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not done this. It distinguished the former TCEQ decision in *City of Hudson Oaks*, Docket No. 6507-S (May 8, 1990), which was relied on by BexarMet as authority that a municipality does not require the consent of another municipal corporation to serve within its boundary. It argued that case was different from the present case because the opposing municipality did not indicate its intent or desire to extend its system into the service area.

Bulverde/GBRA cited WATER CODE § 13.244<sup>214</sup> as requiring each applicant for a CCN to provide evidence to TCEQ that it has received the "required consent, franchise, or permit" from a municipality. They said BexarMet has not received Bulverde's consent.<sup>214</sup> They argued, under WATER CODE § 49.215(a), BexarMet must obtain the consent even if Bulverde has not adopted a franchise ordinance.

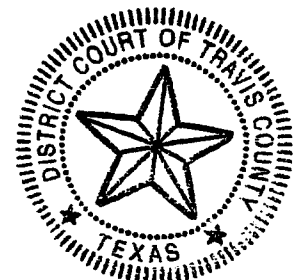
Bulverde/GBRA cited provisions of the BexarMet Act in support of its argument. Section 6 provides that "areas of territory *not included within the limits of any incorporated city*, and not the District, . . . may be annexed to the District. . . ." (Emphasis supplied by Bulverde/GBRA.) Section 3(r) provides that BexarMet may "operate and maintain *with the consent of the governing body of any city, town, or political subdivision* located in the District . . . " facilities necessary to accomplish the purpose of BexarMet Act. (Emphasis from Bulverde/GBRA.)

Bulverde/GBRA contended the public interest protections provided by these provisions are to ensure that cities are able to serve their own citizens and to limit competition among cities and duplication of facilities.

Bulverde/GBRA argued, because BexarMet does not have authority to provide water within the city limits of Bulverde, its application should be denied as a matter of law.

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<sup>214</sup>BexarMet Exhibit C, Tab 9, at 143; Tr. at 427.



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Bulverde/GBRA cited Mr. Ahrens's testimony indicating a BexarMet position that its boundaries automatically expand whenever its CCN is amended.<sup>215</sup> Bulverde/GBRA argued the court in *Rios v. Bexar Metropolitan Water District* did not expand BexarMet's legislatively established boundaries. It simply settled Voting Rights Act of 1965 issues by holding that persons living in certain BexarMet certified areas have an interest in the governance of BexarMet and a right to vote in BexarMet's elections. Because of this, they should be included in BexarMet's political boundaries, notwithstanding the BexarMet Act and other state law to the contrary. Bulverde/GBRA maintained *Rios* does not authorize BexarMet to expand its legislative boundaries by simply receiving approval to expand its CCN, rewrite the legislative mandate in the BexarMet Act describing how it expands its boundaries, or authorize TCEQ to expand BexarMet's statutory boundaries by approving a CCN amendment.

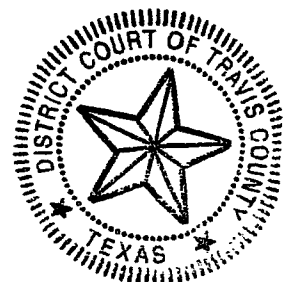
2. The Executive Director

The Executive Director argued it is legal for BexarMet to provide water service in Comal County on the basis of WATER CODE § 49.215(a), which authorizes water districts to purchase, construct, acquire, own, operate, repair, improve, or extend all works, improvements, facilities, plants, equipment, and appliances necessary to provide any services or facilities authorized to be provided by the district to areas contiguous to or in the vicinity of the district provided the district does not duplicate a service or facility of another public utility.

She argued, because neither Bulverde nor GBRA provide water service in the area and will not be able to do so until 2004, BexarMet is not prevented by the non-duplication-of-service clause from providing service.

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<sup>215</sup>Tr. at 424-427.



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The Executive Director maintained Bulverde/GBRA are correct in their argument that BexarMet may not serve within the Bulverde city limits without its permission. She cited the following language in the second sentence of WATER CODE § 49.215(a):

A district providing potable water and sewer utility services to household users shall not provide services or facilities to serve areas outside the district that are also within the corporate limits of a city without securing a resolution or ordinance of the city granting consent for the district to serve the area within the city.

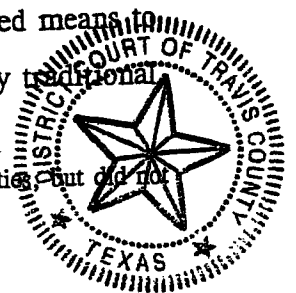
3. BexarMet

BexarMet contested Bulverde/GBRA's argument on several grounds. As an initial matter, it contended the issue need not be reached because TCEQ decided the matter in BexarMet's favor when it granted BexarMet's HEB CCN application in Comal County on June 1, 2000, after the 1999 incorporation of the City of Bulverde.<sup>216</sup> It contended Bulverde/GBRA's argument is a collateral attack on a prior Commission order that is estopped by *stare decisis*.

BexarMet cited multiple means of expanding the BexarMet district. All parties agree that BexarMet can hold an expansion election (the method that must be followed if the district wants to levy ad valorem taxes) and that its boundaries automatically expand whenever territory is annexed to the City of San Antonio.

Bulverde/GBRA argued a third means of expansion was created when BexarMet received a CCN under the Public Utility Regulatory Act, TEX. REV. CIV. STAT. ANN. art. 1346c (legislation preceding the WATER CODE). This provided it with a state-sanctioned means to provide water service outside the boundaries of where it has already expanded by traditional

<sup>216</sup>BexarMet also asserted that it is certified and serves inside other cities and other counties, but did not present supporting evidence to that effect.



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means. Pursuant to this authority, BexarMet has obtained CCNs and certified service areas which until 1996 were outside the district (the 1996-and-after exception is explained below in the discussion of *Rios*).

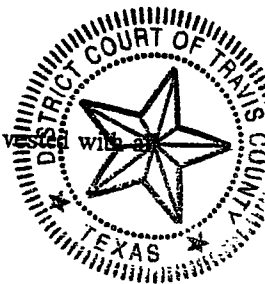
BexarMet cited *Rios*, in which it was sued in 1996 for an alleged violation of the *Voting Rights Act of 1965*, as amended, 42 USC § 1973. It maintained the district court held as a matter of law that its boundaries would henceforth automatically expand to match its state-certified service area. It argued, under the United States Constitution Supremacy Clause, its boundaries automatically expand as a matter of law to encompass a new service area whenever TCEQ issues it a new CCN or amends its CCN.

BexarMet contended its service as a water district is consistent with general service rights under WATER CODE § 49.215. Subsection (d) says a water district may serve outside of the district without a CCN as long as it does not duplicate service. It said it is the single service provider wherever it serves and Bulverde is not yet serving its requested area.<sup>217</sup>

In response to arguments that it may not provide water service inside Bulverde's corporate limits without consent, BexarMet maintained it is a unique creation of the legislature because it is a TEX. CONST. ANN. art. 16 § 59 water district and a municipal corporation.<sup>218</sup> As held by the Texas Water Commission (successor to the Public Utility Commission and predecessor to both the TNRCC and TCEQ) in *City of Hudson Oaks*, a municipality does not require the consent of another corporation to serve within its neighbor's boundary. BexarMet contended a municipal corporation is not required to obtain the consent of another municipal corporation to provide water utility service anywhere. Additionally, a political subdivision is not obligated to obtain a franchise

<sup>217</sup>Barton testimony, Tr. at 63-64.

<sup>218</sup>In BexarMet Act § 2, the legislature declared BexarMet to be "a municipal corporation, with all the authority as such under the constitution and laws of the State of Texas. . . ."



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under the Texas Local Government Code from a municipality because a political subdivision cannot be taxed or assessed a franchise fee.<sup>219</sup>

4. Analysis

a. BexarMet's Authority

The ALJ concludes BexarMet has authority to obtain a CCN to serve its requested area.

The beginning point in analyzing BexarMet's authority is to recognize that water districts have only such power as is granted by statute or implied as an incident to powers expressly granted.<sup>220</sup> Thus, it is necessary to review the powers specifically granted to BexarMet.

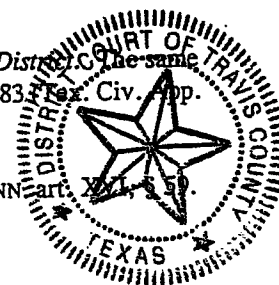
Bulverde/GBRA's basic analysis, which focused on the BexarMet Act, was not persuasive. WATER CODE § 49.211(a) provides that a "district"<sup>221</sup> shall have the functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." (Emphasis added.) WATER CODE § 49.211(b) provides that a "district is authorized to purchase, construct, acquire, own, operate, maintain, repair, improve, or extend inside and outside its boundaries any and all land, works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation or the purposes authorized by this code or any other law." (Emphasis added.) Thus, contrary to Bulverde/GBRA's argument, BexarMet may act in ways not expressed in the BexarMet Act to accomplish the purposes of laws other than the BexarMet Act.

One of the WATER CODE purposes is expressly stated in the first sentence of § 49.215(a), which permits a district to extend improvements, facilities, and equipment that are necessary to

<sup>219</sup>TEX. TAX CODE ANN. § 49.220. BexarMet acknowledged that it might need road use permits, but asserted these are obtained in the ordinary course of business as the need arises. BexarMet will obtain easements for line construction but Bulverde will have no authority over its construction in private easements.

<sup>220</sup>*Tri-City Fresh Water Supply District No. 2 of Harris County; Franklin County Water District*, The same is true for municipal corporations. *City of West Lake Hills v. Westwood, Inc.*, 598 S.W. 2d 681, 683, Tex. Civ. App. - Waco 1980, no writ).

<sup>221</sup>Defined to include districts like BexarMet created under authority of TEX. CONST. ANN. art. XVI, § 59.



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provide its authorized services or facilities to areas contiguous to or in the vicinity of the district, except that it may not duplicate a service provided by another public entity. BexarMet has applied to serve areas contiguous to or in the vicinity of its district that are not being served by other public entities.

Another WATER CODE purpose is stated in § 49.215(d), which provides:

(d) A district shall not be required to hold a certificate of convenience and necessity as a precondition to providing retail water or sewer service to any customer or service area . . . . This subsection does not authorize a district to provide services within an area for which a retail public utility holds a certificate of convenience and necessity or within the boundaries of another district without that district's consent, **unless the district has a valid certificate of convenience and necessity to provide services to that area.** (Emphasis added.)

Of particular significance is the highlighted portion of § 49.215(d), which says the limitation on serving any service area that is already certified to or is within the boundaries of another entity does not apply to a district that has a CCN to provide service in the area. Thus, any "district," may serve any service area if it has a CCN to do so. That is the purpose of BexarMet's application under WATER CODE § 13.241 *et seq.*<sup>222</sup>

BexarMet's contention that Bulverde/GBRA has collaterally attacked a prior TCEQ decision and its assertions are estopped by *stare decisis* was not persuasive. Collateral estoppel applies only to matters actually litigated<sup>223</sup> and to the same parties as the previous action or to those who stand in privity with the previous parties.<sup>224</sup> The TCEQ order approving BexarMet's request to serve HEB was not protested.<sup>225</sup> Thus, the issue of BexarMet's authority was not litigated. There was no evidence that Bulverde/GBRA was a party to or an entity in privity with

<sup>222</sup>This construction is supported by WATERCODE § 13.244(a), which recognizes a public utility's authority to obtain a CCN by requiring it to submit to the Commission an application to obtain a CCN or CCN amendment.

<sup>223</sup>*Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W. 2d 507, 521 (Tex. 1997).

<sup>224</sup>*Wilhite v. Adams*, 640 S.W. 2d 875, 876 (Tex. 1982).

<sup>225</sup>BexarMet Exhibit F.



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other parties in that application. BexarMet's argument that *stare decisis* should apply to an uncontested CCN amendment was unconvincing.

b. Whether BexarMet May Serve Within Bulverde's Corporate Limits Without Consent

The ALJ concludes BexarMet should be permitted to provide water service in Bulverde's corporate limits only if it obtains Bulverde's consent or if its district boundaries are expanded to include Bulverde's corporate limits. Any order approving BexarMet's application for Bulverde's corporate limits should be expressly conditioned on BexarMet's satisfying one of those criteria.<sup>226</sup>

The second sentence of WATER CODE § 49.215(a) provides:

§ 49.215. Service to Areas Outside the District

(a) . . . . A district providing potable water and sewer utility services to household users shall not provide services or facilities to serve areas outside the district that are also within the corporate limits of a city without securing a resolution or ordinance of the city granting consent for the district to serve the area within the city.

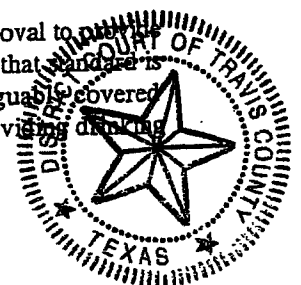
(Emphasis added.)<sup>227</sup>

As can be seen, the statute requires Bulverde's approval for BexarMet to serve within Bulverde's corporate limits if the service is to be outside BexarMet's district. It is undisputed

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<sup>226</sup>WATER CODE § 13.246(b) authorizes the Commission to issue a certificate for the partial exercise of a right or privilege and to impose special conditions to ensure continuous and adequate service.

<sup>227</sup>The ALJ concludes it is appropriate for the Commission to consider whether a CCN approval to provide water service in a particular area would directly conflict with a Water Code provision, even though that standard is not expressly stated as one of the criteria in WATER CODE §§ 13.241 and 13.246. (The issue is arguably covered under § 13.241(b), which requires the Commission to ensure that an applicant "is capable of providing drinking water that meets the requirements of . . . this code.")



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that BexarMet's political boundaries do not now include Bulverde's corporate limits and BexarMet has not received Bulverde's consent to serve within its corporate limits.<sup>228</sup>

There are several conceivable ways for BexarMet to expand its district boundaries. Sections 6 and 6a of the BexarMet Act provide two of the ways. However, they do not authorize expanding into Bulverde's corporate limits. Section 6 provides that territory "not included within the limits of any incorporated village, town or city" may be annexed into the district. Section 6a of the BexarMet Act provides that BexarMet's boundaries will expand to match the boundaries of the City of San Antonio, including territories incorporated as a city or town. However, Bulverde is not part of San Antonio.<sup>229</sup>

Although not cited by the parties, WATER CODE §§ 49.301 and 49.302 also authorize ways for BexarMet to expand its boundaries. However, to do so, it must receive a petition from a certain percentage of landowners or a certain number of landowners. There is no evidence that has occurred or that BexarMet seeks to expand its boundaries in that way.

The other means of expanding its boundaries asserted by BexarMet is under authority of the *Rios* decision. In that case, the court approved a consent order containing a remedial plan for Voting Rights Act violations by BexarMet relating to a dilution of its Hispanic customers' voting. BexarMet contended the court's Order provided that BexarMet's political boundaries would henceforth automatically expand to match its state-certified service areas. The ALJ is unable to find that holding in the Order although he agrees with the court's statement<sup>230</sup> that the remedial plan is "hardly a model of clarity." The Order language that comes closest to supporting BexarMet's contention appears to be at pages 15 and 16 of the Order in the Findings of Fact:<sup>231</sup>

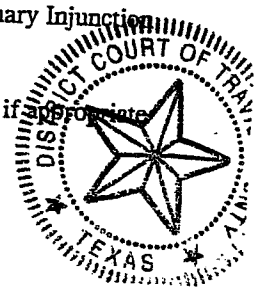
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<sup>228</sup>WATER CODE § 13.245<sup>6</sup> provides that each CCN applicant must file with the Commission evidence of any required consent from appropriate municipalities.

<sup>229</sup>Sections 3(r) and 25 of the BexarMet Act authorize BexarMet to provide water service in cities or towns with their consent.

<sup>230</sup>See page 15 of the court's Findings of Fact and Conclusions of Law in Support of Preliminary Injunction and Approval of Consent Order.

<sup>231</sup>The Order states on page 32 that all fact findings "shall be considered conclusions of law, if appropriate and vice versa."





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The Court finds and the parties agree that under the current electoral system, large number[s] of voters in areas served by the District under CCN's are not allowed to run or vote for the directors of the District. The Court finds and the parties agree that all persons living in the CCN areas of the District have an interest in the governance of the District and a right to vote in the elections for Directors and therefore should be in the District's Political Boundary notwithstanding state law and the District's Special Act to the contrary. (Emphasis added.)

On page 23 of the Order under Conclusions of Law, the court said:

The Court finds and the parties agree that Chapter 49, § 103(d) of the Texas Water Code, effective September 1, 1995, provides authority for the Bexar Metro Board of Directors to apportion the areas within the Political Boundaries of the District (the District's CCN areas served are hereby being made the Political Boundaries of the District pursuant to Section 2 [of the Voting Rights Act]). (Emphasis added.)

None of this language expressly states that the court's ruling makes the remedial plan applicable to BexarMet's future CCN acquisitions. The second sentence of the first quoted language applies to "all persons living in the CCN areas," not to persons who may live there in the future. The parenthetical portion of the second quoted language is also stated in the present rather than future tense.

This understanding of the Order is consistent with the court's finding of a Voting Rights Act violation, which is based on existing facts to justify an order remedying an existing situation. For example, on page two of its Order, the court stated a three-prong test to prove a violation—the minority group must be able to demonstrate that it is large and geographically compact, that it is politically cohesive, and that the white majority votes sufficiently as a block to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate. The court found these matters in the affirmative in 1996 for BexarMet's service areas in Bexar, Atascosa, and Medina Counties. One of the primary reasons for the finding was that BexarMet's board of directors was elected at-large. The board is now elected through single-member districts. It is not known whether these same three-prong-test facts would exist in Comal County if BexarMet's application were approved. It would seem surprising for the court to presume the existence of



those facts prospectively to justify applying the same remedy in Comal County and other places into the indefinite future.

The ALJ notes that on pages 31 and 32 of the Order, the court said it "shall retain jurisdiction to give effect to Section 2 voting rights protection outlined in this Order, and this Order retaining jurisdiction shall control over any state or federal action . . . and this Court further retains jurisdiction for the purpose of clarification and implementation upon motion by Plaintiff or Defendants." In view of this provision and the above-described analysis of *Rios*, BexarMet should bear the burden of obtaining a ruling or other satisfactory evidence from the court that its district boundaries will expand to include its requested service area in Comal County if its CCN application is granted.

The following is a discussion of BexarMet's other contentions. The ALJ disagrees with BexarMet's argument based on *City of Hudson Oaks*. BexarMet accurately stated the Commission's conclusion in that case was that it was unnecessary for one municipality to obtain a second municipality's consent to serve within the second municipality's corporate limits. The Commission's ruling was based in part on its interpretation of Local Government Code § 402.001(b) and (c), that a municipality is authorized to provide water service outside its boundaries, including service inside the corporate limits of another municipality. However, that decision was made in 1990 before the enactment of WATER CODE § 49.215 in 1995. From 1995 forward, a district like BexarMet is not permitted to provide water service outside its district within the corporate limits of a city without the city's consent.<sup>232</sup>

The ALJ disagrees with BexarMet if it is arguing that BexarMet's municipal-corporation status somehow exempts it from obtaining Bulverde's consent under § 49.215 because that statute applies to "districts" rather than municipal corporations. The word "district" in § 49.215 is defined in WATER CODE § 49.001(a)(1) to mean "any district or authority created by authority of . . . Section 59, Article XVI, Texas Constitution, regardless of how created." Because BexarMet is purely a Article XVI § 59 creation,<sup>233</sup> its municipal corporation status is not separate from but is included within the meaning of the word "district" as used in § 49.215.

<sup>232</sup>The commission's determination in *City of Hudson Oaks* also rested on the Commission's exclusive authority to grant or deny a CCN. However, § 49.215 still controls what BexarMet may or may not

<sup>233</sup>BexarMet Act § 1.



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D. Ability of BexarMet to Provide Adequate Service/Access to Adequate Water Supply

1. BexarMet

BexarMet contended the WATER CODE requires it to have access to an adequate supply of water, not that it have the water "in hand" when the application is filed or on the day of the hearing. It argued it is legally permissible for it to serve any portion of its requested area through TCEQ-approved groundwater supplied water systems.<sup>234</sup> It intends to use its stand-alone groundwater system option as an interim means of achieving compliance with 30 TAC § 291.85(b) if it does not have its planned transmission line network in place at the time a qualified service applicant/developer requests service and the option is acceptable to the developer.<sup>235</sup>

BexarMet said its water resource priority development plan is to allocate funds and other resources to bring water to its requested service area. The first step is development of Canyon Lake water, which is the nearest resource. It has one alternate water supply contract with Canyon Lake WSC.<sup>236</sup> Construction is underway to build an elevated storage tank and a transmission line along Highway 281 west of Highway 46 and thence south to Bulverde Hills subdivision service area.<sup>237</sup> This is the first of a network of transmission lines designed by BexarMet deputy general manager and chief engineer Johnnie Terrazas.<sup>238</sup>

In response to Bulverde/GBRA's claim that Bexar County does not currently have a means of delivering water from Bexar County to Comal County, BexarMet said its water resource development plan is consistent with the statutory mandate of having access to an adequate supply of water. Its resources include groundwater wells serving individual systems, a network of transmission lines interconnecting systems, Canyon Lake water supply feeding its transmission

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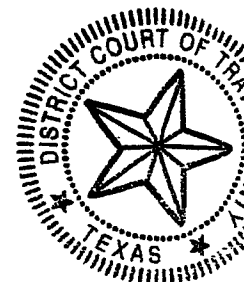
<sup>234</sup>30 TAC §§ 290.38 -290.48; *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W. 3<sup>rd</sup> 75 (Tex. 1999).

<sup>235</sup>Ahrens testimony, BexarMet Exhibit C at 26; Terrazas testimony, BexarMet Exhibit D at 6-7; Bittle testimony, BexarMet Exhibit E at 8.

<sup>236</sup>BexarMet Exhibit C, Attachment 5.

<sup>237</sup>Bittle testimony, Tr. at 501-502.

<sup>238</sup>BexarMet Exhibit C, Attachment 6 (map).



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network, if available in the future, and any other unidentified water source (such as purchased water from WSI).

BexarMet asserted it has other water resources to the south of the requested area, including Trinity Aquifer wells, Edwards Aquifer wells, purchased water contracts, and the first surface water plant in Bexar County. It has a surface water contract with GBRA for water in Bexar County, but GBRA has not approved its request to transfer 400 acre-feet of its water rights under the contract to Comal County and has refused to finalize negotiations on another contract for Comal County.<sup>239</sup> BexarMet pointed out that GBRA is required to sell surplus water without discrimination from the Western Canyon Project if it is available.<sup>240</sup>

BexarMet maintained its mix of water sources could be used throughout the district subject to the availability of transmission paths for routing the water. This could occur through BexarMet transmission lines or by wheeling through neighboring utility systems.

Disputing Bulverde/GBRA's claim that no one has adequate reliable water but them because no one else has a contract for surface water from the Western Canyon Project,<sup>241</sup> BexarMet cited WSI's surface water supply contract with GBRA<sup>242</sup> and Bulverde/GBRA witness Ed Miller's testimony that groundwater is available in the Trinity Aquifer. It cited Mr. Miller as saying the Trinity Aquifer issues are well-spacing and well-productivity rather than water quantity.<sup>243</sup>

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<sup>239</sup>Ahrens testimony, BexarMet Exhibit C, at 7-8, Attachments 3 and 4. GBRA has succeeded to Bulverde Water Company's rights to the GBRA surface water project in western Comal County. BexarMet Exhibit C at 7-8.

<sup>240</sup>Bulverde cited WATER CODE §§ 11.036 - 11.041 and *City of San Antonio v. Tex. Water Comm'n*, 407 S.W. 2d 752, 768 (Tex. 1966).

<sup>241</sup>Welsch testimony, Exhibit D at 16.

<sup>242</sup>Vice-president and chief operator of WSI and Diamond David Wallace testimony, WSI Exhibit (does not say that)

<sup>243</sup>Bulverde Exhibit I at 6-7; Mr. Miller could not say there is sufficient water in the Trinity Aquifer west of Highway 281 to conclude that the problem could be entirely solved by drilling more wells. Tr. at 281-286.



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BexarMet cited testimony from the Executive Director agreeing that BexarMet has access to adequate water.<sup>244</sup>

BexarMet said its water resource plan will be developed as customer growth dictates. This is how public water systems are constructed, as demand and needs increase.<sup>245</sup> The worse case scenario would be a need to supplement groundwater with surface water west of Highway 281.

BexarMet pointed out it is a large retail public water utility with a history of serving the public for over 50 years with current service to over 70,000 connections. It has four certified water service areas in Comal County in proximity to the requested service area and an ongoing program of water resource development to procure water services for the area and to construct facilities necessary to distribute the water. It maintained it has the ability to design, construct, and operate whatever water utility system is needed.<sup>246</sup>

2. The Executive Director

The Executive Director contended the evidence shows BexarMet has the technical and financial ability to provide continuous and adequate service to the requested area; it is providing adequate service to its current customer and it will continue to be able to do so; and there are plans to extend and upgrade the current BexarMet system in Comal County to provide service.

The Executive Director cited testimony from Mr. Howell indicating that BexarMet currently provides services to its customers in Bexar County and it is authorized to issue bonds, incur debt, tax, and collect fees to support its infrastructure and service obligations. It may require individuals and developers requesting service to pay for additional plant equipment.<sup>247</sup>

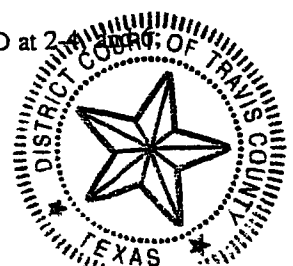
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<sup>244</sup>Tr. at 858, 862-863.

<sup>245</sup>BexarMet cited the Public Drinking Water System Hygiene Rules at 30 TAC § 290.45 providing for increased minimum plant requirements tied to population increases.

<sup>246</sup>Ahrens testimony, BexarMet Exhibit C at 25-26; Terrazas testimony, BexarMet Exhibit D at 2-3; Bittle testimony, BexarMet Exhibit E at 2-3 and 7.

<sup>247</sup>Executive Director Exhibit F at 10.



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The Executive Director cited testimony from Mr. Terrazas that: BexarMet has the ability and resources, with sound engineering and experienced construction crews, to design and construct any utility plant and facility that may be necessary to provide continuous and adequate water service to the area; there is groundwater in the area with seasonal limitations during droughts; and the actual demands of a new service request will dictate to what extent existing wells will be used or new sources needed on a permanent or interim basis.<sup>248</sup>

Mr. Terrazas also said BexarMet has an agreement with Canyon Lake Water Supply for water in a jointly owned storage tank and transmission line, to be constructed in the future. He indicated at some point, the GBRA surface water supply will become available and BexarMet will finalize its plans for routing and building the transmission line.<sup>249</sup>

3. Bulverde/GBRA

Strongly disputing Mr. Ahrens' assertions that BexarMet has numerous sources of water available to supply the requested service area,<sup>250</sup> Bulverde/GBRA asserted that BexarMet's present use of these existing sources and inability to transport water to the requested area shows it does not have a sufficient water supply to provide continuous and adequate service. They cited the following sources of water Mr. Ahrens identified and his testimony concerning them:

- Run-of-river rights in the Medina River are used in northern Atascosa County, south Bexar County and south San Antonio, but have never been used in Comal County.<sup>251</sup>
- Stored water in Medina Lake has never been used in Comal County.<sup>252</sup>

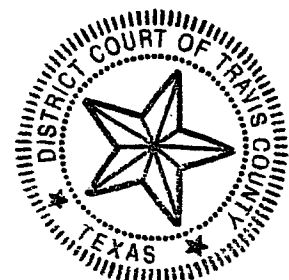
<sup>248</sup>BexarMet Exhibit D at 10.

<sup>249</sup>*Id.*

<sup>250</sup>Tr. at 364-368.

<sup>251</sup>*Id.*, at 366.

<sup>252</sup>*Id.*, at 368.



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- Carizzo Aquifer groundwater in south Bexar County and north Atascosa County has only been used in south Bexar County.<sup>253</sup>
- Carizzo Aquifer groundwater in Gonzales County has never been used in Comal County.<sup>254</sup>
- Contract water from Canyon Regional Water Authority out of Lake Dunlap is to be used for northeast Bexar County and northeast San Antonio and the pipeline to transport the water to this area is only 50 percent complete.<sup>255</sup>
- Edwards Aquifer groundwater in Bexar County is used solely in Bexar County except for small amounts of water BexarMet has trucked in for use in Comal County when BexarMet's water systems there have run short of water. Edwards Aquifer water is restricted for use in the Edwards district.<sup>256</sup>
- Trinity Aquifer water is the sole source of supply for BexarMet's four existing water systems in Comal County.<sup>257</sup>
- SAWS' aquifer storage project is directed at water demands in south Bexar County.<sup>258</sup>
- San Antonio River water rights are authorized for use in Bexar County, but to Mr. Ahrens' knowledge, not in Comal County.<sup>259</sup>

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<sup>253</sup>*Id.*, at 366.

<sup>254</sup>*Id.*, at 366.

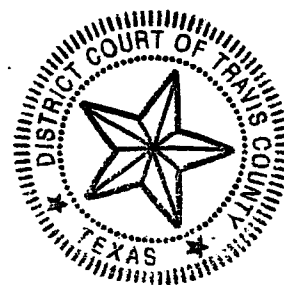
<sup>255</sup>*Id.*, at 367.

<sup>256</sup>*Id.*, at 379.

<sup>257</sup>*Id.*, at 367-368.

<sup>258</sup>*Id.*, at 368.

<sup>259</sup>*Id.*, at 375.



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Bulverde/GBRA contended Mr. Ahrens' testimony shows that BexarMet's existing water resources, except for Trinity Aquifer groundwater, are located outside Comal County and only aquifer groundwater and a small amount of Edwards Aquifer groundwater have been used in Comal County.<sup>260</sup> They cited the fact that BexarMet's four water systems in Comal County that rely solely on groundwater are not interconnected and BexarMet has experienced water shortages in at least one of the systems.<sup>261</sup>

Bulverde/GBRA pointed to Mr. Ahrens' testimony acknowledging that: BexarMet does not have the present ability to transport water into Comal County and does not have contractual agreements with any other entity to "wheel" water in;<sup>262</sup> BexarMet has no contractual arrangements with WSI, Diamond, or Comal and those entities do not have enough water to satisfy BexarMet's needs in any case;<sup>263</sup> although BexarMet has an existing surface water supply contract with GBRA for use in Bexar County, it does not have one in Comal County;<sup>264</sup> and BexarMet has not formalized any agreement with GBRA to allow it to contract with Canyon Lake WSC to divert and treat water for its use.<sup>265</sup>

Bulverde/GBRA discounted BexarMet's claims that its other water resources are available for use in Comal County by wheeling water through other utilities to the requested area. It cited WATER CODE § 11.085 to show BexarMet will not be able to use its surface water rights in the Guadalupe River basin unless it obtains an inter-basin transfer.<sup>266</sup> It asserted BexarMet has presented no evidence outlining its plans, cost estimates, or time lines to interconnect its systems so that water can be moved from sources outside Comal County to the requested area.

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<sup>260</sup>*Id.*, at 368.

<sup>261</sup>*Id.*, at 395-396.

<sup>262</sup>*Id.*, at 382-383, 430.

<sup>263</sup>*Id.*, at 372, 383, 385-387.

<sup>264</sup>*Id.*, at 387-388, 392-393.

<sup>265</sup>*Id.*, at 372.

<sup>266</sup>Subsection (a) of that statute provides, "No person may take or divert any state water from a river basin in this state and transfer such water to any other river basin without first applying for and receiving a water right or amendment to a permit . . . authorizing the transfer."





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Bulverde/GBRA acknowledged that BexarMet and Canyon Lake WSC recently began a construction line to move water from Canyon Lake to its four separate water systems, but pointed out that BexarMet has not constructed other water lines in the requested area.<sup>267</sup> It pointed out the water Canyon Lake WSC has agreed to supply is available on a temporary emergency basis only.<sup>268</sup>

Bulverde/GBRA cited the South Texas Regional Water Plan as evidence that BexarMet's current water demand exceeds its available water sources. The Plan shows shortages for BexarMet at 13,033 acre-feet in the year 2000, 32,424 acre-feet in 2030, and 44,010 acre-feet in 2050. GBRA is shown as having no shortages in those years.<sup>269</sup>

Bulverde/GBRA cited a document from BexarMet's Michael J. Albach indicating that BexarMet's Edwards Aquifer permits will likely be reduced very substantially to meet the Edwards Aquifer Act's mandatory pumpage reduction by 2008.<sup>270</sup>

Based on evidence that BexarMet failed to demonstrate access to adequate water supplies to serve the area, Bulverde/GBRA contended its proposal is clearly the better choice. It acknowledged that 400 acre-feet is insufficient to meet its needs forever, but maintained it has several sources for additional water supplies to meet future needs, including water from the Western Canyon Project.

Bulverde/GBRA argued that its contract with GBRA guarantees a more reliable source of water than BexarMet has shown. They asserted their access to water in the area is reliable and sustainable whereas BexarMet's is limited, speculative, and unreliable. They argued BexarMet's reliance on groundwater is contrary to the South Texas Regional Water Plan and continued reliance on the Trinity Aquifer is problematic.

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<sup>267</sup>Tr. at 369, 394, 430.

<sup>268</sup>BexarMet Exhibit C, Attachment 5, Item 1.

<sup>269</sup>Bulverde Exhibit D, Attachment 21 at ES-44.

<sup>270</sup>Bulverde Exhibit M.



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4. Analysis

Although there is some doubt, the ALJ concludes that BexarMet has access to an adequate source of water in its requested service area.

BexarMet intends to use a mixture of surface and groundwater to serve its customers. The groundwater will be from its existing facilities in the area.<sup>271</sup> The other sources of water will be from Canyon Lake and the sources BexarMet is developing in Bexar County.<sup>272</sup>

Mr. Ahrens testified BexarMet has sufficient water today to meet its requests for service.<sup>273</sup>

BexarMet has contracted with Canyon Lake WSC to jointly construct a storage tank and transmission line to serve its existing service areas. The construction began in late May or early June (about two weeks before the hearing date).<sup>274</sup> Mr. Ahrens believes it will be finished in about eight months from that time. In his opinion, the water from Canyon Lake in addition to the groundwater BexarMet now has and other groundwater from the Trinity Aquifer will be sufficient to meet the needs of the area.<sup>275</sup>

BexarMet's contract with Canyon Lake WSC provides that the water is for emergency use only.<sup>276</sup> However, Mr. Ahrens testified that fact would not have an impact on BexarMet's planning.<sup>277</sup> According to Mr. Ahrens, there are no restrictions on the place the water can be used.<sup>278</sup>

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<sup>271</sup>Bulverde Hills has experienced a deficit in times of drought.

<sup>272</sup>Ahrens testimony, Tr. at 395-396, 504.

<sup>273</sup>*Id.*, at 439.

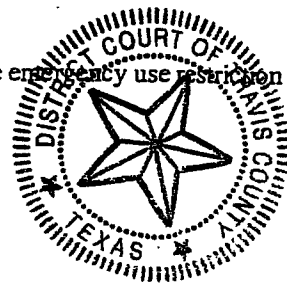
<sup>274</sup>*Id.*, at 369.

<sup>275</sup>*Id.*, at 479-480.

<sup>276</sup>BexarMet Exhibit C, Attachment 5, par. 1.

<sup>277</sup>Tr. at 363. The record did not otherwise show how much of an impediment the emergency use restriction would be.

<sup>278</sup>Tr. at 362.



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Mr. Ahrens and Mr. Bittle both testified that interim service could be provided through groundwater within six months of a service-applicant becoming qualified.<sup>279</sup> BexarMet intends to use its stand-alone groundwater system option as an interim means of achieving compliance with 30 TAC § 291.85(b) if it does not have its planned transmission line network in place at the time a qualified service applicant/developer requests service and the option is acceptable to the developer.<sup>280</sup>

BexarMet said it would consider constructing stand-alone wells if necessary to meet its obligations to provide water.<sup>281</sup>

Although he did not say water scarcity in western Comal County can be entirely solved by drilling more wells, Mr. Miller agreed a utility might drill additional wells in higher producing areas and transport water to other parts of the requested area such as Bulverde Hills.<sup>282</sup>

BexarMet has negotiated with neighboring utilities, including WSI and Diamond over ground and surface water supplies and emergency interconnections for mutual support. It intends to work out emergency connections with WSI, although at present it has no contracts with WSI or Diamond. WSI has a contract with GBRA to purchase 500 acre-feet of surface water from Canyon Lake.<sup>283</sup>

BexarMet indicated it plans to transfer water from Bexar County. It has developed some very strong Trinity Aquifer fields in north Bexar County and is contracting with SAWS to obtain water sources from the strata just the other side of Cibolo Creek from Comal County; it believes

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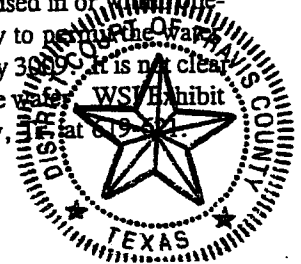
<sup>279</sup>BexarMet Exhibit C at 26; BexarMet Exhibit E at 8.

<sup>280</sup>Ahrens testimony, BexarMet Exhibit C at 26; Terrazas testimony, BexarMet Exhibit D at 6-7; Bittle testimony, BexarMet Exhibit E at 8.

<sup>281</sup>Tr. at 479.

<sup>282</sup>*Id.*, at 286-287, 292. He indicated that in the area east of Highway 281, east of the requested area, the saturation section of the Trinity Aquifer is much thicker. *Id.*, at 296.

<sup>283</sup>BexarMet Exhibit C at 3, 8, 27; Ahrens testimony, Tr. at 327, 371-372, 483. Mr. Ahrens acknowledged WSI cannot meet all of BexarMet's needs. Tr. at 383. The contract provides for the water to be used in or within one-quarter mile of WSI's service area. However, Mr. Wallace testified Mr. Welsch agreed orally to permit the water to also be used east of Stahl Road, south of Highway 46, and north of Highway 1863 to Highway 3809. It is not clear whether the GBRA surface water can be sold to BexarMet, but WSI/Diamond has other available water. WSI Exhibit A at 3 and §§ 4.3 and 4.8 of the WSI/GBRA contract. WSI Exhibit A at 5; Wallace testimony, Tr. at 519.



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it may be able to use some of that water in Comal County as it develops additional resources in Bexar County. However, there are no transmission lines built or planned at present and BexarMet has not negotiated contracts to use other utilities' systems. There also appear to be restrictions on transferring water from the Edwards Aquifer district to another district and from one river basin to another without authorization. Moreover, there will be reductions in the availability of Edwards Aquifer water over the next several years.<sup>284</sup>

BexarMet has a history of service of over 50 years, with over 70,000 accounts at present. It has experienced and well-qualified engineering, construction, customer service, billing, accounting, and management staffs.<sup>285</sup> Mr. Terrazas testified western Comal County does not present unique or insurmountable engineering challenges; he said many areas of Texas overlie an aquifer with a low recharge rate. He maintained BexarMet has addressed this problem before by transporting alternate or supplemental water supplies from other areas.<sup>286</sup>

BexarMet has already made a major commitment to the area by spending a million dollars to acquire and upgrade existing water systems and additional long-term service capacities for the area, including major transmission lines and storage tanks.<sup>287</sup>

BexarMet has requested permission from GBRA to transfer 400 acre-feet of its water rights with GBRA for use in Bexar County to Comal County, but has not received a response.<sup>288</sup>

BexarMet expects the region's long-term water needs to be supplied by Canyon Lake WSC and GBRA.<sup>289</sup> This is the area through which the Western Canyon Project transmission line is

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<sup>284</sup>Tr. at 350-354, 379; BexarMet Exhibit M.

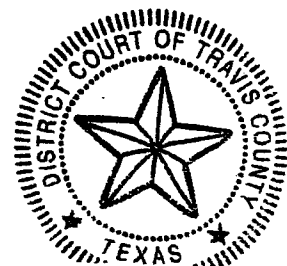
<sup>285</sup>However, on September 13, 2002, the Commission approved an Agreed Enforcement Order in Docket No. 2001-0711-PWS-E, wherein BexarMet was ordered to pay \$16,327 in administrative penalties and required to take action regarding drinking water violations in Atascosa, Bexar, Comal, and Medina Counties.

<sup>286</sup>BexarMet Exhibit C at 14, 25; BexarMet Exhibit d at 2-3.

<sup>287</sup>*Id.* at 25-26; Tr. at 405.

<sup>288</sup>BexarMet Exhibit C at 6; Tr. at 389.

<sup>289</sup>BexarMet Exhibit C at 12.



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scheduled to pass.<sup>290</sup> For several years, GBRA has actively pursued the implementation of a water supply system to meet the increasing needs of this area and other portions of western Comal County, southeastern Kendall County and portions of northern Bexar County.<sup>291</sup>

GBRA has recognized the inadequacy of the Trinity Aquifer in this area. To make the Western Canyon Project affordable, GBRA has actively sought customers with large base water demands to fully utilize project facilities in the near-term, while reserving capacity to ultimately meet needs of growing areas. BexarMet appears to be a prime customer—it has requested 2,138 acre-feet of water per year. The project expressly contemplates selling unused water to BexarMet and SAWS outside of Comal and Kendall Counties.<sup>292</sup>

There is no evidence that GBRA would refuse to provide water to BexarMet if it had a CCN and needed water at a time GBRA needs customers to make the Western Canyon Project financially feasible. GBRA's ten-county statutory service area includes Comal and Kendall Counties.<sup>293</sup> As argued by BexarMet, GBRA is under a duty to sell water to the public without discrimination.<sup>294</sup>

Mr. Howell testified that BexarMet is an established water utility with a long history of providing engineering and construction service. He believes BexarMet has the personnel and resources to provide good service and the ability to build any facilities it needs to supply water. There is no doubt in his mind that BexarMet has the ability to acquire the water resources it needs to serve the area. He believes BexarMet's plan to use multiple sources for water, including ground, surface, and purchased water, is a good way to develop water resources for the region.<sup>295</sup>

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<sup>290</sup>The transmission line is not scheduled to pass through the portion of the requested service area north of Highway 46. Bulverde Exhibit D, Attachment 16 map after ES-22.

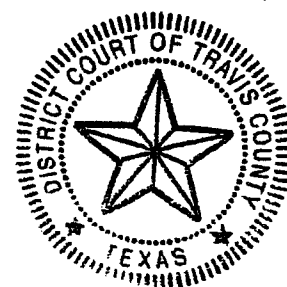
<sup>291</sup>*Id.*, Attachment 16 at ES-1 and map after ES-22.

<sup>292</sup>*Id.*, Attachment 16 at ES-1 and ES-3.

<sup>293</sup>*Id.*, Attachment 18 at 1.

<sup>294</sup>*City of San Antonio* at 768.

<sup>295</sup>*Tr.* at 857, 861-863.



In Mr. Howell's opinion, BexarMet is taking adequate steps to ensure there will be continuous and adequate water to serve western Comal County.<sup>296</sup>

In comparing the Bulverde and BexarMet proposals, it is important to recognize that neither is ideal. Bulverde's plans to provide water before the completion of the GBRA water system in the spring of 2004 are in large part just plans without the details worked out. At present, BexarMet's proposal depends on finding water wherever it can without the firm source of water such as is provided by Bulverde's contract with GBRA. Although the ALJ concludes that BexarMet has access to an adequate source of water to serve its requested area, Bulverde's proposal evidences the most reliable long-range water source because of its contracts with and backing by GBRA.

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

BexarMet contended it is in sound financial condition. Its current in-house staff budget projections are for positive net revenue for the next five years.<sup>297</sup> It cited testimony from Mr. Bittles that it has long-standing in-house capability to design, construct, and operate any water utility plant necessary to provide continuous and adequate service to the requested area.<sup>298</sup> It contended its ability is demonstrated by the planned water transmission system designed by Mr. Terrazas.<sup>299</sup>

As further evidence of its ability, BexarMet cited its track record of serving about 70,000 water connections in and around the greater San Antonio area for over 50 years. It cited testimony that it is dedicated to serving the requested area on a priority basis and has engaged in resource planning and acquisition for a number of years to serve the area.<sup>300</sup> It pointed out it has

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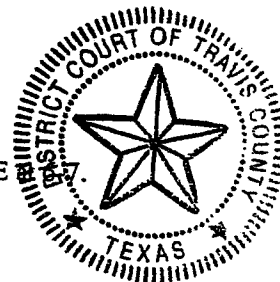
<sup>296</sup>*Id.*, at 858.

<sup>297</sup>Ahrens testimony, BexarMet Exhibit C at 28; Attachment 8

<sup>298</sup>BexarMet Exhibit E at 2-6.

<sup>299</sup>BexarMet Exhibit C, Attachment 6.

<sup>300</sup>Ahrens testimony, BexarMet Exhibit C at 15-17; Bittle testimony, BexarMet Exhibit E



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built facilities jointly with Canyon Lake WSC and is engaged in additional line construction to the requested area.

BexarMet asserted it has demonstrated through the testimonies of Mr. Bittle and Mr. Terrazas that it has the experience and expertise to design, construct, and operate public water systems applicable regulations at 30 TAC § 290.38-290.48.

Neither the Executive Director nor Bulverde/GBRA contended BexarMet does not have the financial, managerial, and technical capability to provide continuous and adequate service.

The ALJ concludes that BexarMet persuasively proved it has the financial, managerial, and technical capability to provide continuous and adequate service.

F. Financial Stability of BexarMet, Including, if Applicable, the Adequacy of Its Debt-Equity Ratio

1. BexarMet

BexarMet maintained it is a stable general law water district with rates set by a board of directors. Uncontested projections in its current budget and in the next five budget years are for positive net revenues.<sup>301</sup> It has invested millions of dollars to bring adequate water service to the region and has committed its resources to do more.<sup>302</sup>

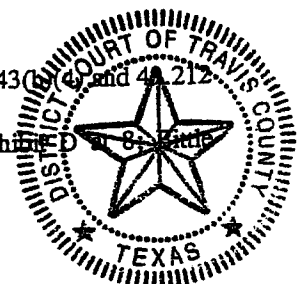
BexarMet contended Mr. Howell's statement about possible concerns staff member Dan Smith might have about BexarMet's financial picture was not qualified testimony because Mr. Howell is not a financial expert and Mr. Smith did not testify.

2. Other Parties

Based on the following factors, the Executive Director's stated his belief that BexarMet has the financial ability to serve the requested certified area: it is a general law district and

<sup>301</sup> Ahrens testimony, BexarMet Exhibit C at 28 and Attachment 8; WATERCODE §§ 13.043(b) and 48.212

<sup>302</sup> Ahrens testimony, BexarMet Exhibit C at 15; Terrazas testimony, BexarMet Exhibit D at 8; Bittle testimony, BexarMet Exhibit E at 8.



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municipal corporation providing limited services to its customers and residents under TEX. CONST. ART. XVI; as a specially created district, it has a broad range of financing options available to it, including debt financing, the issuance of bonds, and levying taxes;<sup>303</sup> as Mr. Ahrens testified, BexarMet is in good financial condition; it recently underwent a rate increase and consolidation to adjust rates to improve its net cash flows to meet its debt service obligations; and it projects positive revenue for the fiscal year ending April 30, 2002, and for the next five years.<sup>304</sup>

Bulverde/GBRA did not argue that BexarMet was not financially stable.

3. Analysis

Based on the above-cited evidence, the ALJ concludes that BexarMet proved it is financially stable.

G. Need for Additional Service in Requested Area

1. BexarMet

BexarMet argued it is indisputable there is a need for service in the areas at issue in these cases based on current need and the service requests it has submitted. These demonstrate customer growth in the immediate area of BexarMet's current service areas in the Highway 281 - Highway 46 area.

BexarMet asserted the development of adequate water resources not totally dependent on Trinity Aquifer ground water, and the fact the area is a prime growth corridor for San Antonio, necessitates a sufficient known and committed customer base to support costs.<sup>305</sup>

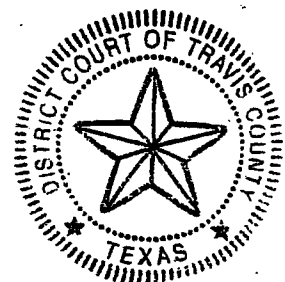
BexarMet disputed the Executive Director's recommendation that the CCN amendment be approved only for the area for which there are service requests. BexarMet contended that a service request is not an exclusive method of demonstrating a need for service. It argued that

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<sup>303</sup>Citing Mr. Ahrens' testimony at Tr. 472-473.

<sup>304</sup>BexarMet Exhibit C at 16.

<sup>305</sup>Ahrens testimony, BexarMet Exhibit C at 11-13.





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neither the WATER CODE, TCEQ rules, nor official TCEQ policy state that requirement. It is only an internal policy of Mr. Howell's division,<sup>306</sup> which is contrary to legislative intent to promote regional water systems as stated in WATER CODE § 13.241(d) and TEX. HEALTH AND SAFETY CODE ANN. § 341.0315(b).

BexarMet said the massive financial and resource investment in regional water system development cannot and will not occur if CCNs can be granted only when individual property service requests are received. Utilities will be reluctant to make investments without adequate customer bases and the differential between the developer/customer's needs and the time it takes to obtain and construct utility service capacities.

BexarMet maintained Bulverde/GBRA's argument that there is not a need for a central retail public water service in the area also applies to BexarMet's requested area west of Highway 281.

2. The Executive Director

Citing both the WATER CODE § 13.246(b) and <sup>©</sup> and the Commission rules at 30 TAC § 291.102(b) and (c)(2),<sup>307</sup> the Executive Director agreed with a BexarMet closing-brief statement that overriding all the § 13.246<sup>©</sup> criteria "is the issue of need and ability to meet that need."

She pointed out that BexarMet currently serves four stand-alone systems and a number of developers have requested water service.<sup>308</sup> She argued that while letters asking for service from BexarMet are sufficient to show a need for specific portions of the requested area,<sup>309</sup> given the likelihood of development, there has been no showing of need in the rest of the area. She cited the fact that BexarMet has not introduced any evidence from landowners, developers, or homeowners showing a need for service in other parts of the requested area. She cited Code Construction Act provisions saying "words and phrases shall be read in context and construed

<sup>306</sup>Howell testimony, Tr. at 870-871.

<sup>307</sup>WATER CODE § 13.246(b) and Rule 291.102<sup>©</sup> both say the Commission may approve CCN applications or amendments only after finding that "a certificate is necessary for the service, accommodation, ~~convenience~~ or safety of the public."

<sup>308</sup>Ahrens testimony, BexarMet Exhibit C at 5 and 10.

<sup>309</sup>BexarMet Exhibit C, Attachment 7.



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according to the rules of grammar and common usage,"<sup>310</sup> and argued there has been no showing of "need" for a CCN in the entire area or that a CCN is "necessary for the service, accommodation, convenience, or safety of the public."

3. Bulverde/GBRA

Bulverde/GBRA asserted that BexarMet failed to demonstrate a need for BexarMet, rather than Bulverde, to provide additional water service in the requested area. They based their argument on evidence that BexarMet has only a few requests for water service in the area where the Bulverde and BexarMet requests overlap (overlapping area). BexarMet's requests are around the intersection of Highways 46 and 281, generally west of Highway 281 along the Highway 46 area<sup>311</sup> and in much of the overlapping area, Bulverde has received requests for water service.<sup>312</sup> Based on the locations of the tracts of land where it has received water-service requests,<sup>313</sup> Bulverde/GBRA contended that landowners appear to prefer service from it rather than BexarMet.

Bulverde/GBRA cited the fact that GBRA's proposed transmission line for the Western Canyon Project will come through the middle of the overlapping area and that Bulverde's Service Area Water Distribution System Master Plan anticipates receiving potable water at several places off the line. They asserted they are poised to provide water service in the overlapping area by virtue of their jurisdictional authority and proximity of the water transmission line.

4. Analysis

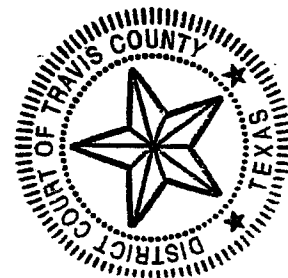
The ALJ concludes the evidence demonstrated a need for service in the portion of the requested service area south of Highway 46. There is also a need for service in BexarMet's two existing service areas to the north of Highway 46 and in the areas where there have been specific requests for service. Most of the reasons for a need for service south of Highway 46 have already been addressed in relation to Bulverde's application: groundwater from the Trinity Aquifer,

<sup>310</sup>TEX. GOV'T CODE ANN. § 311.011(a).

<sup>311</sup>Ahrens testimony at 411.

<sup>312</sup>Bulverde Exhibit A at Tab 12; the areas are identified at Exhibit D at Tab 23.

<sup>313</sup>BexarMet Exhibit D at Tab 23.



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particularly in the area west of Highway 281, is inadequate for long-term growth; the area is a prime growth corridor for the San Antonio metropolis; a reliable and adequate water system will make residential and commercial growth feasible; the area is presently served by small CCNs often serving a particular subdivision or by personal wells; a reliable, regulated centralized service would be an improvement over existing private wells; there are many requests for service throughout the area, and there is no evidence supporting the Executive Director's apparent position that is more desirable to expand CCNs in a piecemeal fashion only to areas where specific requests have been received. Utilities will be reluctant to build a water system without a reasonably protected customer base. There is a need for service from an experienced and capable water district such as BexarMet.

The need for service for all of the area north of Highway 46 is not adequately demonstrated. The only requests for service in the area, including requests received by BexarMet since it filed its application, appear to be close to the intersection of Highways 46 and 281. Most of those appear to be to the south of Highway 46 although there may be some to the north.<sup>314</sup> By contrast, there are numerous service requests to the south of Highway 46—in addition to the BexarMet requests just south of Highway 46 and west of Highway 281, there are several requests to Bulverde in the western and east-central portions of the overlapping area.<sup>315</sup>

Most of the territory around the intersection of Highways 46 and 281 is already in a certified area or appears to be within one-fourth mile of BexarMet's existing service area just to the south of Highway 46, Diamond's service area to the north of Highway 46, the Berry Oaks Water Company service area, or the Canyon Lake WSC projected area to the east of Highway 281.<sup>316</sup>

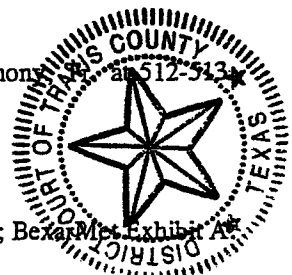
Overall, there was not a lot of evidence of present need to the north of Highway 46 other than the areas already being served or for which requests have been received in the vicinity of Highway 46/Highway 281 intersection. Mr. Ahrens testified he believes there will be a need for

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<sup>314</sup>Ahrens Testimony, Tr. at 477; Terrazas testimony, Tr. at 494-495; Bittle testimony, Bulverde Exhibit C, Attachment 7.

<sup>315</sup>Bulverde Exhibit D, Attachment 23.

<sup>316</sup>Bulverde Exhibit H; Bulverde Exhibit A, map at Attachment 7; Bulverde Exhibit C; BexarMet Exhibit A.



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service "in the future" in the area where there has not been a request for service, but not today.<sup>317</sup> He said the CCN request is for future growth.<sup>318</sup>

H. Adequacy of Service Currently Provided in Requested Area

BexarMet maintained there are no known instances of existing retail public utilities providing state-approved public water utility service in its requested service area and it is not seeking certification to a certified area of any other retail public utility.<sup>319</sup> It contended that private systems do not fulfill the legislative policy of promoting the development and use of regional and area-wide drinking water systems.<sup>320</sup>

The Executive Director contended the public interest is best served by a single reliable water supplier certified to the entire area that water service is needed and desired. He pointed out that water is now provided on an *ad hoc*, unplanned basis, with various landowners receiving groundwater from personal groundwater wells or the four small, stand-alone systems presently operated by BexarMet. The rest of the uncertified requested area has no uniform, planned water utility service.

Bulverde/GBRA did not contend the BexarMet application should be denied because the requested area is being adequately served.

The ALJ concludes the Executive Director's argument was persuasive that the public interest is best served by a single reliable water supplier certified to the entire area where water service is needed and desired rather than water being provided on an *ad hoc*, unplanned basis. To that extent, current service in the area is inadequate.

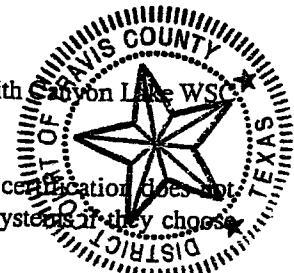
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<sup>317</sup>Tr. at 477.

<sup>318</sup>*Id.*, at 435.

<sup>319</sup>Ahrens testimony, BexarMet Exhibit C at 17. It cited its service area agreements with Canyon Lake WSC and Comal. BexarMet Exhibits A and B.

<sup>320</sup>TEX. HEALTH & SAFETY CODE ANN. § 341.0315(b). BexarMet pointed out that certification does not obligate landowners to take water from the district. They may continue to use their on-site systems if they choose to do so. Ahrens testimony, BexarMet Exhibit C at 18.



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I. Effect of Granting the Amendment on BexarMet and on Any Retail Public Utility of the Same Kind Already Serving the Proximate Area.

1. BexarMet

BexarMet maintained that granting the CCN amendment would allow it to continue with its plans to develop a mixed supply of water resources for the region consisting of shared use facilities with Canyon Lake WSC, BexarMet's wells, groundwater from local sources, possibly Western Canyon Project water, and water from outside the region it is able to bring in or wheel in through neighboring utilities. It would provide a secure customer base to support its bonds and justify its expenses, and promote economies of scale with the increase in its customer base over time, with a consequent impact on rates. It would generate additional revenues from added customers resulting in additional debt service revenues for capital asset and water resource investments.

BexarMet said without a secure customer base, it would go forward with its plans to bring reliable water to its existing service areas, but would otherwise drastically cut back its capital commitment to the region.<sup>321</sup>

BexarMet maintained the "effect on other utilities" criterion does not apply to Bulverde because it is not a retail public utility of the same kind already serving the proximate area. It argued even if Bulverde were a retail public utility, an approval of the BexarMet application would have no effect on it because it will not have water available from GBRA through the Western Canyon Project until April 2004.<sup>322</sup> It pointed out Bulverde never said when it would have a distribution system to serve its entire city limits, ETJ, and adjacent areas and the GBRA board of directors has not approved the master plan for the Bulverde distribution system.<sup>323</sup>

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<sup>321</sup>Ahrens testimony, BexarMet Exhibit C at 20-22.

<sup>322</sup>Blumberg testimony, Bulverde Exhibit E at 13.

<sup>323</sup>Barton testimony, Tr. at 63-64; Blumberg testimony, Tr. at 216-217. BexarMet asserted one way Bulverde might be affected is if BexarMet's CCN amendment is granted, Bulverde will not be allowed to use CCN as a means to control growth or in other ways the legislature never intended.



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BexarMet cited the fact that the only retail public utilities appearing at the hearing shown to be west of Highway 281 are Canyon Lake WSC and Comal, both of which have entered into a service area agreements with BexarMet.<sup>324</sup>

BexarMet addressed Mr. Howell's assertion that the CCN amendment should be denied because existing utilities wanting to expand their service area might be boxed in.<sup>325</sup> It argued that the utilities Mr. Howell is concerned with had notice, but chose not to appear at the hearing,<sup>326</sup> and Mr. Howell made no effort to determine whether any of the utilities wanted to expand, had a need to expand, or had the financial, managerial, technical ability or water resources to expand. It asserted that Mr. Howell did not look at the map to see if any of the utilities would really be boxed in. An example is Fair Oaks Ranch, where only a small portion of the utility's service area is in Comal County—most of it is in Bexar and Kendall Counties.<sup>327</sup> It contended there is no evidence that any existing neighboring utility actually serving the proximate area will be adversely affected by granting the application. Even GBRA, which holds a CCN for Johnson Ranch (a water system to be built in the future along Highway 281<sup>328</sup>) did not present testimony to that effect.

2. Executive Director

The Executive Director cited Mr. Ahrens' testimony that BexarMet would greatly benefit from inclusion of the requested area in its CCN, including additions to its customer base; an impact on current and future rates and fees in the area through economies of scale; and additional revenues to help finance capital improvements to its water system for the benefit of customers and to help service debt on existing investments in capital assets and water resources.<sup>329</sup> Mr. Ahrens testified that without a long-term customer base to support the districts bonds, BexarMet will

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<sup>324</sup>BexarMet Exhibits A and B.

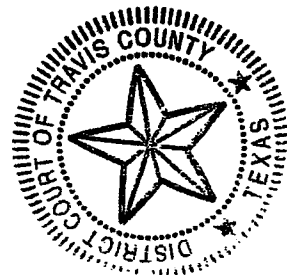
<sup>325</sup>Tr. at 872-873.

<sup>326</sup>*Id.*, at 876.

<sup>327</sup>*Id.*, at 874; Bulverde Exhibit D, Attachment 22.

<sup>328</sup>Bulverde Exhibit D, Attachment 22.

<sup>329</sup>BexarMet Exhibit C at 22.



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drastically cut back its capital commitments to the region.<sup>330</sup> Based on this testimony, the Executive Director said a refusal to grant the CCN amendment could undermine the work and effort BexarMet has expended.

Mr. Howell testified that granting the application as proposed will negate or at least make it difficult to obtain water service from an adjacent retail public utility.<sup>331</sup> The Executive Director pointed out there are numerous retail public utilities in the area serving or wanting to serve the area requested by BexarMet. However, BexarMet has reached settlement agreements with Comal and Canyon Lake WSC that resolved allocation problems between them in requested area.<sup>332</sup>

The Executive Director argued because Bulverde is not presently a retail public utility, this criterion does not apply to it.

3. Bulverde/GBRA

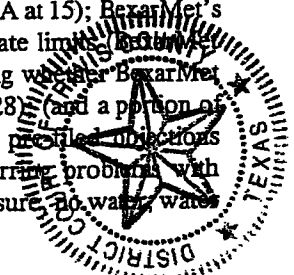
Bulverde/GBRA contended an approval of the BexarMet application will negatively effect it because it would effectively eliminate its ability to provide water service to its citizens. It pointed out that BexarMet has no operating agreement with Bulverde and asserted because BexarMet has shown little or no respect within its corporate and jurisdictional boundaries,<sup>333</sup> Bulverde will have little or no control over water service provided by BexarMet. It argued there are serious concerns about BexarMet's ability to provide continuous and adequate service to the

<sup>330</sup>Executive Director Exhibit C at 21.

<sup>331</sup>*Id.*, at 10. The Executive Director cited WATERCODE § 13.242(a), which precludes another retail public utility from serving an area already served by a certified utility unless it is itself certified.

<sup>332</sup>BexarMet Exhibits A and B.

<sup>333</sup>Bulverde/GBRA cited the following evidence as a basis for that assertion: Mr. Barton's testimony that the City has received complaints about service from BexarMet and WSI, but has no enforcement authority, the City held a town hall meeting to air complaints, and that BexarMet and its predecessor Comal have rationed water every summer since 1999, including prohibiting outside watering (Barton testimony, Bulverde Exhibit A at 15); BexarMet's CCN amendment application shows that part of its requested area is within Bulverde's corporate limits (BexarMet Exhibit C Tab 9, at 143); Mr. Ahrens' failure to give an affirmative answer to a question asking whether BexarMet would comply with Bulverde city ordinances if its CCN amendment is approved (Tr. at 427-428) (and a portion of Mr. Ahrens' pre-filed testimony that was excluded from the evidentiary record based on pre-filed objections (BexarMet Exhibit C at 15, lines 16-20).) Mr. Barton also testified the City has had recurring problems with BexarMet, including its failure to comply with city ordinances and complaints of low water pressure, no water, water leaks, and slow response to fix leaks. Bulverde Exhibit A at 11.



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City. It cited Mr. Ahrens' testimony that BexarMet is having difficulty serving Bulverde Hills in times of drought or peak usage.<sup>334</sup>

4. Analysis

The ALJ concludes that granting the CCN will have a positive effect on BexarMet for the reasons cited by BexarMet and the Executive Director.

This criteria does not apply to Bulverde because it is not presently a retail public utility of the same kind already serving the proximate area. Nonetheless, granting a CCN to BexarMet will prevent it from gaining jurisdiction over water services to its citizens and ETJ.

As argued by the Executive Director, granting the CCN amendment will make it more difficult for other utilities to serve the area. However, BexarMet has reached settlement agreements with the utilities that appeared at the hearing.

J. Feasibility of Obtaining Service From an Adjacent Retail Public Utility

1. BexarMet

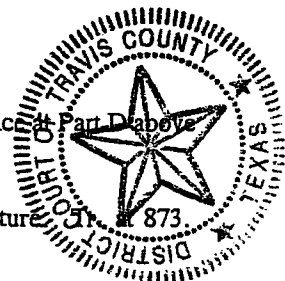
BexarMet asserted there are no retail public water utilities serving the requested area and none of the neighboring utilities with pending CCN amendment applications are affected by BexarMet's application.<sup>335</sup>

BexarMet said it is seeking authority to provide end-use service to areas adjacent to or in regional proximity to its currently certified areas. Service could be provided by line extensions to the extent that existing facilities have sufficient capacity. New facilities will be built where

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<sup>334</sup>Tr. at 395-398. Bulverde/GBRA also referred to their argument and supporting evidence concerning the ability of BexarMet to provide adequate service and its access to water.

<sup>335</sup>Mr. Howell testified other utilities may want to expand their service areas in the future. BexarMet contended this testimony is speculative.





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needed. The end result will be systems interconnected with a system of transmission lines for the efficient routing and sharing of available resources.<sup>336</sup>

BexarMet argued Bulverde is not an alternative to it because the surface water plant and main transmission line from the Western Canyon Project will not be ready until the spring of 2004. In addition, no bonds have been sold for the Western Canyon Project, no bond date is set, and no substantive construction will begin until they are; GBRA does not have the wastewater discharge permit necessary for the surface water treatment plant and does not know how long it will take to get it if it is contested; and Bulverde does not own any water or facilities on its on.<sup>337</sup>

2. Other Parties

The Executive Director cited the fact that the requested area is adjacent to several retail public utilities, including Comal, Canyon Lake WSC, Diamond, and WSI. Comal and Canyon Lake WSC protested the applications. BexarMet settled its dispute with both utilities, and they withdrew their protests. As a result, there is no evidence that these entities wish to provide water service in the requested area.

The Executive Director pointed out that Bulverde protested the application, but again said Bulverde is not a retail public utility. She also cited Mr. Howell's testimony that Bulverde has not demonstrated the financial, managerial, and technical ability to provide water service to the proposed area.<sup>338</sup>

Bulverde/GBRA did not argue that BexarMet's CCN application should be denied because service could be obtained from an adjacent retail public utility.

3. Analysis

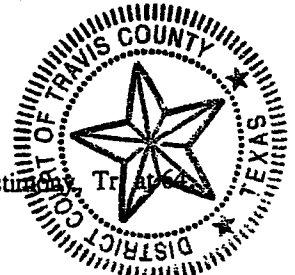
The ALJ agrees with the Executive Director that no other retail public utility has expressed

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<sup>336</sup> Ahrens testimony, BexarMet Exhibit C at 9-10; Attachment 6.

<sup>337</sup> Blumberg testimony, Bulverde Exhibit E at 13 and Tr. at 217, 220-222; Barton testimony, Tr. at 62.

<sup>338</sup> Executive Director Exhibit F at 7.



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a desire to provide service to the requested area. Bulverde has expressed that desire, but as indicated previously, it does not have the financial, managerial, or technical ability to do so.

K. Environmental Integrity

1. BexarMet

BexarMet argued the environmental impact of granting its CCN amendment would be similar for any retail public utility serving the requested areas because whoever puts in a large pipeline will need to meet the same local, state, and federal standards and there will be the same temporary disruption of soils and animal habitats. It said it will use groundwater as an interim measure until outlying developments can be connected to the planned transmission pipeline network. It asserted although the area west of Highway 281 will ultimately need water to supplement the Trinity Aquifer, it does not matter whether that is accomplished by surface or groundwater. It contended Mr. Miller acknowledged that it makes little difference whether the additional water is surface or groundwater.<sup>339</sup>

BexarMet disputed Bulverde/GBRA's argument that using groundwater is bad for the environment and argued there is no evidence in the record to that effect. It cited Bulverde/GBRA witness David Welsch's testimony that Bulverde would not have enough water with 400 acre-feet from GBRA and would need supplemental water including groundwater and other sources.<sup>340</sup>

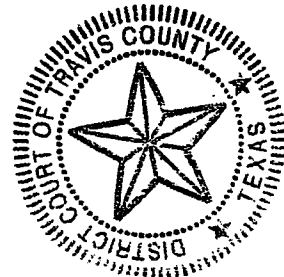
2. Executive Director

The Executive Director maintained there was no evidence of potential damage to the surrounding environment if the CCN amendment is granted. Both BexarMet and Bulverde would install piping and associated equipment. It cited Mr. Ahrens' testimony that each of BexarMet's groundwater wells are in the process of being permitted with the Edwards Aquifer Authority and that BexarMet would augment its water supply through various groundwater agreements.<sup>341</sup>

<sup>339</sup>Miller testimony, Tr. at 287-289.

<sup>340</sup>Bulverde Exhibit D at 10.

<sup>341</sup>BexarMet Exhibit C at 25; Tr. at 351.



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CODE, or any other law. One of the WATER CODE purposes is to permit a water district such as BexarMet to serve any area if it has a CCN to do so.

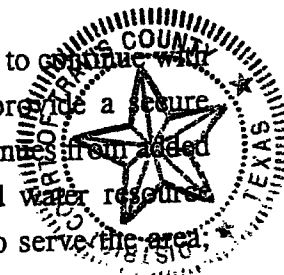
Based on WATER CODE § 49.215 and other Water Code provisions, BexarMet should be permitted to provide water service within Bulverde's corporate limits only BexarMet if it obtains Bulverde's consent to do so or if its boundaries are expanded to include Bulverde's corporate limits.

Although not without some doubts, the preponderant evidence is that BexarMet has adequate access to water to serve its requested area. This conclusion is based on the feasibility of using groundwater from existing wells, BexarMet's ability to meet existing water requests, the feasibility of drilling stand-alone wells if necessary, the feasibility of producing more water by drilling additional wells properly spaced in the Trinity Aquifer, the joint construction of a transmission line and storage tank with Canyon Lake WSC to provide Canyon Lake water to the area on an emergency basis, the possibility of purchasing water from neighboring utilities such as WSI or Diamond, the possibility of amending the BexarMet/GBRA contract to permit BexarMet to use the water in Comal County, BexarMet's possible participation in GBRA's Western Canyon Project, and BexarMet's long history of providing successful water service to thousands of customers in several areas.

BexarMet's application was not opposed on the basis of its financial, managerial, and technical capability or its financial stability. The ALJ concludes BexarMet adequately satisfies these criteria because its current and projected budgets and budget projections for the next five years are positive, it has a long-standing in-house capability to design, construct, and operate water utilities, and it has a 50-year record of service to numerous customers.

The public interest would be best served by reliable, certified water supplies rather than the present situation where water is provided on an *ad hoc* basis. To that extent, current service in the area is inadequate.

Granting the CCN will have a positive effect on BexarMet by allowing it to continue with its plans to develop a mixed supply of water resources for the region, to provide a secure customer base and promote economies of scale, and to generate additional revenues from added customers resulting in additional debt service revenues for capital asset and water resource investments. Granting a CCN will make it more difficult for other utilities to serve the area.



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however, except for GBRA, BexarMet has reached settlement agreements with other utilities serving the area that appeared at the hearing.

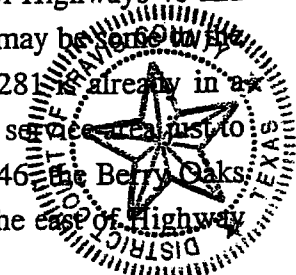
Granting the CCN would not adversely Bulverde's ability to serve its customers because it is not an existing utility. Moreover, Bulverde does not have the financial, managerial, or technical ability to serve customers. No existing utility has expressed a desire to serve the area.

The effect on environmental integrity would be about the same as for the Bulverde application. There would be a temporary disruption of earth and animal habitat from the construction of distribution systems and storage facilities, but there was no scientific evidence of undue endangerment to the environment. There was likewise no scientific evidence that the use of surface water in the area is environmentally superior to groundwater.

The installation of a water system and distribution network subject to state and federal regulations would improve service to the requested area over the present unplanned system with landowners receiving water from personnel wells, BexarMet stand-alone systems, or other small CCNs serving particular subdivisions. The evidence does not show whether there would be greater or lesser costs to consumers.

The need for service in the requested area south of Highway 46 is demonstrated for many of the same reasons in the Bulverde application. Groundwater from the Trinity Aquifer will be inadequate for long-term growth, the area is a prime growth corridor for San Antonio, a reliable and adequate water supply will make residential and commercial growth feasible, utilities will be reluctant to build a water system without a reasonably protected customer base, a regulated centralized service would be an improvement over existing wells, there are many requests for service in the area, and BexarMet is an experienced and capable water supplier.

The need for service for some of the area north of Highway 46 is not adequately demonstrated. The only requests for service in the area, including requests received by BexarMet since it filed its application, are in the far southeast close to the intersection of Highways 46 and 281. Most of those appear to be to the south of Highway 46 although there may be some to the north. Most of the territory around the intersection of Highways 46 and 281 is already in a certified area or appears to be within one-fourth mile of BexarMet's existing service area, just to the south of Highway 46, Diamond's service area to the north of Highway 46, the Berry Oaks Water Company service area, or the Canyon Lake WSC projected area to the east of Highway



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281. Mr. Ahrens testified he believes there will be a need for service "in the future" in the area where there has not been a request for service, but not today. He said BexarMet's CCN request is for future growth.

VIII. Allocation of Transcript Costs

As applicants, Bulverde and BexarMet agreed to split the costs of the transcript. The Commission will not assess reporting or transcription costs to statutory parties who are precluded by law from appealing any ruling, decision, or other act of the Commission.<sup>352</sup> Neither the Executive Director nor the Public Interest Counsel may appeal a ruling, decision, or other act of the Commission.<sup>353</sup>

IX. Conclusion

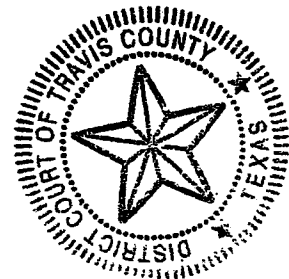
Based on the evidence presented in this case, the ALJ recommends that: Bulverde's CCN application be denied; BexarMet's application to amend its CCN No. 10675 be approved for its requested service area south of Highway 46, except that it should be permitted to serve within Bulverde's corporate limits only if it receives Bulverde's consent to do so or if its district boundaries are expanded to include Bulverde's corporate limits; and BexarMet's application to serve in areas north of Highway 46 be denied except for areas where it has specific requests for service and in already approved service areas.

Signed this 20<sup>th</sup> day of November, 2002.

  
JAMES W. NORMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

<sup>352</sup>30 TAC § 80.23(d)(2).

<sup>353</sup>WATER CODE §§ 5.275 and 5.356.



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

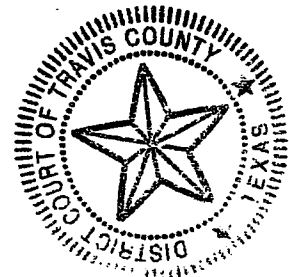


**AN ORDER**

Denying the Application of the City of Bulverde for a CCN in Comal County; TCEQ Docket No. 2001-0951-UCR; SOAH Docket No. 582-01-3633

Approving in part the Application of Bexar Metropolitan Water District to Amend its CCN No. 10675 in Comal County; TNRCC Docket No. 2001-0697-UCR; SOAH Docket No. 582-02-0432

On \_\_\_\_\_, 200\_\_, the Texas Commission on Environmental Quality (Commission) considered an application of the City of Bulverde to obtain a certificate of convenience and necessity in Comal County, Texas, for authorization to provide water utility service and an application by Bexar Metropolitan Water District to amend its certificate of convenience and necessity No. 10675 in Comal County to provide water utility service. The applications were consolidated for hearing. The applications were presented to the Commission with a Proposal for Decision by James W. Norman, an Administrative Law Judge with the State Office of Administrative Hearings, who conducted a contested case hearing concerning the applications. After considering the Administrative Law Judge's Proposal for Decision and the evidence and arguments presented, the Texas Commission on Environmental Quality makes the following Findings of Fact and Conclusions of Law:



## FINDINGS OF FACT

### PROCEDURAL HISTORY

1. On June 28, 2000, the City of Bulverde (Bulverde) filed an application for a certificate of convenience and necessity (CCN) to provide water utility service in western Comal County (Bulverde's requested service area).
2. Notice of Bulverde's 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 service area.
3. Additionally, that same notice was published in the BULVERDE COMMUNITY NEWS, a newspaper regularly published and generally circulated in Comal County, on October 19, 2000.
4. After requests for hearing were filed, the Chief Clerk referred Bulverde's application to the State Office of Administrative Hearings (SOAH) on July 12, 2001, for a hearing.
5. Administrative Law Judge (ALJ) James W. Norman held a preliminary hearing on the application on September 10, 2001. Notice of that preliminary hearing was mailed, on August 16, 2001, to all parties who had requested a hearing on the application.
6. At or soon after the preliminary hearing, the following were admitted as parties in the Bulverde case:

Bulverde (represented by attorney Mayo J. Galindo, subsequently also represented by attorneys Bruce Wasinger and Emily Rogers);



Executive Director (represented by attorney Fread Houston, subsequently represented by attorneys Todd Galiga and John Deering);

Bexar Metropolitan Water District (BexarMet) (represented by attorney Mark H. Zeppa);

The Public Interest Counsel of the Commission (did not participate);

Comal Water Company (Comal) (represented by Kathleen B. Cileske, subsequently represented by Mr. Zeppa);

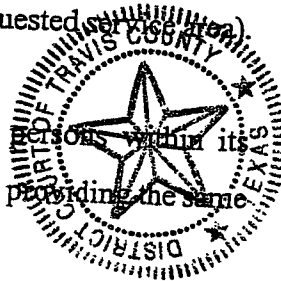
Water Services, Inc. (WSI) (represented by David L. Wallace, subsequently represented by Mr. Zeppa);

Diamond Water Company (Diamond) (represented by David L. Wallace, subsequently represented by Mr. Zeppa);.

San Antonio Water System (SAWS) (represented by attorney Martin Rochelle); and

Canyon Lake Water Supply Corporation (Canyon Lake WSC) (represented by attorney John O. Houchins)

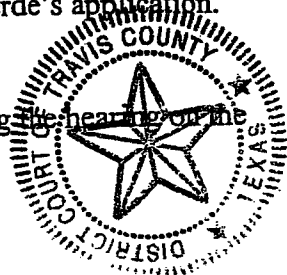
7. SAWS withdrew as a party on November 20, 2001.
8. On November 3, 2000, BexarMet filed an application to amend its CCN No. 10675 to provide water utility service in western Comal County (BexarMet's requested service area).
9. Notice of BexarMet's application was mailed on May 1, 2001, to persons within its 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 its requested service area.

10. Additionally, that same notice was published in the SAN ANTONIO EXPRESS NEWS, a newspaper published in Bexar County, Texas, and generally circulated in Comal County, on May 13, and 20, 2001.
11. After requests for hearing were filed, the Chief Clerk referred BexarMet's application to SOAH on August 22, 2001, for hearing.
12. Administrative Law Judge Bill Newchurch held a preliminary hearing on the application on December 4, 2001. Notice of that preliminary hearing was mailed, on October 23, 2001, to all parties who had requested a hearing on the application.
13. Guadalupe Blanco River Authority (GBRA) (represented by Bruce Wasinger and Emily Rogers) was admitted as an additional party at the December 4, 2001, preliminary conference.
14. The two applications were consolidated for hearing at the December 4, 2001, preliminary conference.
15. On December 11, 2001, BSR Water Company requested party status. In an order dated December 20, 2001, the request was denied.
16. Comal initially opposed both applications, but withdrew its opposition to BexarMet after reaching a settlement before the hearing. It continued to oppose Bulverde's application.
17. Canyon Lake WSC withdrew its opposition to both applications during the hearing on the merits after reaching settlement agreements.

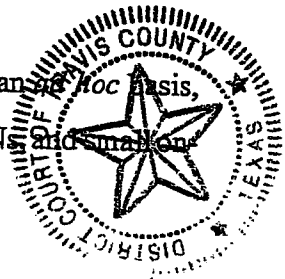


18. The hearing on the merits began on June 11, 2002, and concluded on June 13, 2002. The parties filed written closing arguments by August 9, 2002, and replies by September 11, 2002.
19. Both Bulverde and BexarMet requested that the record be reopened to receive additional documentation. The record was reopened on October 16, 2002, and on October 18, 2002, for the receipt of additional documents and arguments. The record closed on October 18, 2002.

## BULVERDE APPLICATION

### BACKGROUND FACTS

20. 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 persons.
21. Bulverde seeks a CCN for its requested service area of about 57,500 acres in western Comal County, where it anticipates rapid population growth in the coming years.
22. The Bulverde and BexarMet requested service areas contain a common area (the overlapping area) roughly bounded by Highway 281 on the east, the Kendall County line on the west, the Bexar County line on the south, and by a line about two-thirds of a mile north of Highway 46 on the north. The overlapping area is approximately one-half of the territory requested by each applicant.
23. Presently, portions of Bulverde's requested service area receive water on an ad hoc basis, through small utilities, serving some subdivisions and businesses under CCNs and small on-site wells.



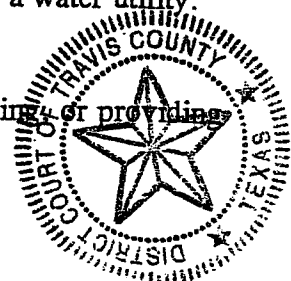
FINANCIAL, MANAGERIAL, AND TECHNICAL CAPABILITY TO PROVIDE CONTINUOUS AND ADEQUATE SERVICE

24. Bulverde 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 Canyon Treated Water Project (Western Canyon Project).
25. 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 that have traditionally relied on the Trinity and Edwards Aquifers to meet their water supply needs.
26. GBRA will provide 400 acre-feet of water annually to Bulverde under the terms of three contracts it has entered into with Bulverde: a water supply contract, an Operating Agreement, and an Interlocal Agreement.
27. The Operating Agreement obligates GBRA to design, construct, finance, operate, and maintain the water distribution system to provide treated water on behalf of Bulverde. Provisions of the Operating Agreement include the following:
  - a. Section 3.3(a) and (b) provide that GBRA will own the water distribution system and 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. Failure to exercise the option within a three-year-option period will result in termination of Bulverde's exclusive right to purchase.
  - b. Section 3.3(a) and (d) provide that GBRA may sell the water distribution system and any lands comprising a portion of the water distribution project, but that



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.

- c. Section 5.4 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.
  - d. Section 8.2 provides that both parties may avail themselves of all available legal and equitable remedies in the case of a default by the other party. In the case of a default by GBRA, Bulverde must give GBRA notice and 30 days to cure before taking action.
  - e. Under § 8.2, GBRA has the right to terminate or suspend service in the event of a default by Bulverde.
28. The water supply contract includes a provision at § 5.7 stating that Bulverde's obligation to pay for water will not be affected for any reason unless the agreement expressly provides otherwise.
29. Paragraph 7 of the Interlocal Agreement obligates Bulverde to indemnify, defend, and hold harmless GBRA, its officials, officers, trustees, agents, and employees from any claims, expenses, costs, demands, judgments, causes of action, suits, or liability of any nature which may arise from the negligent operation of the water utility facilities.
30. Bulverde does not presently have the resources to develop and manage a water utility.
31. Bulverde will not have technical staff dedicated to maintaining, operating, or providing water service.



32. Bulverde will not have a groundwater supply or hold a water supply in its own name.
33. Bulverde has not budgeted funds to operate a water utility.
34. Bulverde will not have the day-to-day responsibility for operating the system.
35. Bulverde cannot provide water without GBRA's assistance.
36. Bulverde will not have financial and managerial responsibility for the water system.
37. Bulverde has no plans to designate city employees to handle requests for service and does not know how many GBRA employees will handle customer complaints.
38. Bulverde assumes GBRA will operate the water distribution system in compliance with applicable regulations.

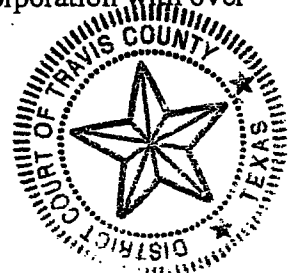
#### **STATUTORY FINDING**

39. Bulverde does not possess the financial, managerial, and technical capability to provide continuous and adequate service.

### **BEXARMET APPLICATION**

#### **BACKGROUND FACTS**

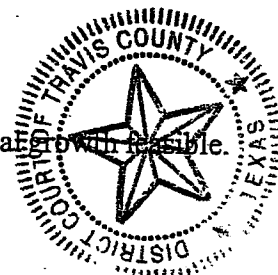
40. BexarMet is a general law water conservation district and municipal corporation with over 70,000 accounts and 250 employees.



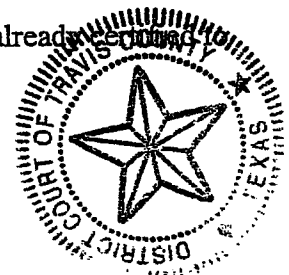
41. BexarMet submitted its application to meet the growing water utility needs of its requested service area and to spread development costs to bring water and infrastructure to existing and future areas.
42. BexarMet's requested service area is in western Comal County roughly bounded by FM 3009 and Highway 281 to the east, Cibolo Creek to the south, the Kendall County line on the west, and the Guadalupe River on the north. The area is bifurcated from east to west by Highway 46.
43. BexarMet began providing water service to parts of the requested area in April 1998, when it purchased the assets of Bulverde Water Company, including the Bulverde Hills water system, the Oakland Estates water system, and the Spring Branch water system.
44. BexarMet operates a fourth system serving the HEB Grocery chain, under a water CCN amendment, just south of Highway 46 immediately west of Highway 281.
45. Presently, portions of BexarMet's requested service area receive water on an *ad hoc* basis, through small CCNs serving some subdivisions or businesses under CCNs, and small on-site wells.

#### NEED FOR SERVICE IN THE PROPOSED AREA/ADEQUACY OF SERVICE

46. The Trinity Aquifer, particularly in areas west of Highway 281, is inadequate for long-term population growth expected to be between four and seven percent per year.
47. The area is a prime growth corridor for the San Antonio metropolis expanding from the south.
48. A reliable and adequate water supply will make residential and commercial growth feasible.



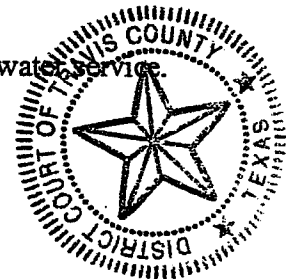
49. A regulated centralized service would be an improvement over existing private wells and small CCNs providing water on an *ad hoc* basis.
50. Utilities will be reluctant to build a water system without a reasonably protected customer base.
51. BexarMet has received four requests for service near the intersection of Highways 46 and 281, including a 150-unit apartment complex just south of Highway 46.
52. BexarMet has received several more requests for service in the vicinity of Highway 46 and Highway 281 since it filed its application.
53. Bulverde has received several requests for service in far western Comal County toward the Kendall County line and south of Highway 46 and requests along Highway 281 in the south portion of BexarMet's requested service area north of the Bexar County line.
54. BexarMet is an experienced and capable water supplier with 50 years of experience.
55. There is a need for service in the requested service area south of Highway 46 and north of Highway 46 in places where BexarMet has received requests for service and in existing BexarMet service areas.
56. The only requests for service in the portion of BexarMet's requested service area north of Highway 46 are in the far southeast corner close to the intersection of Highways 46 and 281. Many of the requests near that intersection are south of Highway 46.
57. Most of the territory around the intersection of Highways 46 and 281 is already owned by other utilities or is within one-fourth mile of a certified service area.



58. There is not a present need for service in parts of the requested service area north of Highway 46 except where BexarMet already has service areas and in places where there has been a specific request for service.

**ABILITY TO PROVIDE ADEQUATE SERVICE/ACCESS TO ADEQUATE SUPPLY OF WATER**

59. BexarMet has already made a major commitment to the requested service area by spending approximately a million dollars to acquire and upgrade existing water systems and add long-term service capacities for the area.
60. BexarMet intends to use a mixture of surface and groundwater to serve its customers. The groundwater will come from existing facilities in the area. The other sources of water are from Canyon Lake and sources BexarMet plans to develop in Bexar County.
61. BexarMet has sufficient water today to meet existing requests for service.
62. BexarMet has contracted with Canyon Lake WSC to jointly construct a storage tank and transmission line to serve its existing service areas. The water is for emergency use. The construction will be completed in early 2003.
63. BexarMet is able to provide interim service through groundwater within six months of an applicant for water becoming qualified.
64. It is possible to drill additional wells in higher producing areas in the Trinity Aquifer and transport water to other parts of the requested service area to provide water service.
65. BexarMet will consider drilling stand-alone wells if necessary to provide water service.

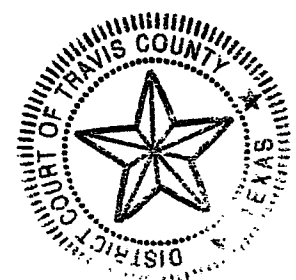




66. BexarMet has negotiated with other utilities, including WSI and Diamond, over ground water and surface water supplies and emergency connections for mutual support.
67. BexarMet has plans to transfer water from Bexar County although it has not built transmission lines as yet and has not yet negotiated contracts with other utilities to use their systems. BexarMet has developed very strong Trinity Aquifer fields in northern Bexar County.
68. Through the Western Canyon Project, GBRA intends to actively pursue the implementation of a water supply system to meet the increasing needs of western Comal County, southeastern Kendall County, and portions of northern Bexar County. GBRA has sought customers with large base water demands to fully utilize project facilities in the near term.
69. BexarMet has requested GBRA to supply it with water in western Comal County.
70. BexarMet has experienced and well-qualified engineering and construction personnel.
71. BexarMet has successfully dealt with problems in providing water from an aquifer with a low recharge rate before.
72. BexarMet has the ability to provide adequate water service.

#### **SERVICE FROM AND IMPACT ON OTHER UTILITIES**

73. Ten utilities have service areas adjacent to, within, or near BexarMet's requested service area: Comal, WSI, Diamond, Canyon Lake WSC, GBRA, Elm Ridge Water Company, Berry Oaks Water Company, Lomas Water Company, Fair Oaks Ranch Utilities, and BSR Water Company.



74. BexarMet does not seek to serve within the certified area of any other utility.
75. The other utilities in the immediate area do not seek to serve in BexarMet's requested service area.
76. Granting the CCN amendment would make it more difficult for other utilities to serve the area; however, the only utilities that appeared at the hearing to oppose BexarMet, other than GBRA, were Canyon Lake WSC and Comal, both of which reached agreements with BexarMet settling their differences and withdrawing their opposition.
77. A single reliable water supplier certified to an entire area better serves the public interest than water service provided on an *ad hoc*, unplanned basis, with various landowners receiving water from personnel water wells, BexarMet stand-alone systems, or small utilities created to serve particular developments.
78. Granting the CCN amendment will have a positive impact on BexarMet, including allowing it to continue to develop a water supply for the region, securing its customer base, promoting economies of scale, and creating additional revenues for debt service and capital asset and water resource improvements.

**FINANCIAL, MANAGERIAL, AND TECHNICAL CAPABILITY TO PROVIDE CONTINUOUS AND ADEQUATE SERVICE/FINANCIAL STABILITY**

79. BexarMet's current and projected budgets for the next five years are positive.
80. BexarMet is in sound financial condition.
81. BexarMet has a broad range of financing options available to it, including debt financing, issuing bonds, and levying taxes.

