



Control Number: 44463



Item Number: 20

Addendum StartPage: 0

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PETITION OF BLUEBERRY HILLS § PUBLIC UTILITY  
WATER WORKS, LLC APPEALING §  
A DECISION BY THE CITY OF §  
BEEVILLE TO CHANGE §  
WHOLESALE WATER RATES § COMMISSION OF TEXAS

**PETITIONER'S RESPONSE TO THE CITY OF BEEVILLE'S PLEA IN ABATEMENT**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Petitioner ask the Administrative Law Judge (ALJ) to deny the City of Beeville's ("Beeville") Plea in Abatement because the intentions of Beeville and Blueberry Hills as expressed in the Wholesale Water Supply Contract clearly shows that the protested water rate increase is not charged pursuant to the Agreement.

**Background**

1. Beeville is a home-rule municipality that has power to regulate water utility rates that it charges for water utility service, however, this power applies to the regulation of water utility rates within the city and not to the water utility rates charged to the Petitioner on a wholesale basis outside the boundaries of Beeville. *See*, Tex. Water Code Ann. §13.042(a); *City of Ranger v. Morton Valley Water Supply Corp.*, 79 S.W.3d 776 (Tex. App.-Eastland [11<sup>th</sup> District] 2002) (the rate provisions in the contract were valid and enforceable and the City breached the contract)
2. On November 29, 2011, the Petitioner and Beeville executed an Agreement for Wholesale Potable Water Supply ("Wholesale Water Supply Contract" or "Agreement"). The intent of the parties as expressed in the Agreement was that Beeville would sell potable water to Blueberry Hills and Blueberry Hills would buy potable water from Beeville on a wholesale basis with the contract price to be fixed at \$2.76 per 1,000 gallons with a monthly pro rata reimbursement of \$574 per month for the pro rata costs to bring water to the point of delivery as set out in the contract, subject to any amendments to the contract that were duly approved by the governing body of each party to the Agreement. A true and correct copy of the Agreement between Beeville and the Petitioner, dated November 29, 2011, that is the subject of this proceeding is attached to this response as **Exhibit A** and is incorporated by reference for all purposes.
3. On approximately March 5, 2013, Beeville informed Blueberry Hills that it increased the fixed contract price for the wholesale water supply provided to Blueberry Hills in an undisclosed amount beyond the fixed contract price set out in the Agreement. Similar to the city in the *City of Ranger* case referenced above, Beeville incorrectly argued that as a home rule city it had the

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power to increase its water rates pursuant to its governmental rate regulation authority based on the “as amended from time to time” text in the Agreement and that the rate could be significantly more than the fixed contract price set out in the Agreement. Blueberry Hills argued that the Agreement was valid and enforceable and that Beeville could only increase the price for the wholesale water supply in accordance with a proper amendment to the Agreement that was duly approved by the governing body of each party to the Agreement. Beeville never provided any formal notice to Blueberry Hills regarding the adoption of a water rate ordinance to increase Blueberry Hills wholesale water rate prior to the adoption of the water rate ordinance by Beeville’s city council and Beeville never provided any information to Blueberry Hills that explained how Beeville calculated the amount that Blueberry Hills was being charged for the wholesale water supply that Beeville provided to Blueberry Hills.

4. On approximately December 29, 2014, Beeville informed Blueberry Hills that it increased the fixed contract price for the wholesale water supply provided to Blueberry Hills from the fixed contract price of \$2.76 per 1,000 gallons as set out in the Agreement to a base rate of \$600 per month (based on Blueberry Hills’ 6 inch wholesale water meter), \$4.00 per 1,000 gallons (above 2,000 gallons) for the wholesale water supply provided to Blueberry Hills plus administrative costs. Similar to the city in the *City of Ranger* case referenced above, Beeville incorrectly argued again that as a home rule city it had the power to increase its water rates pursuant to its governmental rate regulation authority based on the “as amended from time to time” text in the Agreement and that the rate could be significantly more than the fixed contract price set out in the Agreement. Blueberry Hills argued that the Agreement was valid and enforceable and that Beeville could only increase the price for the wholesale water supply in accordance with a proper amendment to the Agreement that was duly approved by the governing body of each party to the Agreement. Beeville never provided any formal notice to Blueberry Hills regarding the adoption of a second water rate ordinance to increase Blueberry Hills wholesale water rate prior to the adoption of the second water rate ordinance by Beeville’s city council and Beeville never provided any information to Blueberry Hills that explained how Beeville calculated the amount that Blueberry Hills was being charged for the wholesale water supply that Beeville provided to Blueberry Hills under the second water rate ordinance.

5. On February 18, 2015, Blueberry Hills filed a petition with the Public Utility Commission of Texas (“Commission”) pursuant to Texas Water Code §13.043(f) appealing a decision by the City of Beeville (Beeville) to significantly increase its wholesale water rates. The new increased wholesale water rates are set out in Beeville Ordinance 2246. The petition challenges the City of Beeville’s (“Beeville”) latest increase to the wholesale water rates, effective with meter readings after January 1, 2015. Blueberry Hills also requested interim water rates until a final decision is made in this case.

6. On February 27, 2015, Commission staff recommended that this docket be referred to the State Office of Administrative Hearing (SOAH) because the Petition met the requirements of P.U.C. Subst. R. 24.130.

7. On March 3, 2015, this proceeding was referred to SOAH and the Order of Referral required the interested parties to file with the Commission a list of issues to be addressed in this

docket by March 11, 2015. In accordance with the Order of Referral, the Petitioner timely filed its List of Issues.

8. On March 27, 2015, the Commission issued a Preliminary Order that identified the issues that must be addressed in this docket by the ALJ. The Commission stated that the list of issues in its Preliminary Order are not intended to be exhaustive and that the parties and ALJ are free to raise and address any issues relevant in this docket that they deem necessary subject to any limitation imposed by the ALJ or the Commission in future orders issued in this docket. A true and correct copy of the Commission's Preliminary Order is attached to this response as **Exhibit B** and incorporated by reference for all purposes.

9. On March 30, 2015, Beeville filed its Plea in Abatement and List of Issues with SOAH and asked the ALJ to abate the proceeding referred to SOAH by the Commission based solely on its false claim that is not supported by any evidence in which Beeville alleged that Beeville and the Petitioner do not agree on whether or not the protested water rate increase is charged pursuant to a written contract.

10. Contrary to the claim by Beeville, the Petitioner contends that the objective intent of the parties as expressed in the Agreement controls the construction of the unambiguous Agreement. Therefore, the ALJ should give effect to the parties' intentions as expressed in the Agreement that clearly shows that the protested water rate increase is not charged pursuant to the Agreement.

11. Petitioner attaches an affidavit to this response as **Exhibit C** to establish facts not apparent from the record and incorporates it by reference.

### **Arguments & Authorities**

#### **A. The parties' intentions as expressed in the Wholesale Water Supply Contract clearly shows that the protested water rate increase is not charged pursuant to the Agreement**

12. According to the Texas Supreme Court, a written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol evidence rule. Facts and circumstances that may be considered include the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction. When interpreting an integrated writing, the parol evidence rule precludes considering evidence that would render a contract ambiguous when the document on its face is capable of a definite legal meaning. The rule does not, however, prohibit considering surrounding facts and circumstances that provide information regarding the contract text and render it capable of only one meaning. *Americo Life, Inc. v. Meyer*, 440 S.W.3d 18 (Tex. 2014); *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex. 2010)

13. When a question relating to the construction of a contract is presented, a court is to take the wording of the instrument, considering the same in the light of the surrounding circumstances, and apply the pertinent rules of construction thereto and thus settle the meaning

of the contract. If in the light of surrounding circumstances, the language of the contract appears to be capable of only a single meaning, the court can then confine itself to the writing. Consideration of the facts and circumstances surrounding the execution of a contract is simply an aid in the construction of the contract's language. However, there are limits. For example, when interpreting an integrated writing, the parol evidence rule circumscribes the use of extrinsic evidence. The parol evidence rule applies when parties have a valid, integrated written agreement, and precludes enforcement of prior or contemporaneous agreements. The rule does not prohibit consideration of surrounding circumstances that inform rather than vary from or contradict the contract text. Those circumstances include the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties. A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them. *Houston Exploration Co., v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462 (Tex. 2011); *Americo Life, Inc. v. Meyer*, 440 S.W.3d 18 (Tex. 2014), *City of Ranger v. Morton Valley Water Supply Corp.*, 79 S.W.3d 776 (Tex. App.-Eastland [11<sup>th</sup> District] 2002) (the rate provisions in the contract were valid and enforceable and the City breached the contract)

14. In this case, based on the standards articulated by the Texas Supreme Court in the *Americo Life* case, the Wholesale Water Supply Contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol evidence rule. The clear intent of the parties regarding the purchase price of potable water as explained in the sworn affidavit of Linda Unger, Manager of Blueberry Hills Water Works and a party to the Agreement, was that the purchase price of potable water under the Agreement was fixed at \$2.76 per 1,000 gallons as set by Beeville's Ordinance that was adopted at that time subject to a contract amendment by Beeville and Blueberry Hills pursuant to Section 9.05 of the Agreement. The contract amendment text was included in the Agreement to allow the parties to mutually agree to amend the Agreement if it was necessary to account for fluctuations in the water rates charged under the Agreement based on a cost of service study by Beeville. Contrary to the claim by Beeville, the parties did not intend to authorize Beeville to unilaterally change the fixed contract price for the wholesale water supply by any amount at any time as determined by Beeville without a contract amendment that was duly approved by the governing bodies of each party. *See*, Sworn Affidavit of Linda Eissler Unger, Manger of Blueberry Hills, attached as **Exhibit C** and incorporated by reference for all purposes.

**B. Beeville's claim regarding its authority to unilaterally modify the price for water pursuant to the Wholesale Water Supply Contract is prohibited by the Parol Evidence Rule**

15. The parol evidence rule applies in this case because the parties have a valid, fully integrated written agreement. The parol evidence rule prohibits the ALJ from considering Beeville's claim that the words "as amended from time to time" in Section 4.01 of the Agreement authorizes Beeville to unilaterally modify the price for water by any amount at any time because this claim: (1) contradicts the fixed price contract text in Section 4.01 of the Agreement; (2) contradicts the contract amendment text in Section 9.05 of the Agreement, and (3) contradicts the entire agreement fully integrated text in Section 9.04 of the Agreement. A

binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them. *Houston Exploration Co., v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462 (Tex. 2011); *City of Ranger v. Morton Valley Water Supply Corp.*, 79 S.W.3d 776 (Tex. App.-Eastland [11<sup>th</sup> District] 2002) (the rate provisions in the contract were valid and enforceable and the City breached the contract)

16. In addition, the parol evidence rule prohibits the ALJ from considering Beeville's claim that the words "as amended from time to time" in Section 4.01 of the Agreement authorizes Beeville to unilaterally modify the price for water by any amount at any time because considering this claim would render the Agreement ambiguous when the document on its face is capable of a definite legal meaning. *Americo Life, Inc. v. Meyer*, 440 S.W.3d 18 (Tex. 2014)

**C. The ALJ should find that the protested water rate is not charged pursuant to a written contract because the fixed contract price for water is specifically stated in the Agreement**

17. Since this case presents a question relating to the construction of a contract, the ALJ should take the wording of the instrument, considering the same in the light of the surrounding circumstances, and apply the pertinent rules of construction thereto and thus settle the meaning of the contract based on the standards articulated by the Texas Supreme Court in the *Houston Exploration Co.* case. Since the language in the Agreement is capable of only a single meaning regarding the fixed contract price for water, the ALJ should confine himself to the writing and find that the fixed contract rate for the wholesale water supply is \$2.76 per 1,000 gallons as agreed to by the parties in the Agreement and that the protested wholesale water base rate of \$600 per month (based on Blueberry Hills' 6 inch wholesale water meter), \$4.00 per 1,000 gallons (above 2,000 gallons) for the wholesale water supply provided to Blueberry Hills plus administrative costs in Beeville Ordinance 2246 is not charged pursuant to the written contract that is the subject of this proceeding. *Houston Exploration Co., v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462 (Tex. 2011); *Americo Life, Inc. v. Meyer*, 440 S.W.3d 18 (Tex. 2014)

18. Contrary to the claim by Beeville, Section 4.01 of the Agreement is not an open term price provision that calculates the sale price of wholesale water based upon Beeville's firm water rate that is similar to the contract in the *Canyon Regional* case. In the *Canyon Regional* case, the water authority and river authority entered into a water purchase contract. The contract contained an open term price provision that calculated the sale price of wholesale water based upon the river authority's firm water rate. After executing the contract, the river authority increased the firm water rate in annual increments. The water authority filed a rate appeal petition with the Texas Commission on Environmental Quality. The parties reached an impasse and asked for declaratory relief. The trial court held that the firm water rate that was included in the contract's price calculation was a contractual rate and pursuant to the contract a public interest hearing was the appropriate means to obtain a rate setting hearing. The trial court found no compelling reason to disturb the rate reviewing scheme that the Commission had crafted.

19. The pertinent language in the contract between the water authority and river authority regarding the open term price provision is as follows:

15. Charges. (a) Canyon Regional shall pay GBRA for each month beginning the first month of this Water Purchase Contract through the term of this Water Purchase Contract an amount of money equal to  $1/12^{\text{th}}$  the product of that party's Long-Term Annual Quantity in effect during that month times the Firm Water Rate (hereinafter defined) in effect during that month. The "Firm Water Rate" shall be the rate charged by GBRA per acre-foot of water per year for a firm water supply reserved and supplied pursuant to this Water Purchase Contract, but in any event not less than the rate charged for stored water on a firm-yield bases from Canyon Reservoir. The present Firm Water Rate is \$61.00 per acre-foot per year.

16. Annual Adjustment. Canyon Regional shall pay GBRA at it office in Guadalupe County, Texas or such other place as GBRA may designate in writing, no later than the thirty-first (31<sup>st</sup>) day of January of each year, a dollar amount equal to the product of the following: a factor of 2.0 times the Firm Water Rate in effect on December 31 of the previous year, times the number of acre-feet of water used in the previous calendar year in excess of the Total Annual Commitment applicable for that year.

17. Adjustment of Rates. (a) the Firm Water Rate specified in this Water Purchase Contract may be adjusted by GBRA at any time and from time to time. If GBRA desires to adjust either rate, it shall, at least sixty (60) days prior to the first day on which such adjustment is proposed to become effective, give written notice of the proposed adjustment to the parties to this Water Purchase Contract: (b) The monthly charge to be paid for water delivery may be set and adjusted by GBRA at any time and from time to time, provided that the basis for the rate established by GBRA shall be the cost of service, including the debt service requirements of GBRA which were incurred in connection with the financing of the water delivery system; (c) In the event of a disagreement between GBRA and any party over any adjustment proposed by GBRA to the Firm Water Rate... applicable to that party, or over the setting or adjustment by GBRA of any delivery charge applicable to that party, GBRA and that party may apply by appropriate means to the TNRCC, or any agency succeeding to the rate-making jurisdiction of the TNRCC to establish a just and reasonable adjustment or charge.

20. The pertinent language in this fully integrated Wholesale Water Supply Contract between Beeville and Blueberry Hills provides as follows:

a. Article III, Section 3.01, Maximum Volume and Rate of Flow. Upon the execution of this Agreement by the Parties, Beeville agrees to sell, and Blueberry Hills agrees to buy a supply of potable water for the customers of Blueberry Hills Public Water System...

b. Article IV, Section 4.01, Purchase Price of Potable Water. Under this Agreement, the price of the potable water purchased from Beeville by Blueberry Hills shall be \$2.76 per 1,000 gallons as set by the City of Beeville Ordinance and as amended from time to time. Additionally, Blueberry Hills shall pay Beeville a monthly pro rata reimbursement of \$574 per month beginning on the first billing cycle after water is first delivered under this agreement and each month for a total of 240 payments or until the \$87,293 pro rata reimbursement is paid in full (whichever comes first) with no penalty for early payoff.

c. Article IV, Section 4.02, Billing and Payment. ...Blueberry Hills shall pay the agreed monthly rate and the total amount owed to Beeville based on the agreed metered quantity of wholesale water delivered multiplied by Beeville's wholesale water rate for Blueberry Hills...

d. Article IX, Section 9.04, Entire Agreement. This agreement, including any exhibits attached hereto and made a part hereof by reference for all purposes, constitutes the entire agreement between the parties relative to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements, representations, covenants or warranties, whether oral or in writing, respecting the subject matter thereof.

e. Article IX, Section 9.05, Amendment. No amendment of this Agreement shall be effective unless and until it is duly approved by the governing bodies of each party and reduced to a writing signed by the authorized representative of Beeville and Blueberry Hills.

21. Contrary to the claim by Beeville, the facts in the *Canyon Regional* case are clearly distinguishable from the facts in this case and the language in the above referenced open term price provisions in the *Canyon Regional* case does not support Beeville's contention that the Wholesale Water Supply Contract between Beeville and Blueberry Hills is an open term price contract that is analogous to the contract provisions in the *Canyon Regional* case for the following reasons: (1) unlike the open term price in the *Canyon Regional* case the Wholesale Water Supply Contract explicitly sets forth a fixed price for the wholesale water supply; (2) unlike the open term price in the *Canyon Regional* case the Wholesale Water Supply Contract does not contain a pricing scheme that allow the parties to enter into a contract for the sale of the wholesale water supply even though the price is not settled, and (3) unlike the open term price in the *Canyon Regional* case the Wholesale Water Supply Contract does not calculate the sale price of wholesale water based on Beeville's firm water rate.

**Prayer**

22. For these reasons, Petitioner asks the ALJ to deny Beeville's Plea in Abatement.

Respectfully submitted,

By: \_\_\_\_\_

Ronnie Jones

State Bar No. 00786003

9951 Anderson Mill Road, Unit 201

Austin, Texas 78750

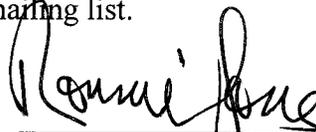
(512) 291-6821 (office)

(512) 291-6823 (facsimile)

**Attorney for Blueberry Hills Water Works, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of April, 2015, a true and correct copy of Petitioner's Response to Beeville's Plea in Abatement was served via first class mail, facsimile, or hand delivered to the following person on the attached mailing list.

  
\_\_\_\_\_  
RONNIE JONES

Patrick W. Linder  
Davidson, Troilo, Ream & Garza, P.C.  
7550 West IH-10, Suite 800  
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**Attorney for the City of Beeville, Texas**

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Austin, Texas 78711-3326  
**Attorney for the Public Utility Commission of Texas**

STATE OF TEXAS §

Dallas COUNTY §

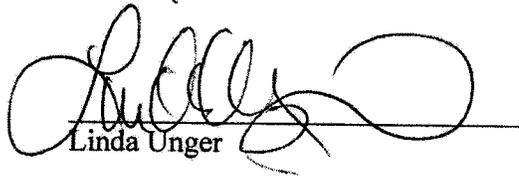
AFFIDAVIT OF LINDA UNGER

Before me, the undersigned notary, on this day personally appeared, Linda Unger, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

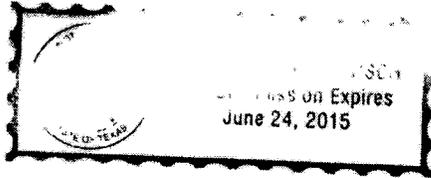
1. My name is Linda Unger, I am a managing member of Blueberry Hills Water Works, LLC ("Blueberry Hills"). I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. On approximately November 29, 2011, Blueberry Hills and the City of Beeville, Texas ("Beeville") executed an Agreement for Wholesale Potable Water Supply ("Wholesale Water Supply Contract" or "Agreement"), which is the subject of water rate appeal case by Blueberry Hills in SOAH Docket Number 473-15-2671.WS. The intent of the parties as expressed in the Agreement was that Beeville would sell potable water to Blueberry Hills and Blueberry Hills would buy potable water from Beeville on a wholesale basis with the contract price to be fixed at \$2.76 per 1,000 gallons with a monthly pro rata reimbursement of \$574 per month for the pro rata costs to bring water to the point of delivery as set out in the contract, subject to any amendments to the contract that were duly approved by the governing body of each party to the Agreement.
3. The intent of the parties regarding the purchase price of potable water under the Agreement was that the purchase price of potable water under the Agreement was fixed at \$2.76 per 1,000 gallons as set by Beeville's Ordinance that was adopted at that time subject to a contract amendment by Beeville and Blueberry Hills pursuant to Section 9.05 of the Agreement. The contract amendment text was included in the Agreement to allow the parties to mutually agree to amend the Agreement if it was necessary to account for fluctuations in the water rates charged under the Agreement based on a cost of service study by Beeville. When the agreement was executed by me and an authorized representative of Beeville I did not intend to authorize Beeville to unilaterally change the fixed contract price for the wholesale water supply by any amount at any time as determined by Beeville without a contract amendment that was duly approved by the governing bodies of each party.
4. Beeville's claim that it is authorized to unilaterally modify the price for water by any amount at any time contradicts: (1) my intent to fix the purchase price for the wholesale water supply at \$2,76 per 1,000 gallons in the text in Section 4.01 of the

Agreement at the time the Agreement was executed; (2) my intent to include the contract amendment text in Section 9.05 of the Agreement to require any and all changes to the Agreement to be reduced to a writing that is duly approved by the governing bodies of each party at the time the Agreement was executed, and (3) my intent to include the entire agreement fully integrated text language in Section 9.04 to clarify that the Agreement superseded all prior or contemporaneous agreements, representations, covenants or warranties whether oral or in writing respecting the subject matter of all provisions in the Agreement at the time the Agreement was executed.

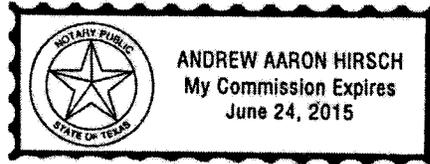
5. The fixed contract rate for the wholesale water supply is \$2.76 per 1,000 gallons as agreed to by the parties in the Agreement. The protested wholesale water base rate of \$600 per month (based on Blueberry Hills' 6 inch wholesale water meter), \$4.00 per 1,000 gallons (above 2,000 gallons) for the wholesale water supply provided to Blueberry Hills plus administrative costs in Beeville Ordinance 2246 is not charged pursuant to the written contract that is the subject of this proceeding. My intent at the time that I signed the Agreement was that any and all wholesale water supply rates that were more than the \$2.76 per 1,000 gallons rate as agreed to by the parties in the Agreement were not pursuant to the Agreement that is the subject of this proceeding. At the time that the Agreement was executed, the authorized representative of Beeville and I agreed that any and all wholesale water supply rates that were more than the \$2.76 per 1,000 gallons rate as agreed to by the parties in the Agreement were not pursuant to the Agreement.
6. At the time the Agreement was executed, I did not intend that Section 4.01 of the Agreement would be not an open term price provision that calculates the sale price of wholesale water based upon Beeville's firm water rate. Section 4.01 of the Agreement is not an open term price provision that calculates the sale price of wholesale water based upon Beeville's firm water rate.
7. At the time the Agreement was executed, we did not intend that Section 4.01 of the Agreement would be an open term price provision because: (1) we explicitly set forth a fixed price for the wholesale potable water supply; (2) we did not include a pricing scheme that allowed the parties to enter into a contract for the sale of the wholesale water supply even though the price was not settled, and (3) we did not calculate the sale price of wholesale water based on Beeville's firm water rate.

  
Linda Unger

SUBSCRIBED AND SWORN TO BEFORE ME on April 9, 2015.



  
Notary Public in and for the State of Texas  
My commission expires: June 24, 2015



## AGREEMENT FOR WHOLESALE POTABLE WATER SUPPLY

THE STATE OF TEXAS    §  
                                  §       KNOW ALL PERSONS BY THESE PRESENTS  
COUNTY OF BEE         §

This Municipal Wholesale Potable Water Supply Agreement (the "2011 Municipal Wholesale Potable Water Supply Agreement") is between Beeville, Texas ("Beeville"), a Texas municipal corporation and Blueberry Hills Water Works, LLC ("Blueberry Hills"), a Texas limited liability company.

### ARTICLE I RECITALS

- 1.1 WHEREAS, Beeville owns and operates a water supply distribution system with the capacity currently capable of providing water to Blueberry Hills; and
- 1.2 WHEREAS, Beeville and Blueberry Hills wish to enter into an agreement whereby Beeville will provide a wholesale potable drinking water supply to Blueberry Hills at a mutually agreeable rate; and
- 1.3 WHEREAS, Beeville has agreed to sell to Blueberry Hills and Blueberry Hills has agreed to buy from Beeville water for the use of Blueberry Hill's retail customers for municipal use for the consideration and upon the terms and conditions as provided in this Agreement, and
- 1.4 NOW THEREFORE, in consideration of these premises, the covenants of each Party, and other good and valuable consideration, the receipt and sufficiency of which each Party acknowledges, Beeville and Blueberry Hills (together, the "Parties") do hereby agree and covenant as follows:

### ARTICLE II DEFINITIONS

The following terms shall have the meanings set out below:

- 2.01 **Commission or TCEQ:** means the Texas Commission on Environmental Quality (TCEQ) or its successor agency.
- 2.02 **Connection:** means a single family residential unit or each commercial establishment which drinking water is supplied from the system. As an example, the number of service connections in an apartment complex would be equal to the number of individual apartment units.

- 2.03 **Default:** means the omission or failure of a party to perform their contractual duty under this Agreement.
- 2.04 **Metering Facility:** means the meter, meter vault, and all metering equipment required to measure wholesale water service to Blueberry Hills at the agreed point of delivery.
- 2.05 **Point of Delivery:** means the point designated and approved under this Agreement at which Blueberry Hills shall receive water from Beeville's Water System for distribution within Blueberry Hills' Water System as more particularly described in Exhibit 1 that is incorporated by reference to this Agreement for all purposes.
- 2.06 **Water:** means potable water meeting the requirements of the Texas Commission on Environmental Quality (TCEQ) for human consumption and other domestic uses.
- 2.07 **Wholesale Water Service Area:** means Blueberry Hills' certified water service area as more particularly described in Exhibit 2 that is incorporated by reference to this Agreement for all purposes.
- 2.08 **Wholesale Water Service:** means Beeville's provision of a potable water supply to Blueberry Hills for its distribution system that serves retail connections in its certificated water service area.

### **ARTICLE III DELIVERY OF WATER**

- 3.01 **Maximum Volume and Rate of Flow.** Upon execution of this Agreement by the Parties, Beeville agrees to sell, and Blueberry Hills agrees to buy a supply of potable water for the customers of Blueberry Hills Public Water System. The current number of connections is 138. The initial quantity of water to be delivered under this contract shall be for all current users and customers of Blueberry Hills Water Works, LLC. Current user is defined to include any connection made within one year from the day water is first delivered under this Agreement. Connections to domestic and commercial uses shall be on an "as needed" basis in an amount not to exceed two gallons per minute for every connection at a minimum pressure of 55 pounds per square inch (psi) under normal operating conditions at the delivery point.
- 3.02 **Maintenance and Repair of Facilities.** Beeville shall be responsible for maintaining and repairing its water facilities on Beeville's side of the meter described in this Agreement, which is used to provide potable water to Blueberry Hills' Water System. Blueberry Hills shall be responsible for maintaining and repairing its water facilities on Blueberry Hills' side of the meter that is used to provide potable water to Blueberry Hills' Water System.
- 3.03 **Point of Delivery.** The point of delivery will be in the general area shown on Exhibit 1.

**ARTICLE IV  
WATER RATES, CHARGES AND BILLING**

- 4.01 **Purchase Price of Potable Water.** Under this Agreement, the price of the potable water purchased from Beeville by Blueberry Hills shall be \$2.76 per 1,000 gallons as set by the City of Beeville Ordinance and as amended from time to time. Additionally, Blueberry Hills shall pay Beeville a monthly pro rata reimbursement of \$574 per month beginning on the first billing cycle after water is first delivered under this agreement and each month for a total of 240 payments or until the \$87,293 pro rata reimbursement is paid in full (whichever comes first) with no penalty for early payoff.
- 4.02 **Billing and Payment.** Beeville shall send a bill to Blueberry Hills by the fifth day of each month setting forth the quantity of water delivered to Blueberry Hills as determined by Beeville's periodic readings of the master meter(s) installed at the agreed point of delivery during the previous month. Each bill shall be due within 30 days of the billing date and Blueberry Hills shall pay the agreed monthly rate and the total amount owed to Beeville based on the agreed metered quantity of wholesale water delivered multiplied by Beeville's wholesale water rate for Blueberry Hills. Blueberry Hills shall pay the total amount owed to Beeville within 30 days of the billing date on each bill for wholesale water service. If Blueberry Hills, in good faith, questions the amount of the bill, Blueberry Hills shall follow the billing dispute procedures established by Beeville and Blueberry Hills, Blueberry Hills agrees to make timely payments to Beeville for wholesale water service.
- 4.03 **Pro Rata reimbursement.** Blueberry Hills, LLC agrees to reimburse Beeville for the pro rata cost to bring the water to the point of delivery in the original principal amount of \$87,293. This amount shall accrue interest at the rate of 4.95% per annum until paid in full, to be paid in monthly payments of \$574.00 with payments applied first to accrued interest and then to the reduction of principal, until all the original principal amount and accrued interest are paid in full. Blueberry Hills Water Works, LLC, shall guarantee repayment of these costs by signing this Wholesale Water Supply Agreement. Failure to make the payments will constitute a default and breach of this Agreement and termination of the City of Beeville's duty to perform any part of this contract.

**ARTICLE V  
MASTER METER**

- 5.01 **Master Meter Required.** Water consumed by Blueberry Hills shall be measured by a master water meter of a design, size, location and configuration approved by Beeville's Engineer. The parties agree that the proposed master water meter located in the general area of the point of delivery in Exhibit 1 shall be deemed approved under this Section upon the effective date of this Agreement. Blueberry Hills shall provide a backflow preventer that is approved by the City of Beeville.

- 5.02 **Master Meter Installation.** A master meter and related facilities, including a meter loop, a meter house or pit and appurtenances required for properly measuring the quantity of water delivered to Blueberry Hills shall be installed at the point of delivery. Blueberry Hills shall, at its own expense, install and provide the meter loop, and the meter house or pit and appurtenances. Beeville shall operate and maintain the master meter and related equipment and appurtenances. If the meter registers within AWWA (American Water Works Association) standards for that type and size of meter it shall be deemed to be accurate. Unless otherwise agreed in writing, if the meter fails to register accurately for any period, Beeville's charge for the amount of water furnished during such period shall be determined by Blueberry Hills and Beeville. In no case shall adjustments in billing be made for meter inaccuracy for more than 3 months from the time Beeville is notified of such inaccuracy. Beeville shall read the metering equipment at least once for each monthly billing cycle.

## ARTICLE VI COMPLIANCE WITH STATE

- 6.01 **Legal Lot Required.** Blueberry Hills shall not sell taps or otherwise permit the connection of water service to any new customers on a tract of land or in a subdivision, other than the Blueberry Hills subdivision within the agreed wholesale water service area unless the property is properly platted in accordance with the authority having jurisdiction over platting at the time the plat was filed.
- 6.02 **Limitation of Service Area.** This Agreement is for a specific level of wholesale water service for the wholesale water service area of Blueberry Hills. Blueberry Hills may not provide service outside its wholesale water service area as it exists on the date of this agreement without the written approval of Beeville.
- 6.03 **Plumbing Inspection.** All future plumbing work tying to the Blueberry Hills water system shall be inspected by a State licensed plumber, a licensed customer service inspector or an appropriate Bee County official to insure that the improvements are constructed in accordance with the International Plumbing Code. The inspector shall not be the plumber performing the installation.
- 6.04 **Discontinuance, Reduction or Impairment of Service.** Beeville shall to the best of its ability provide continuous and adequate wholesale water service to Blueberry Hills. Beeville shall not discontinue, reduce, or impair service to Blueberry Hills except for nonpayment of charges for water utility service provided by Beeville or for failure of Blueberry Hills to maintain and operate its distribution system in accordance with TCEQ rules and regulations. If drought conditions require curtailment of deliveries to the City of Beeville, either by Beeville's supplier or by regulation from the TCEQ or other state or federal agency, then Beeville may curtail the amount of water delivered to Blueberry Hills in conformity with and subject to the conditions, restrictions and limitations the TCEQ or its water contract with the City of Corpus Christi prescribes.

**ARTICLE VII  
TERMS AND RENEWALS**

- 7.01 **Term of Agreement.** This Agreement shall be effective from the date of execution by the authorized representatives of Beeville and Blueberry Hills and shall continue in effect for a period of twenty (20) years unless earlier terminated in accordance with the provisions hereof. Payment for services will begin on the first billing cycle after water is first delivered under this agreement.
- 7.02 **Termination.** The parties acknowledge and agree that this Agreement may only be terminated before its term by the mutual written agreement of the parties or by default of a material provision in this Agreement. Section 4.03 is a material provision of this agreement and a breach of that section by nonpayment shall constitute a default.
- 7.03 **Default.** In the event that one party believes that the other party is in default of any of the provisions in this Agreement, the non-defaulting party will make written demand to cure to the defaulting party and give the defaulting party up to 30 days to cure the default. This period must pass before the non-defaulting party may initiate any remedies available to the non-defaulting party due to such default. The non-defaulting party shall mitigate direct or consequential damages arising from any default to the extent reasonably possible under the circumstances. The parties agree that they will use their best efforts to resolve any disputes and may engage in non-binding arbitration or other alternative dispute resolution methods as recommended by the laws of the State of Texas before initiating any lawsuit to enforce their rights under this Agreement.
- 7.04 **Renewal.** This Agreement may be renewed or extended by the mutual agreement of the parties in writing for such additional periods as may be approved by the governing bodies of Beeville and Blueberry Hills.

**ARTICLE VIII  
PERFORMANCE AND FORCE MAJEURE**

- 8.01 **Effect of Force Majeure.** In the event that either party is rendered unable by force majeure to carry out any of its obligations under this Agreement, whether in whole or in part, then the obligations of that party, to the extent affected by the force majeure, shall be suspended during the continuance of the inability, provided however, that due diligence is exercised to resume performance at the earliest practicable time. As soon as reasonably possible after the occurrence of the force majeure relied upon to suspend performance, the party whose contractual obligations are affected thereby shall give notice and full particulars of the force majeure to the other party. The cause, as far as possible, shall be remedied with all reasonable diligence. The term "force majeure" includes acts of God, strikes, lockouts or other industrial disturbances, criminal conduct or sabotage, acts of the public enemy, orders of the government of the United States or the State of Texas or any civil or military authority, insurrections, riots, epidemics, landslides, lightening, earthquakes, fires, hurricanes, storms,

floods, washouts, droughts, arrests, restraints of government and civil disturbances, explosions, breakage to equipment or pipeline that are not within the control of the party claiming their ability and that could not have been avoided by the exercise of due diligence.

## ARTICLE IX GENERAL PROVISIONS

- 9.01 **Notices.** Any notice required or permitted to be delivered under this Agreement shall be forwarded via hand-delivery or by the United States Postal Service, postage pre-paid, to the address shown below:

Blueberry Hills Water Works, L.L.C.  
5902 Morningside Avenue  
Dallas, Texas 75206  
Att. Linda Unger, Manager

Beeville, Texas  
400 N. Washington Street  
Beeville, Texas 78102-3938  
Att. Beeville City Manager

With a copy to:  
Ronnie Jones  
Attorney & Counselor at Law  
9951 Anderson Mill Road, Unit 201  
Austin, Texas 78750

With a copy to:  
Frank Warner  
City Attorney  
CITY OF BEEVILLE  
310 East Corpus Christi Street  
Beeville, Texas 78102-4814

- 9.02 **Address Change Procedure.** The addresses of the parties shall, until changed as hereinafter provided, be as shown above. The parties shall have the right at any time to change their respective addresses by giving written notice of the same to the other party.
- 9.03 **Severability.** The provisions of this Agreement are severable, and if any word, phrase, clause, sentence, paragraph, section, or other part of this Agreement or the application thereof to any person or circumstances shall ever be held by any court of competent jurisdiction to be invalid or unconstitutional for any reason, the remainder of this Agreement and the application of such word, phrase, clause, sentence, paragraph, section, or other part of this Agreement to other persons or circumstances shall not be affected thereby and this Agreement shall be construed as if such invalid or unconstitutional portion had never been contained herein.
- 9.04 **Entire Agreement.** This Agreement, including any exhibits attached hereto and made a part hereof by reference for all purposes, constitutes the entire agreement between the parties relative to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements, representations, covenants or warranties, whether oral or in writing, respecting the subject matter thereof.
- 9.05 **Amendment.** No amendment of this Agreement shall be effective unless and until it is duly approved by the governing bodies of each party and reduced to a writing signed by the authorized representatives of Beeville and Blueberry Hills.

- 9.06 **No Third Party Beneficiary.** This Agreement shall not be construed to confer any right, privilege or benefit on any person or entity not a party hereto or otherwise creates any vested right or third party beneficiary relationship.
- 9.07 **Governing Law.** This Agreement shall be construed under the laws of the State of Texas and all obligations of the parties are deemed performable in Bee County, Texas.
- 9.08 **Venue.** Venue for any suit arising under this Agreement shall be in Bee County, Texas.
- 9.09 **Effective Date.** This Agreement shall become effective on the date of execution by the authorized representatives of Beeville and Blueberry Hills.
- 9.10 **Assignment and Transfer.** Blueberry Hills' rights, interests and obligations under this contract may be sold, assigned and/or transferred by Blueberry Hills upon written notice to and written approval of the City of Beeville regarding the sale, assignment and/or transfer of Blueberry Hills Water System to a third party and such written approval by the City of Beeville shall not be unreasonably withheld.

IN WITNESS WHEREOF, the authorized representatives of Beeville and Blueberry Hills have executed this Agreement as of the date(s) set forth below.

ATTEST:

CITY OF BEEVILLE, TEXAS

  
Tomas P. Saenz, City Secretary

By: 

Name: Jimmy Martinez, Jr. MICHAEL W. SCOTTEN

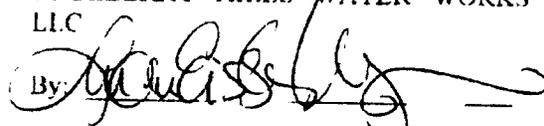
Title: Mayor MAYOR PRO-TEMPORE

Date: 11/29/2011

ATTEST:

BLUEBERRY HILLS WATER WORKS  
LLC

Blueberry Hills Managing Member

By: 

Name: LINDA EISSLER UNGER

Title: MANAGER

Date: 9/22/2011

THE STATE OF TEXAS )  
 )  
BEE COUNTY, TEXAS )

THIS INSTRUMENT is acknowledged before me on this 29<sup>th</sup> day of Nov., 2011,  
by Mike Scotten as Mayor Pro-Temp of the City of Beeville, Texas a  
municipal corporation, on behalf of said Municipal Corporation.

Susana Martinez  
Notary Public, State of Texas

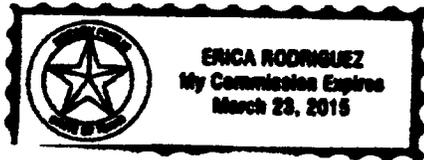


Susana Martinez  
Printed/Typed Name of Notary

My Commission Expires 3/2/2012

THE STATE OF TEXAS     )  
*Dallas*                             )  
BEE COUNTY, TEXAS     )

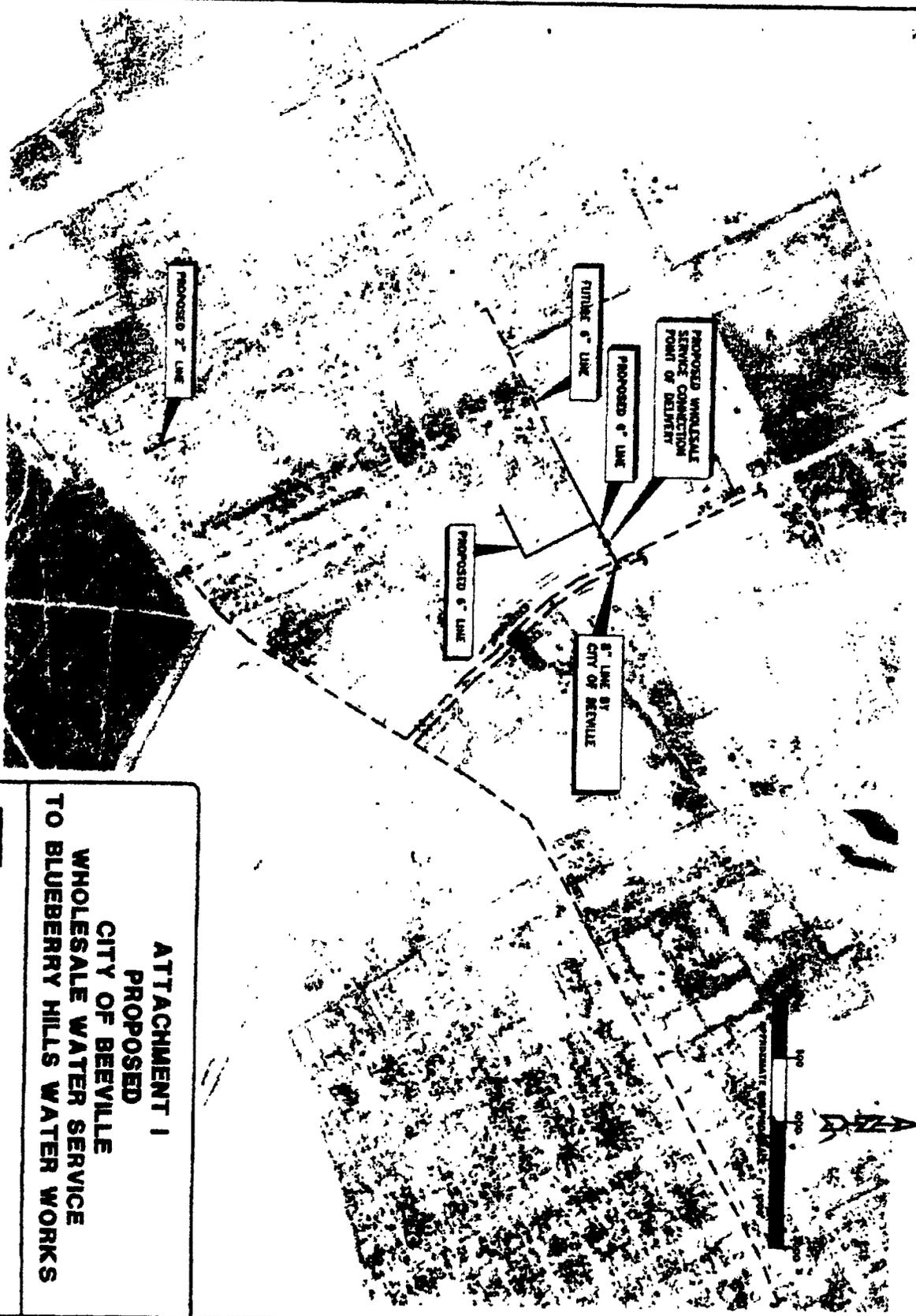
THIS INSTRUMENT was acknowledged before me on this 22 day of September, 2011 by Linda Unger, Managing Member, Blueberry Hills Water Works, L.L.C., on behalf of said company.



*Erica Rodriguez*  
Notary Public, State of Texas

*Erica Rodriguez*  
Printed/Typed Name of Notary

My Commission Expires March 23, 2015

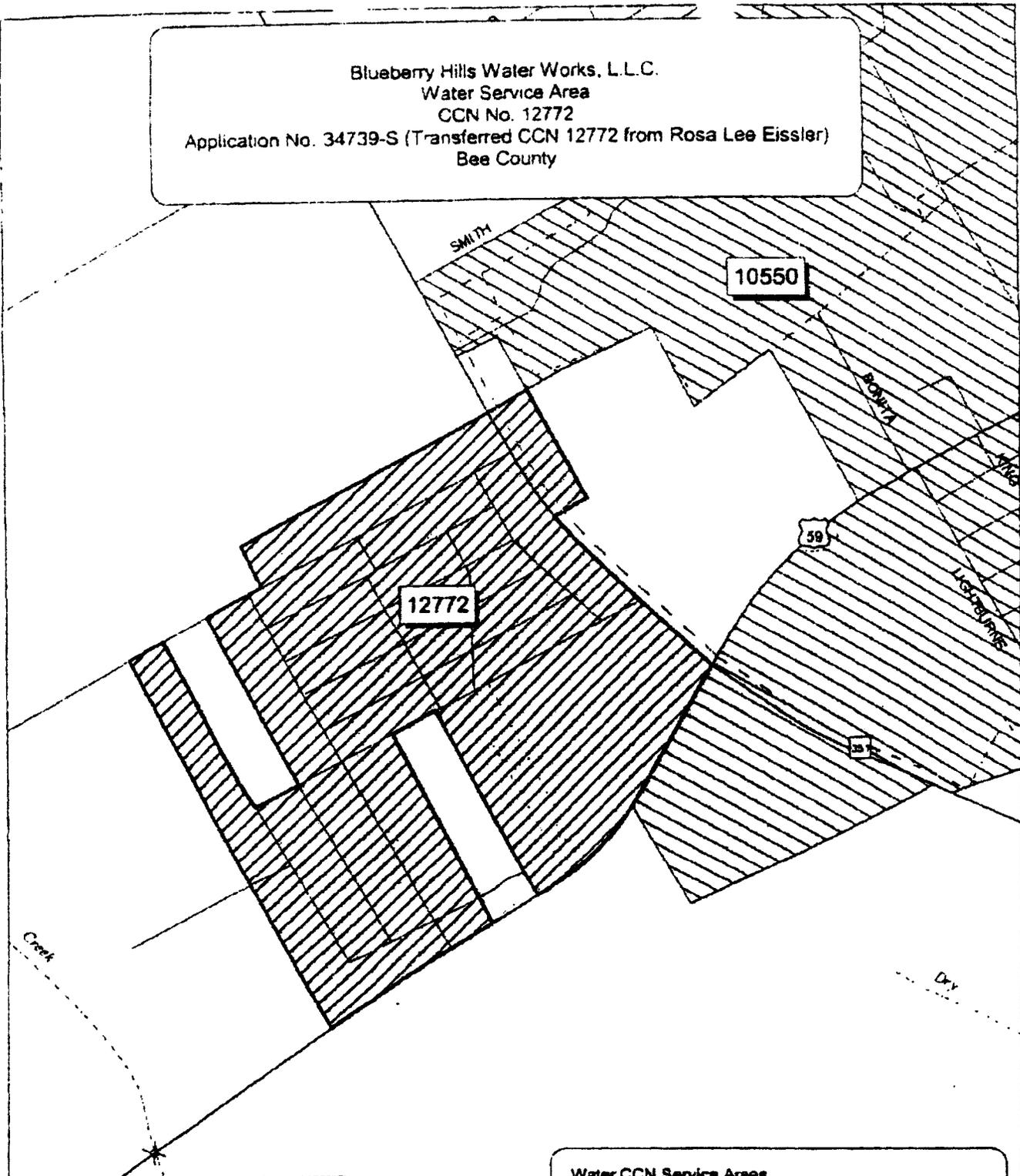


**ATTACHMENT I**  
**PROPOSED**  
**CITY OF BEEVILLE**  
**WHOLESALE WATER SERVICE**  
**TO BLUEBERRY HILLS WATER WORKS**

**TCE** TRONHOF CONSULTING ENGINEERS, INC.

**EXHIBIT**  
**I**

Blueberry Hills Water Works, L.L.C.  
Water Service Area  
CCN No. 12772  
Application No. 34739-S (Transferred CCN 12772 from Rosa Lee Eissler)  
Bee County



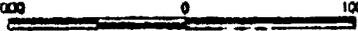
Map by S. Jester 7/29/2008  
Data path: s:\water\ccn\_working\ccn\_sj\proj\proj\34739-s.apr

**EXHIBIT**  
**2**

Water CCN Service Areas

-  12772 - BLUEBERRY HILLS WATER WORKS LLC
-  10550 - CITY OF BEEVILLE

1000 0 1000 Feet





1. Does Blueberry's appeal meet the requirements of TWC § 13.043(f) and P.U.C. SUBST. R. 24.130, 16 Texas Administrative Code (T.A.C.) § 24.130?
2. If so, are the challenged wholesale water rates set by the city of Beeville charged pursuant to a written contract (whether by agreement of the parties or as resolved by court determination in accordance with P.U.C. SUBST. R. 24.131, 16 T.A.C. § 24.131)?
  - a. If the rates are charged pursuant to a written contract, has Blueberry met its burden of proof, under P.U.C. SUBST. R. 24.136, 16 T.A.C. 24.136, by demonstrating that the rates set by the city of Beeville adversely affect the public interest by violating at least one of the public interest criteria listed in P.U.C. SUBST. R. 24.133(a), 16 T.A.C. 24.133(a)?
    - i. If the rates do not adversely affect the public interest, what are the bases for determining that the rates do not adversely affect the public interest, as required by P.U.C. SUBST. R. 24.134(a), 16 T.A.C. § 24.134(a)?
    - ii. If the rates adversely affect the public interest, what are the bases for determining that rates adversely affect the public interest, as required by P.U.C. SUBST. R. 24.134(e), 16 T.A.C. § 24.134(e)?
  - b. If the wholesale water rates set by the city of Beeville are not charged pursuant to a written contract, has the city of Beeville met its burden of proof under P.U.C. SUBST. R. 24.136, by showing that its cost of service supports imposition of the rates under P.U.C. SUBST. R. 24.131(c) and 24.135, 16 T.A.C. §§ 24.131(c) and 24.135?
3. Should interim rates be established under TWC § 13.043(h)?<sup>2</sup> If so, what are the appropriate interim rates?

This list of issues is not intended to be exhaustive. The parties and the SOAH ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to

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<sup>2</sup> See, *Petition of the City of Dallas for Review of a Decision by the Sabine River Authority to Set Water Rates (Lake Fork Reservoir)*, Docket No. 43674, Order on Appeal of SOAH Order No. 5 (Mar. \_\_, 2015).

any limitations imposed by the SOAH ALJ, or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the SOAH ALJ in the future any additional issues or areas that must be addressed, as permitted under TEX. GOV'T CODE ANN. § 2003.049(e).

## II. Effect of Preliminary Order

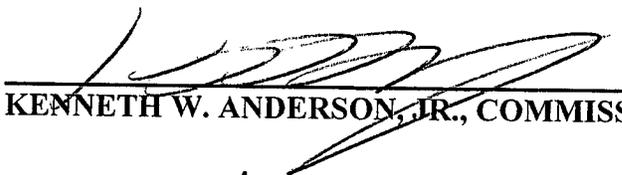
This Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the SOAH ALJ at hearing. The SOAH ALJ, upon his or her own motion or upon the motion of any party, may deviate from this Order when circumstances dictate that it is reasonable to do so. Any ruling by the SOAH ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 27<sup>th</sup> day of March 2015.

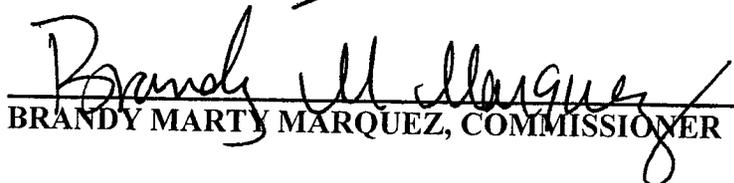
### PUBLIC UTILITY COMMISSION OF TEXAS



\_\_\_\_\_  
DONNA L. NELSON, CHAIRMAN



\_\_\_\_\_  
KENNETH W. ANDERSON, JR., COMMISSIONER



\_\_\_\_\_  
BRANDY MARTY MARQUEZ, COMMISSIONER