standards for a water system only if it owns the system. Bulverde will not be empowered to enact ordinances respecting other utilities in this docket because GBRA will own the water system.

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<sup>57</sup>Bulverde Exhibit D, Ex. 19, § 3.3.

<sup>58</sup>In support of this assertion, Protestants cited the definition of "affiliate" at WATERCODE § 13.002(2)(G). It appears Protestants meant to cite subsection 2(F) rather than 2(G). Paragraph (F) includes the following as one of the definitions of "affiliate":

(G) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a utility or over which a utility exercises such control or that is under common control with a utility, such control being the possession directly or indirectly of the power to direct or cause the direction of the management and policies of another, whether that power is established through ownership or voting of securities or by any other direct or indirect means . . . .

<sup>59</sup>There was no statutory or rule citation supporting this assertion.



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Protestants maintained Bulverde's argument that granting the CCN will minimize risks to public funds is unconvincing because Bulverde and GBRA have presented evidence that Bulverde will have no funds at risk.

Protestants argued that Bulverde's contentions that it has a duty to serve and not abandon the project are not relevant to determining whether it should receive a CCN.

According to Protestants, Bulverde will not be a "retail public utility" as defined in WATER CODE § 13.002(19)—"operating, maintaining, or controlling . . . facilities for providing potable water service . . . for compensation" because GBRA will operate and maintain the system.

Protestants opined that Bulverde's real purpose for wanting the CCN appears to have nothing to do with serving the public. Its true purpose was stated on pages 31 and 32 of its September 11, 2002, closing brief when it said the CCN is necessary for Bulverde to control who provides water service to its citizens. However, CCNs are meant to ensure adequate utility service to the public, not to empower local municipalities, and TCEQ is vested with exclusive jurisdiction to make that determination under the WATER CODE.

Protestants pointed out that granting the CCN will obligate a small municipality, created in 2001, to provide water service encompassing an area that Mr. Barton believes the city's population will expand to in 50 years.

4. Analysis

The ALJ concludes that Bulverde does not possess the financial, managerial, and technical capability to provide continuous and adequate service. Several considerations are pertinent



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Under the Bulverde/GBRA contracts, GBRA, rather than Bulverde, will design, construct, finance, operate, or maintain the water distribution. The Western Canyon Project transmission line, GBRA treatment plant, and water distribution system will be owned and operated by GBRA. Mr. Barton's own statement that Bulverde "does not personally have the resources to develop and manage a water utility" is an acknowledgment that Bulverde does not itself have the financial, technical, or managerial capabilities that WATER CODE § 13.241(a) requires of each applicant.<sup>60</sup>

Mr. Barton also testified that Bulverde will not have a technical staff dedicated to maintaining, operating, or providing the water service, will not have its own groundwater supply or hold water rights in its own name, has not budgeted funds for operating a water utility, will not have day-to-day responsibility for operating the water system, will not have financial and managerial responsibility for the utility, cannot provide water without GBRA assistance, and has no plans to designate city employees to handle requests for service.<sup>61</sup> Mr. Barton testified Bulverde does not know how many GBRA employees will answer customer complaints,<sup>62</sup> and that he "would assume" GBRA will operate the water distribution system in compliance with applicable regulations.<sup>63</sup>

Mr. Barton's statement on the first page of Bulverde's application that Bulverde does not itself possess the resources to develop and manage a water utility and his testimony were more persuasive than Mr. Schuerg's assertion that Bulverde could finance a water system.<sup>64</sup> As argued

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<sup>60</sup>Mr. Barton testified there has been no need for Bulverde to budget funds because "GBRA is responsible for those [constructing and financing the system] costs." *Tr. at 106.*

<sup>61</sup>*Id.* at 65-70, 122, 128.

<sup>62</sup>*Id.* at 92.

<sup>63</sup>*Id.* at 102.

<sup>64</sup>*Id.* at 255-256. Mr. Schuerg was not sure Bulverde could operate the system. *Id.*



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by Protestants, the evidence did not show Mr. Schuerg's testimony was based on an analysis of Bulverde's capabilities.

The following pre-filed testimony from Mr. Barton (with emphasis added) on the controlling issues is also telling:

"The City of Bulverde and/or GBRA, acting on behalf of the City, has the ability to provide adequate service;"<sup>65</sup>

"The City of Bulverde and/or GBRA acting on behalf of the City, are financially stable."<sup>66</sup>

"The City of Bulverde and/or GBRA, acting on behalf of the City, are capable of providing drinking water that meets the requirements of Chapter 341, Texas Health and Safety Code."<sup>67</sup>

"The City of Bulverde and/or GBRA acting on behalf of the City, have access to an adequate water supply."<sup>68</sup>

This testimony shows that even Bulverde's representative could not say Bulverde meets the ultimate statutory criteria.

It is also important to take note of the following portions of the Welsch, Blumberg, Schuerg, and Vandertulip pre-filed testimonies (with emphasis added):

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<sup>65</sup>Bulverde Exhibit A at 16.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 17.

<sup>68</sup>*Id.*



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Mr. Welsch answered "Yes" to the question, "In your opinion, does Bulverde, with GBRA as the operator of the system, possess the managerial and technical capability to provide continuous and adequate service to the requested area."<sup>69</sup>

Mr. Blumberg answered "Yes" to the question, "In your opinion, does Bulverde, with GBRA as its operator, have the managerial capability to provide continuous and adequate service to the requested area."<sup>70</sup>

Mr. Schuerg answered "Yes" to the question, "In your opinion, is the City, with GBRA financing, constructing, and operating the water distribution system, financially capable of providing continuous and adequate service to the requested area."<sup>71</sup>

Mr. Vandertulip answered "Yes" to the question, "with the treated water supplied by GBRA and the proposed distribution system will Bulverde, through its operator GBRA, be able to provide adequate and continuous service to its customers in the proposed area."<sup>72</sup>

None of this testimony is an unqualified statement that Bulverde meets the applicable statutory criteria.

With so much of Bulverde's application dependent on GBRA's capabilities, it is necessary to determine how close Bulverde and GBRA are tied together. Although testimony from Mr.

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<sup>69</sup>Bulverde Exhibit D at 19-20.

<sup>70</sup>Bulverde Exhibit E at 13.

<sup>71</sup>Bulverde Exhibit F at 8.

<sup>72</sup>Bulverde Exhibit G at 9.



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Barton and the other Bulverde witnesses may give an impression that the application is a GBRA/Bulverde joint venture,<sup>73</sup> GBRA is not a partner in the CCN application with equal obligations and rights. To the contrary, Bulverde's contracts with GBRA show Bulverde stands alone in applying for a CCN. In the broadest sense, GBRA has agreed to provide water and design, finance, build, operate, and maintain a water distribution system in return for the right to serve Bulverde's customers within the CCN for a defined amount of compensation.<sup>74</sup>

Individual contractual provisions showing an arms-length relationship between GBRA and Bulverde include the following:

Pursuant to the Bulverde/GBRA water supply contract,<sup>75</sup> Bulverde has agreed to purchase 400 acre-feet of water annually from GBRA. Under § 5.7, Bulverde's obligation to pay will not be effected for any reason but will continue until all bonds are paid unless the agreement expressly states otherwise.

Section 3.3(a) of the Operating Agreement provides that GBRA,<sup>76</sup> as owner of the water distribution system, "may transfer title to the Water Distribution System and/or any lands and interests in land comprising a portion of the Water Distribution Project to any person." Section 3.3(d) provides, if GBRA decides to sell, Bulverde will have the first right of refusal on the same terms and conditions offered by GBRA or conditions agreed to with a third party.

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<sup>73</sup>If it were a joint venture, GBRA would also need to apply for a CCN.

<sup>74</sup>Bulverde Exhibit D, Attachment 18 Article III; Attachment 19 §§ 3.2 and 6.1-6.2; Attachment 19 § 3.

<sup>75</sup>*Id.*, Attachment 18.

<sup>76</sup>*Id.*, Attachment 19.





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Pursuant to Section 3.3(b) of the Operating Agreement, Bulverde will have an option to buy the water distribution project in its service area on the later of 20 years after the effective date of the Operating Agreement or the payment of all debt or debt instruments to finance the project. Failure to exercise the option within a three-year option period will result in a termination of Bulverde's exclusive right to purchase.

Section 5.4 of the Operating Agreement gives GBRA the right to suspend service for Bulverde's material non-compliance with applicable legal requirements in the design, construction, and operation of any building, facility, development, or other improvement on lands within the Bulverde service area.<sup>77</sup>

Under Section 8.2 of the Operating Agreement, both parties may avail themselves of all available legal and equitable remedies in the case of a default. In the case of a default by GBRA, Bulverde must give GBRA notice and 30 days to cure before taking action.

Under § 8.2, GBRA has the right to terminate or suspend service in the event of a default by Bulverde.<sup>78</sup>

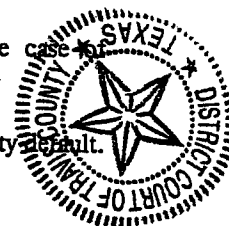
Paragraph 7 of the Bulverde/GBRA Inter-local Agreement<sup>79</sup> obligates Bulverde to indemnify, defend, and hold GBRA harmless from claims, costs, and judgments from the negligent operation of the water utility facilities.

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<sup>77</sup>Obviously, a CCN holder would not have the right to stop serving its customers in the case of noncompliance by a third party.

<sup>78</sup>Again, a CCN holder would not have the right to stop serving its customers because of a third-party default.

<sup>79</sup>Bulverde Exhibit D, Attachment 20.



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These provisions compel an overall conclusion that Bulverde has requested a CCN as a stand-alone entity, rather than as a partner with GBRA, while arguing at the same time that it is a qualified applicant because of GBRA's help.

Bulverde argued both that it had significant control over the water distribution system and that control is not required by the WATER CODE provisions under which the application is to be judged. Its argument was persuasive that nothing in the WATER CODE standards for judging a CCN application expressly states that an applicant must control or own a water system.

Bulverde's claim that it has a variety of ways to control GBRA's performance does not show that Bulverde has the financial, technical, and managerial capability of providing continuous and adequate service. Its own testimony shows that it does not.

Bulverde's argument that its contract with GBRA will not likely fail ignores the hard terms of the contract that spell out the rights and duties of the parties in a dispute. The Executive Director's and Protestants' arguments were persuasive that contractual disputes do arise. Bulverde's belief that GBRA will not abandon its service obligations does not necessarily mean it might not, under any circumstance, end its agreements with Bulverde. Protestants' and the Executive Director's arguments were persuasive that Bulverde's and GBRA's formal and informal agreements to work and cooperate with one another are not a substitute for meeting the WATER CODE criteria for obtaining a CCN.

Bulverde's citation to § 402.001 of the Texas Local Government Code and § 791.026 of the Inter-local Cooperation Act as indicating legislative support for a CCN application by a municipality was unconvincing. Inter-local Cooperation Act § 791.026(a) authorizes a municipality, district, or river authority to contract with another municipality, district, or river authority to obtain or provide part or all of its water supply. The right to obtain or supply

