



## Filing Receipt

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**PUC DOCKET NO. 52655**

<b>PETITION OF McCART ST, LLC</b>	<b>§</b>	<b>BEFORE THE PUBLIC UTILITY</b>
<b>TO AMEND BOLIVAR WATER</b>	<b>§</b>	
<b>SUPPLY CORPORATION’S</b>	<b>§</b>	
<b>CERTIFICATE OF CONVENIENCE</b>	<b>§</b>	<b>COMMISSION OF TEXAS</b>
<b>AND NECESSITY IN DENTON</b>	<b>§</b>	
<b>COUNTY BY EXPEDEITED</b>	<b>§</b>	
<b>RELEASE</b>	<b>§</b>	

**PETITIONER’S RESPONSE**  
**TO BOLIVAR’S APPRAISAL REPORT**

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

McCart St, LLC (“Petitioner”) hereby files this Response to Bolivar Water Supply Corporation’s (“Bolivar”) Appraisal Report (hereafter “Appraisal Report”).<sup>1</sup> In support thereof, Petitioners show the following:

**I. BACKGROUND**

On April 4, 2022, the Commission issued a Final Order granting streamlined expedited release of approximately 251 acres (the “Removed Area”), which is the property at issue in this docket, and triggering the compensation phase of the docket. On June 10, 2022, Petitioner’s appraisal report determined that \$0 in compensation is owed to Bolivar because of the decertification in this docket.<sup>2</sup> On June 13, 2022, Bolivar filed its Appraisal Report. The Appraisal Report, relied on a “Planning Report”<sup>3</sup> and concluded that the compensation amount should be **\$1,928,355.**

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<sup>1</sup> The Appraisal Report was filed as Document No. 27 in this docket.

<sup>2</sup> Petitioner’s appraisal report was filed as Document No. 25 in this docket.

<sup>3</sup> *Planning Report for Water Facility Improvements Year 2022 Through 2032*, Bolivar Water Supply Corporation, Cooke, Denton & Wise County, Texas (June 13, 2022) (hereafter “Planning Report”). The Planning Report is attached to the Bolivar Appraisal Report as an Addenda.

Bolivar's Appraisal Report is deficient on the law and the facts. In reaching its compensation determination, Bolivar purports to rely on the factors set out at Tex. Water Code §13.254(g) and 16 Tex. Admin. Code § 24.245(j), but Bolivar grossly misapplies such factors. In particular, Bolivar seeks approximately \$1.92 million by combining certain factors from Tex. Water Code §13.254(g). Even a cursory reading of Bolivar's explanation shows what Bolivar is really seeking is compensation for lost future revenues, which is clearly not authorized by Statute, Rule and past Commission decisions. Second, Bolivar seeks approximately \$149,000.00 for costs allocable to service to the decertificated area. This argument is clearly erroneous since there is not, and never has been, service to the decertificated area.

From a factual standpoint, Bolivar alleges that the decertificated property is in Pressure Plane 5. However, it appears, according to the map shown on **Exhibit 1**, the property that is the subject of this proceeding is outside of any of the pressure planes. *See Exhibit 1*. The significance of this fact is that, among other matters, Bolivar's "Planning Report" makes no plans for service to the property in question. Even if it did, Bolivar's Appraisal Report has other serious deficiencies. Specifically:

- With respect to Factor 2C:
  - A. As stated above, because there is no service to the decertificated area, as is the case here, there are no costs to allocate.
  - B. The area to be served is not in any Pressure Plane identified in Bolivar's "Planning Report." There are no facilities allocated to the Removed Area.
  - C. The facilities in Pressure Plane 5 Serve Existing Customers, not the Removed Area.
  - D. The "Planning Report" vastly overstates the value of the facilities.

- E. If an acreage calculation is correct, then the cost of the entire system should be considered.
- F. Bolivar's Appraisal failed to consider depreciation that is recognized in the audits.
- With respect to Factors 2E/2F/2H:
  - A. Bolivar seeks to obtain compensation for "losing the opportunity to receive revenues from serving the released 251.233 acres."<sup>4</sup> The law is settled that Bolivar is not entitled to compensation for such loss.
  - B. Commission precedent is clear that Bolivar cannot recover for "losing the opportunity to receive revenues from serving the released" property.
  - C. Even if Bolivar is entitled to compensation under Factors 2E/2F/2H, Bolivar does not appropriately calculate present value.
- With respect to Factor 2G:
  - A. Bolivar is not entitled to the cost of its appraisal.
  - B. Bolivar is not entitled to unnecessary legal expenses and professional fees.

## **II. THE REMOVED AREA IS OUTSIDE ALL OF THE AREAS IDENTIFIED FOR POSSIBLE SERVICE IN BOLIVAR'S "PLANNING REPORT"**

The Bolivar Appraisal Report included and relied on a "Planning Report" that was prepared on June 13, 2022. The "Planning Report" was clearly prepared for litigation purposes and has little to do with Bolivar's actual planning as it was prepared on the date that the Appraisal Report was due and filed.

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<sup>4</sup> Bolivar Appraisal Report at 4.

The “Planning Report” (dated June 13, 2022) was not in existence on the date that the Removed Area was decertified (April 4, 2022). Therefore, it does not provide any basis for analysis when the Removed Area was still in the CCN. It is nothing more than a document prepared under the guise of a “Planning Report” when none existed before, simply to advance Bolivar’s position.<sup>5</sup> It should be disregarded in its entirety.

Moreover, Bolivar’s “Planning Report” does not plan for the area that was decertified. The Planning Reports states that “[c]urrently the BWSC system is segmented into seven (7) pressure planes with the capability of being able to move water between selected planes on an emergency basis or when growth occurs near common pressure plane boundaries.”<sup>6</sup> The Appraisal Report’s assertion that the Removed Area is in pressure plane 5 is mistaken. A simple comparison of the map of the Removed Area with the map of the pressure planes in the “Planning Report” shows that the Removed Area is not in any of the pressure planes. See **Exhibit 1**. Because the Removed Area is not in any of the pressure planes for Bolivar, according to Bolivar’s own “Planning Report” the Bolivar system has no “capability” to serve the Removed Area.

### **III. FACTOR 2C (“expenditures for planning, design, or construction of the service facilities of the former CCN holder that are allocable to service to the removed area”)**

Factor 2C provides compensation for “expenditures for planning, design, or construction of the service facilities of the former CCN holder that are allocable to service to the removed area.”<sup>7</sup> Bolivar’s analysis on this issue is contrary to the statutory and regulatory requirements

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<sup>5</sup> Even if an entity is entitled deference (which is not the case here), such deference must be disregarded “when it appears that the interpretation is nothing more than a ‘convenient litigating position,’ *Bowen v. Georgetown Univ. Hospital*, 488 U. S. 204, 213, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988), or a ‘post hoc rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack,” *Auer [v. Robbins]*, 519 U. S. 452, 462, 117 S. Ct. 905, 137 L. Ed. 2d 79 (quoting *Bowen*, supra, at 212, 109 S. Ct. 468, 102 L. Ed. 2d 493; alteration in original).” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166-67 (2012).

<sup>6</sup> “Planning Report” at 3 (emphasis added).

<sup>7</sup> 16 Tex. Admin Code § 24.245(j) (emphasis added). See also Tex. Water Code §13.254(g) (emphasis added). (“the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question”).

and should not be adopted. As discussed below, and set out in Petitioner's appraiser's report, \$0 in value should be assigned to this factor.

**A. There Are No Facilities that Serve the Removed Area**

In Findings of Fact 21-23, the Commission has already found in this case that:

21. The CCN holder has not committed or dedicated any facilities or lines to the tract of land for water service.

22. The CCN holder has no facilities or lines that provide water service to the tract of land.

23. The CCN holder has not performed any acts for or supplied anything to the tract of land.

In other words, there are no facilities or lines that are allocable to service the Removed Area. If there is no service, there are no costs to allocate. Bolivar's attempt to say that nearby facilities are somehow relevant, when they are not committed or dedicated to the subject tract, when they do not serve the removed area, is simply disingenuous and should be disregarded.

**B. The Removed Area is Not in any Pressure Plane – There Are No Facilities**

As discussed above, Bolivar's Appraisal Report asserts that the Removed Area is part of pressure plane 5.<sup>8</sup> It is not. **Exhibit 1.** Because the "Planning Report" claims to identify the areas Bolivar is capable of serving, and because the Removed Area is not in any of those areas, there can be no facilities that have been allocated to Removed Area. The Removed Area is outside all of the identified the pressure planes.

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<sup>8</sup> Appraisal Report at 3.

**C. The Facilities in Pressure Plane 5 Serve Existing Customers – Not the Removed Area**

The “Planning Report” states that the “[e]ach pressure plane is served by [facilities] based on the number of connections served in each plane.”<sup>9</sup> Even in Bolivar’s own suspect “Planning Report,” the facilities are based on number of connections, not acres.

Basing the facilities on connections rather than acres is consistent with TCEQ rules. Facility requirements are based upon the number of connections and are not dependent on acreage.<sup>10</sup> Allocating cost based on acreage is thus arbitrary, and is inconsistent with how facilities are designed and operated under TCEQ rules. An acreage calculation is not an appropriate basis for conducting the appraisal.

Applying Bolivar’s own “Planning Report,” the facilities in pressure plane 5 were designed to serve 569 existing connections.<sup>11</sup> There is no evidence that the existing facilities were designed to serve the Removed Area, as it has zero connections.

In fact, the “Planning Report” states that if the number of connections were to increase to 869 connections (a 300-connection increase over what is currently being served), then Bolivar would need to design and build an additional 300,000 Gallon Elevated Tank and another water supply well. The Removed Area would use 250 LUEs.<sup>12</sup> Thus, the existing facilities are clearly insufficient to serve the Removed Area and are not “allocable” to service to the removed area.

To recover compensation under Factor 2C, absent a showing of actual service to the Removed Area, Bolivar should be required to establish that it has unused capacity that could only serve the 251 acres that were decertificated. It is clear that is not the case, as the “Planning Report”

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<sup>9</sup> “Planning Report” at 3 (emphasis added).

<sup>10</sup> See, e.g., 30 Tex. Admin. Code §290.45 (providing, for instance, for pumping capacity of 1.5 gpm *per connection*; ground storage of 200 gallons *per connection*; and elevated storage of 100 gallons *per connection*).

<sup>11</sup> “Planning Report” at 4.

<sup>12</sup> Bolivar Appraisal Report at 4.

provides evidence that there is no unused capacity because additional facilities will need to be built to serve an additional 250 LUEs. In fact, the “Planning Report” states that pressure plane 5 has approximately 25,000 acres and only 569 connections. Bolivar has not, therefore, met the minimum requirements for demonstrating that it is owed compensation under this factor.

#### **D. The Planning Report Vastly Overstates the Value of the Facilities**

The “Planning Report” contains valuations that are dramatically inflated and are contradicted by Bolivar’s 2021 and 2020 Audit Reports, which show much lower valuations.<sup>13</sup> See **Exhibit 2** and **Exhibit 3** for Bolivar’s Audit Reports. For instance, the “Planning Report” concludes that the value of Bolivar’s distribution system alone is \$60,477,000.<sup>14</sup> Adding up the value of all the facilities identified in the “Planning Report” yields the conclusion that the entire system is valued at \$89,457,500. This is in contrast to Bolivar’s 2021 Financial Statements and Independent Auditors’ Reports, which was produced by Bolivar in discovery and determines that the value of Bolivar’s entire system is only \$11,646,812.<sup>15</sup> Bolivar’s 2020 Financial Statements and Independent Auditors’ Report similarly concluded that the value of Bolivar’s entire system was \$10,663,688.<sup>16</sup> Assuming the higher 2021 valuation, Bolivar audits show the system to be worth only 13% of what its “Planning Report” purports the values to be. Bolivar’s “Planning Report” valuations were obviously created for purposes of litigation, are dramatically inflated compared to its Independent Auditors’ Reports, are not credible, and should be disregarded. Bolivar’s Appraiser Report’s reliance on the inflated “Planning Report” figures was in error. At best, the most that could possibly be due even under Bolivar’s method (which Petitioner continues

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<sup>13</sup> The Audits were conducted by Certified Public Accounts “in accordance with the auditing standards generally accepted in the United States of America.”

<sup>14</sup> “Planning Report” at 3-5.

<sup>15</sup> **Exhibit 2.**

<sup>16</sup> **Exhibit 3.**



to assert to be flawed), based on actual audited statements, is 13% of what the Appraiser Report asserts (for a maximum of \$19,334.00).

**E. If an Acreage Calculation is Correct, then the Entire System Should be Considered**

Petitioner adamantly disagrees that an “acreage” calculation would be correct for determining facilities that are allocable to service to the removed area.

Notwithstanding, if an acreage calculation is accepted by the Commission, then the entire system should be considered. The “Planning Report” states that “[c]urrently the BWSC system is segmented into seven (7) pressure planes with the capability of being able to move water between selected planes on an emergency basis or when growth occurs near common pressure plane boundaries.”<sup>17</sup> In other words, the entire system is interconnected. Therefore, any acreage calculation based on acres should consider all acres of the CCN area.

The entire CCN is 212,035 acres.<sup>18</sup> The Removed Area is approximately 251 acres. The Removed Area, therefore, constitutes 0.1% of the entire interconnected area. Thus, even under Bolivar’s theory, because the facilities are interconnected, the acreage calculation should be based on all the facilities and the Removed Area constituting only 0.1% of the total. The 2021 Audit states that the value of all the facilities is \$11,646,812.<sup>19</sup> The amount allocable to the Removed Area, therefore, is at most \$11,646.81 (0.1% of \$11,646,812).

**F. Bolivar’s Appraisal Failed to Consider Depreciation.**

Bolivar’s “Planning Report” asserts, without any support, that the facilities in pressure plane 5 are valued at \$14,800,000.<sup>20</sup> The “Planning Report” fails to account for any depreciation,

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<sup>17</sup> Planning Report at 3.

<sup>18</sup> Planning Report at 3.

<sup>19</sup> Exhibit 2.

<sup>20</sup> “Planning Report” at 4.

however, which fails to accurately identify the value of a facility. Compare the “Planning Report” with Bolivar’s Audits at **Exhibit 2** and **Exhibit 3**.

#### **IV. FACTORS 2E/2F/2H**

Bolivar meshes three factors together to obfuscate the fact that what they are seeking is compensation for “losing the opportunity to receive revenues from serving the released 251.233 acres.”<sup>21</sup> This attempt to recover lost revenues from future customers is contrary to the statute and several Commission precedents that have directly addressed this issue.

##### **A. The Statute Prohibits Compensation for Loss of Future Customers**

Applying principles of statutory construction to TWC §13.254(g) can only result in the determination that there is no compensation available to a decertified utility for future revenues from customers who are not receiving service at the time of decertification.

The Texas Water Code §13.254(g) provides that the value of personal property shall be determined according to specified factors. Critically, one of those factors is “*the impact on future revenues lost from existing customers.*” Texas Water Code §13.254(g) (emphasis added). Clearly, the Texas Legislature dealt with the issue of future revenues, or “lost economic opportunity” and limited compensation based on future revenues to revenue generated by those customers that existed at the time of the decertification.

In construing statutes, the goal is to give effect to the drafter’s intent. *Texas Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). This determination begins with the wording of the statutes or regulations involved. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998). In construing a statute, courts presume that the Legislature intended the entire statute to be effective. *See* Tex. Gov’t Code Ann

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<sup>21</sup> Appraisal at 4.

§ 311.021(2). Accordingly, a court must interpret the statute as written. *See In re Doe*, 19 S.W.3d 346, 351 (Tex. 2000).

Every word in a statute is presumed to have been used for a purpose and every word excluded is presumed to have been excluded for a purpose. *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995). Thus, “a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible.” *Texas Workers’ Compensation Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (citing *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963)).

In other words, when construing a statute the entire statute is presumed to be effective and the court should not read a portion of the statute to be useless or a nullity.<sup>22</sup> A court must give effect to all words of a statute and not treat any language as surplusage.<sup>23</sup> The Texas Supreme Court has held, “It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.”<sup>24</sup>

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<sup>22</sup> *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); *see also* Tex. Gov’t Code Ann. § 311.021(2); *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 (Tex. 2010); *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010); *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *Phillips v. Bramlett*, 288 S.W.3d 876, 880–81 (Tex. 2009); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006); *Cities of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442–43 (Tex. 2002).

<sup>23</sup> *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89–90 (Tex. 2001); *Tex. Workers’ Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); *Abrams v. Jones*, 35 S.W.3d 620, 625 (Tex. 2000); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

<sup>24</sup> *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002); *see also* *Kappus v. Kappus*, 284 S.W.3d 831, 835 (Tex. 2009); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *Old Am. Cnty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

Bolivar's attempt to be compensated for "losing the opportunity to receive revenues from serving the released 251.233 acres"<sup>25</sup> is merely an attempt to recoup for future revenues lost from future customers.

A simple review of the history of TWC §13.254 is helpful. In the Omnibus water bill in the 75<sup>th</sup> Legislative Session, commonly called "SB 1", the legislature amended TWC §13.254 to add subsection (g) that included factors to consider in determining the monetary amount, if any, for a retail public utility that had part or all of its CCN decertificated. In SB 1, the goal of the compensation factors was as follows: "The factors ensuring that the compensation to a retail public utility for the taking, damaging, or loss of personal property, including the retail public utility's business, is just and adequate shall at a minimum include . . . ."<sup>26</sup> The most relevant of the factors that SB 1 included in §13.254(g) at that time was "the impact on future revenues and expenses of the retail public utility".<sup>27</sup> Equally important is the language that SB 1 included in new subsection (h).<sup>28</sup> New §13.254(h), added by SB 1, read as follows:

(h) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time. If there were no current customers in the area decertified and no immediate loss of revenues or if there are other valid reasons determined by the commission, installment payments as new customers are added in the decertified area may be an acceptable method of payment.<sup>29</sup>

Reading TWC §13.254(g) and (h), as they were passed in 1997 pursuant to SB 1, it is clear that the Legislature contemplated a retail public utility that had its CCN, either totally or partially,

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<sup>25</sup> Appraisal Report at 4.

<sup>26</sup> **Exhibit 4**, "Excerpts from An Act Relating to the Development and Management of the Water Resources of the State; Providing Penalties, 75th Legislative Session (1997), Commonly Called 'SB 1'" at 2 (emphasis added) (hereafter "SB1 Excerpts").

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 3.

<sup>29</sup> *Id.*

decertificated, would be compensated, at least at some level, for lost revenues from customers that did not exist at the time of the decertification. This was the law prior to 2005.

It is just as clear, however, that in 2005, the 79<sup>th</sup> Legislature changed its mind and specifically did not intend for a retail public utility, when an area was decertificated, to be compensated for lost revenue for customers not in existence at the time of the decertification. The legislative vehicle for this was HB 2876.<sup>30</sup> First, the Legislature amended the goal of the compensation by removing any reference to compensating for the loss of a retail public utility's business, which is exactly what Bolivar is claiming.<sup>31</sup> HB 2876 also removed from the compensation factors the term "at a minimum".<sup>32</sup> So, after HB 2876, only the eight factors that are listed were to be considered in determining adequate compensation. Second, the Legislature amended the relevant language of TWC §13.254(g) relating to compensation factors as follows: "the impact on future revenues lost from existing customers." Equally important, HB 2876 fully repealed TWC §13.254(h), which, prior to 2005, provided for payments for future customers.<sup>33</sup>

By limiting future revenue only to that revenue that existing customers generate, the Legislature focused compensation largely to be limited to actual stranded assets that have been built in the area and are to serve the removed area.<sup>34</sup>

The Bolivar Appraisal Report offers no precedent or legal authority to support its claim that Bolivar is entitled to compensation for "losing the opportunity to receive revenues from serving the released 251.233 acres."<sup>35</sup>

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<sup>30</sup> **Exhibit 5**, HB 2876, An Act Relating to Certificates of Public Convenience and Necessity for Water Service and Sewer Service, 79th Legislative Session (2005) (hereafter "HB 2876").

<sup>31</sup> *Id.* at 015 to 016.

<sup>32</sup> *Id.* at 015.

<sup>33</sup> *Id.* at 021:9.

<sup>34</sup> See **Exhibit 6**, House Research Organization Bill Analysis HB 2876, 79th Legislative Session (May 11, 2005) at 6 (hereafter "HB 2876 Analysis").

<sup>35</sup> Bolivar Appraisal Report at 4.

Instead, Bolivar’s justification for ignoring these principles of statutory construction is that it should be compensated for lost future revenue under the “other relevant factors” category set forth in Texas Water Code §13.254(g).<sup>36</sup> This position, however, ignores another basic canon of statutory construction – that the express mention or enumeration of one person, thing, consequence, or class is the equivalent to an express exclusion of all others.<sup>37</sup> The legislature identified a factor – “future revenues.” It expressly included “future revenues lost from existing customers.” Therefore, it expressly excluded other types of “future revenues” – including future revenues from future customers. “Other relevant factors” are other factors – not other “future revenues.” The legislature’s amendment makes it clear that the “future revenues” factor is limited. The fact that in the same bill where the Legislature fully repealed TWC §13.254(h), which specifically included timing of payments when new customers are added, makes it abundantly clear that the Legislature abandoned the notion of compensation for future customers.

**B. Commission Precedent is Clear that Bolivar Cannot Recover for Losing the Opportunity to Receive Revenues From Future Customers in the Released Area.**

In PUC Docket No. 45848, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County* (hereafter *Celina*), Mr. Korman, the author of the Bolivar Appraisal Report, argued that a CCN Holder should be compensated for the “lost . . . economic opportunity of the reasonably probable 575 connections for both water and waste water [from the land that was decertificated].”<sup>38</sup> The Commission rejected Mr. Korman’s argument in that case, yet he makes it again here.

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<sup>36</sup> Bolivar Appraisal Report at 4.

<sup>37</sup> *Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108–09 (Tex. 1985).

<sup>38</sup> Exhibit AT-1 at 7, Document No. 8 in PUC Docket No. 45848, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*.

The *Celina* case supports the position that potential lost revenues from future customers is not a proper basis for a compensation award. In that 2017 decertification case, at issue was whether “lost economic opportunity” concerning lost future revenues from future customers was a proper basis for a compensation award.<sup>39</sup> There, the Proposal for Decision (PFD) considered the compensation factors of Water Code §13.254(g) and stated that while the CCN holder “argues that removing the Tract from its CCN hurt its ‘regional economic opportunity,’ such ‘opportunity’ from non-existent customers is speculative and precisely the type of hypothetical damages the Legislature sought to avoid in drafting the statute.”<sup>40</sup> The ALJ concluded:

[I]t is clear that the legislature did not intend a decertified utility to be compensated for future revenues from customers who do not yet exist at the time of decertification. The statute itself is clear when it states that compensation shall include the impact on future revenues lost from existing customers.<sup>41</sup>

The PUC’s Final Order in that case likewise provides that “TWC § 13.254(g) limits recovery for the impact on future revenues to losses from existing customers. [The CCN holder’s] lost future revenues from currently non-existing customers are not property and are not compensable under TWC §§ 13.254(d) and (g).”<sup>42</sup>

The same conclusion was reached by the Commission in PUC Docket No. 45702, *Application of City of Cibolo for Single Certification* (Conclusion of Law 15 stated “TWC § 13.255(g) limits recovery for the impact on future revenues to losses from existing customers.

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<sup>39</sup> See PUC Docket No. 45848, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*.

<sup>40</sup> PUC Docket No. 45848, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, SOAH Proposal for Decision, Jan. 27, 2017, at p. 30.

<sup>41</sup> PUC Docket No. 45848, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, SOAH Proposal for Decision, Jan. 27, 2017, at p. 31 (emphasis in original).

<sup>42</sup> PUC Docket No. 45848, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, Final Order, April 13, 2017, at Conclusion of Law 19.

[The CCN Holder's] lost future revenues from currently non-existing customers are not property and are not compensable under TWC § 13.255(c) and (g)".<sup>43</sup>

A recent Appraiser's Report submitted by PUC Staff likewise stated that projected loss from any future customers is not an appropriate consideration for a compensation determination where, as here, the CCN holder will not lose any real property, facilities, or customers within the release area.<sup>44</sup>

In short, the statute, PUC rules, and precedent make clear that future losses from future customers is not a basis for a compensation award. No compensation should be awarded to Bolivar under these factors.

**C. Even if Bolivar is Entitled to Compensation under Factors 2E/2F/2H, Bolivar Does not Appropriately Calculate Present Value**

It is clear that in calculating the \$1,765,848 number, despite referring to the figure as the "net present value amount," Bolivar calculated the gross amount without taking into account any costs or expenses. This is simply not how present value is calculated. Thus, even if these speculative losses were properly part of the compensation owed to a CCN holder (and they are not), Bolivar's reliance on gross figures without offsetting for expenses was erroneous.

Because Bolivar's "Planning Report" shows that it will require an additional \$2,200,000 in capital expenditures to serve the Removed Area,<sup>45</sup> the appropriate Net Value calculations is shown below at Figure 1:

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<sup>43</sup> PUC Docket 45702, *Application of City of Cibola for Single Certification*, Document No. 182.

<sup>44</sup> See PUC Docket No. 51973, Commission Staff's Submission of Appraisal Report, March 18, 2022 ("HMW is endeavoring to use a fair market analysis determination to derive a value for projected loss from any future customers in the tract being part of the expedited [sic] release. Given that HMW will not lose any real property nor facilities or customers within the expedited [sic] release of this tract from its certified service area, no value should be allocated for this factor"). See also PUC Docket No. 45679 (Third-party appraiser determining that "[t]here are no existing [CCN Holder] customers within the Subject Tract . . . [t]herefore, no value is assumed for this item."

<sup>45</sup> Planning Report at 6.



Figure 1

Discounted Cash Flow								
Period	Year			Required Capital for Development to Service McCart's Property	LUE's	Fee	Sales	Total
0	2022	-	2023	(2,200,000)	-	\$ -	\$ -	(2,200,000)
1	2023	-	2024		-	\$ -	\$ -	\$ -
2	2024	-	2025		50	225,000	32,500	257,500
3	2025	-	2026		100	225,000	65,000	290,000
4	2026	-	2027		150	225,000	97,500	322,500
5	2027	-	2028		200	225,000	130,000	355,000
6	2028	-	2029		250	225,000	162,500	387,500
7	2029	-	2030		250	\$ -	162,500	162,500
8	2030	-	2031		250	\$ -	162,500	162,500
9	2031	-	2032		250	\$ -	162,500	162,500
10	2032	-	2033		250	\$ -	162,500	162,500
11	2033	-	2034		250	\$ -	162,500	162,500
12	2034	-	2035		250	\$ -	162,500	162,500
13	2035	-	2036		250	\$ -	162,500	162,500
14	2036	-	2037		250	\$ -	162,500	162,500
15	2037	-	2038		250	\$ -	162,500	162,500
16	2038	-	2039		250	\$ -	162,500	162,500
17	2039	-	2040		250	\$ -	162,500	162,500
18	2040	-	2041		250	\$ -	162,500	162,500
19	2041	-	2042		250	\$ -	162,500	162,500
20	2042	-	2043		250	\$ -	162,500	162,500
Net Present Value @ 10% Discount Rate = (\$234,151.99)								

As can be seen, when one includes the cost of \$2.2 million to construct the necessary infrastructure to provide water service, the NPV of that project's cash flows is a negative value.

## V. FACTOR 2G

### A. Bolivar is not entitled to the cost of its appraisal.

In Factor 2G, Bolivar includes its \$8,000 appraisal fee as part of its total fees for which compensation should be provided. However, the statute and the PUC's rules are clear: Bolivar must bear the costs of its appraisal. The Texas Water Code states that where the "petitioner and the certificate holder cannot agree on an independent appraiser ... the petitioner and the certificate

holder shall each engage its own appraiser *at its own expense*.”<sup>46</sup> Bolivar may not recover the costs of its appraiser.

**B. Bolivar is not entitled to unnecessary legal expenses and professional fees**

In addition, only necessary legal expenses and professional fees are available to Bolivar. Bolivar provided no evidence in the form of bills to justify its legal fees. Because the Removed Area is not even in the pressure planes of Bolivar, there was no justification any attorney’s fees or appraisal. Moreover, Bolivar made numerous filings in this case that were simply not necessary. Bolivar’s request for legal fees should be denied.

**PRAYER**

Petitioner prays that

- (1) the Third-Party appraiser consider the arguments made in this response and that nothing be awarded as compensation to Bolivar;
- (2) that Commission consider the arguments made in this response and that nothing be awarded as compensation to Bolivar; and
- (3) the Commission grant all such further relief to which Petitioner may be entitled.

Dated: June 20, 2022

Respectfully submitted,

/s/ David Tuckfield

**ANDY BARRETT & ASSOCIATES, PLLC**

Andrew N. Barrett

State Bar No. 01808900

3300 Bee Cave Road, Suite 650 #189

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<sup>46</sup> Tex. Water Code § 13.2541(i); *see also*, 16 Tex. Admin. Code § 24.245(i)(2)(B).

Austin, Texas 78746  
512-600-3800  
512-330-0499 FAX

**THE AL LAW GROUP, PLLC**  
David J. Tuckfield  
12400 Highway 71 West  
Suite 350-150  
Austin, TX 78738  
(512) 576-2481  
(512) 366-9949 Facsimile  
david@allawgp.com

ATTORNEYS FOR PETITIONER  
MCCART ST, LLC

**CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record on June 20, 2022 in accordance with the Order Suspending Rules filed in Project No. 50664.

*/s/ David Tuckfield*  
\_\_\_\_\_  
David J. Tuckfield

# **EXHIBIT 1**

**UNSWORN DECLARATION OF GREGORY N. GRAHAM  
PURSUANT TO TEXAS CIVIL PRACTICE AND REMEDIES CODE § 132.001**

1. “My name is Gregory N. Graham. I am over twenty-one (21) years of age. I am of sound mind, and I have never been convicted of a felony or crime involving moral turpitude. I am capable of making this declaration and certification.

2. The facts, statements, certifications, acknowledgments, and verifications made herein are within my personal knowledge and are true and correct.

3. I am a Landman for Amtex Energy, Inc. and, as such, I am familiar with mapping and mapping systems.

4. I prepared the map attached as Attachment A to this Declaration by starting with the map entitled “Bolivar Water Supply Corporation Pressure Planes” attached as Appendix A in the *Planning Report for Water Facility Improvements Year 2022 Through 2032*, Bolivar Water Supply Corporation, Cooke, Denton & Wise County, Texas (June 13, 2022) (hereafter “Bolivar Pressure Plane Map”). Using the Bolivar Pressure Plane Map as the base map, I overlayed the approximately 251-acre tract that was removed from Bolivar Water Supply Corporation’s certificate of convenience and necessity in Texas PUC Docket No. 52655 and I labeled that tract “McCart St, LLC Property.” I did not prepare the Bolivar Pressure Plane Map and make no representations regarding such map – I only used it as the base to overlay the McCart St, LLC Property. The McCart St, LLC Property overlay was hand-drawn by me, so while the location is very close, it may not be precise.

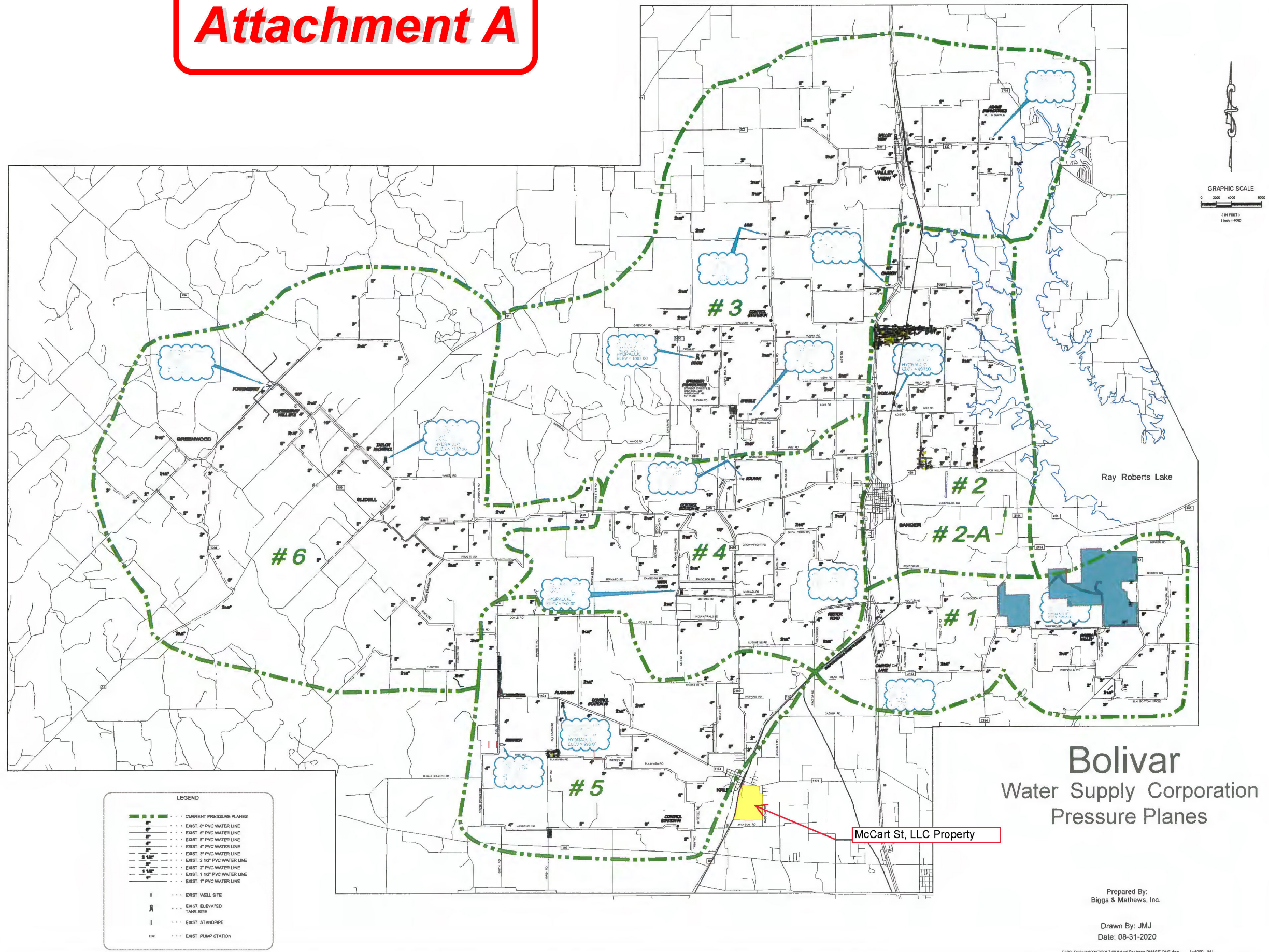
**My name is Gregory N. Graham, my date of birth is 05/14/1985, and my address is P.O. Box 470158 Fort Worth 76147, Tarrant County, Texas, the United States of America. I declare under penalty of perjury that the foregoing is true and correct.**

**Executed in Tarrant County, State of Texas on the 17<sup>th</sup> day of June 2022.”**

By: 

Gregory N. Graham

# Attachment A



# **EXHIBIT 2**

**BOLIVAR WATER  
SUPPLY CORPORATION**

**FINANCIAL STATEMENTS  
AND  
INDEPENDENT AUDITORS' REPORT**

**DECEMBER 31, 2021**



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902 NORTH LOCUST  
P.O. BOX 977  
DENISON, TX 76202-0977

TEL (940) 337-3553  
FAX (940) 333-4746

**INDEPENDENT AUDITORS' REPORT**

Board of Directors  
Bolivar Water Supply Corporation  
Sanger, Texas

We have audited the accompanying financial statements of Bolivar Water Supply Corporation (a nonprofit corporation), which comprise the balance sheet as of December 31, 2021, and the related statements of income and retained earnings and cash flows for the year then ended, and the related notes to the financial statements.

***Management's Responsibility for the Financial Statements***

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

***Auditor's Responsibility***

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

## **Opinion**

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Bolivar Water Supply Corporation as of December 31, 2021, and the changes in its net assets and its cash flows for the year then ended in accordance with accounting principles generally accepted in the United States of America.

## **Other Reporting Required by *Government Auditing Standards***

In accordance with Government Auditing Standards, we have also issued our report dated March 8, 2022, on our consideration of Bolivar Water Supply Corporation's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements and other matters. The purpose of that report is to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with Government Auditing Standards in considering Bolivar Water Supply Corporation's internal control over financial reporting and compliance.

Hankins, Eastup, Deaton, Tonn & Seay, PC  
Denton, Texas

March 8, 2022

# BOLIVAR WATER SUPPLY CORPORATION

## BALANCE SHEET DECEMBER 31, 2021

### ASSETS

Current assets:		
Cash and cash equivalents	\$ 1,113,857	
Accounts receivable - trade (net of allowance), pledged	203,142	
Investments	6,627,938	
Prepaid expenses	8,714	
Inventory, at cost	88,958	
Total current assets		\$ 8,042,609
Investments - restricted		135,175
Property and equipment, pledged:		
Wells and well sites, water distribution system and storage facilities	22,765,872	
Buildings	1,447,060	
Furniture, equipment and vehicles	765,318	
Construction in progress	1,507,637	
	26,485,887	
Less accumulated depreciation	(15,241,693)	
Land, right of way and easements	403,618	
Net property and equipment		11,647,812
Other assets:		
Utility deposits	70	
Total other assets		70
TOTAL ASSETS		<u>\$ 19,825,666</u>

### LIABILITIES AND MEMBERS EQUITY

Current liabilities:		
Accounts payable	\$ 524,566	
Accrued expenses	30,275	
Current portion of long-term debt	65,666	
Total current liabilities		\$ 620,507
Long-term debt, net of current portion		1,013,054
TOTAL LIABILITIES		<u>1,633,561</u>
Members' equity:		
Contributed capital -		
Member accounts	416,900	
Other contributed capital	3,025,098	
Total contributed capital		3,441,998
Retained earnings:		
Restricted	135,175	
Unrestricted	14,614,932	
Total retained earnings		14,750,107
Total members' equity		<u>18,192,105</u>
TOTAL LIABILITIES AND OWNER'S CAPITAL		<u>\$ 19,825,666</u>

See accompanying notes to the financial statements.

# **BOLIVAR WATER SUPPLY CORPORATION**

## **STATEMENT OF INCOME AND RETAINED EARNINGS YEAR ENDED DECEMBER 31, 2021**

Revenues:		
Water sales	\$ 2,706,987	
Current period new member additions	1,294,500	
Installations and road bores	100,479	
Other fees and changes	46,424	
Other income	48,183	
Total revenues		\$ 4,196,573
Operating expenses:		
Depreciation	685,921	
Salaries	864,121	
Payroll taxes	66,247	
Employee insurance	98,705	
Utilities	308,228	
Repairs, maintenance and operations	622,765	
Contracted services - GTUA	97,221	
Interest expense	55,803	
Insurance and bonds	51,791	
Miscellaneous	30,965	
Bank and credit card charges	50,977	
Office supplies and expense	40,750	
Telephone	12,835	
Professional fees	23,192	
Postage	13,558	
Retirement plan contribution	24,846	
Auto and truck expense	80,695	
Water sample expense	20,428	
Total operating expenses		3,149,048
Net operating income		1,047,525
Other income (loss):		
Interest and dividend income	194,648	
Realized gain/(loss) on investments	534,996	
Unrealized gain/(loss) on investments	(142,207)	
Gain on sale of equipment	5,500	
Total other income (loss)		592,937
Net Income		1,640,462
Retained earnings - beginning of year		13,109,645
Retained earnings - end of year		\$ 14,750,107

See accompanying notes to the financial statements.

# **BOLIVAR WATER SUPPLY CORPORATION**

## **STATEMENT OF CASH FLOWS DECEMBER 31, 2021**

Cash flows from operating activities		
Net income		\$ 1,640,462
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation	\$ 685,921	
(Increase) decrease in:		
Accounts receivable - trade	(49,739)	
Prepaid expenses	(1,334)	
Inventory	2,414	
Increase (decrease) in accounts payable	279,861	
Increase (decrease) in accrued expenses	(26,479)	
Interest and dividend income	(194,648)	
Realized and unrealized gains/losses on investments	(392,789)	
Gain on sale of equipment	(5,500)	
Total adjustments		<u>297,707</u>
Net cash provided by operating activities		<u>1,938,169</u>
Cash flows from investing activities:		
Proceeds from sale of investments	4,664,802	
Proceeds from sale of equipment	5,500	
Purchase of property and equipment	(1,670,045)	
Purchase of investments	(5,471,593)	
Interest and dividend income	194,468	
Net cash used by investing activities		<u>(2,276,868)</u>
Cash flows from financing activities:		
Principal payments on long-term debt	(73,923)	
Increase in member accounts - net	21,427	
Net cash used by financing activities		<u>(52,496)</u>
Net decrease in cash and cash equivalents		(391,195)
Cash and cash equivalents at beginning of year		<u>1,505,052</u>
Cash and cash equivalents at end of year		<u><u>\$ 1,113,857</u></u>
Supplemental disclosure:		
Cash paid for interest		<u><u>\$ 50,078</u></u>

See accompanying notes to the financial statements.

## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2021**

---

#### **NOTE 1 – SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES**

##### **Nature of Organization**

Bolivar Water Supply Corporation ("the Corporation") is operated in a manner similar to a private enterprise where the intent is to provide water and related services to the general public with all costs financed primarily through user charges. The Corporation is a nonprofit, member-owned corporation governed by a nine member Board of Directors elected by the members of the Corporation. The Corporation serves individuals residing in the rural areas surrounding Sanger, Texas in northern Denton County, southern Cooke County, and eastern Wise County, Texas.

##### **Revenue and Expense Recognition**

The books and records of the corporation are maintained on the accrual basis of accounting in accordance with accounting principles generally accepted in the United States of America. Revenues are recognized in the accounting period they are earned, and expenses are recognized when incurred.

##### **Property, Equipment and Depreciation**

Depreciation expense included in the accompanying financial statements is recorded on the straight-line method over the estimated useful lives of the assets. Property and equipment in excess of \$2,000 is recorded at cost or, if contributed, estimated cost of materials and installation. Useful lives range from 5 years for light equipment to 40 years for certain system improvements.

##### **Inventory**

Inventory, consisting of supplies and equipment, is stated at cost. Cost is determined primarily by the first-in, first-out method.

##### **Accounts Receivable - Trade**

Accounts receivable consist primarily of receivables related to water sales. Trade accounts receivable are shown net of an allowance for uncollectible amounts of \$30,264. All trade accounts receivable are pledged as security for the U.S.D.A. Rural Development loans. Accounts receivable are not collateralized.

##### **Accounting Estimates**

The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

##### **Cash and Cash Equivalents**

For purposes of financial statement presentation, the Corporation considers all money market funds and highly liquid debt instruments with maturities of three months or less when acquired to be cash equivalents.

**BOLIVAR WATER SUPPLY CORPORATION**

**NOTES TO THE FINANCIAL STATEMENTS  
DECEMBER 31, 2019**

---

**NOTE 2 – LONG-TERM DEBT**

Long-term debt at December 31, 2021, consisted of the following:

<u>United States Department of Agriculture Rural Development:</u> 5% note payable, dated March 8, 1996, maturing in July 2033. Due in monthly installments of \$10,341 including interest. Secured by the water system.		<u>\$ 1,078,720</u>
Total		1,078,720
Less Current Portion		<u>(65,666)</u>
Long-Term Debt		<u>\$1,013,054</u>

Maturities of Long-Term Debt are as follows:

Years Ended December 31:

2022	\$ 65,666
2023	75,146
2024	78,990
2025	83,032
2026	87,280
Thereafter	<u>688,606</u>
Total	<u>\$1,078,720</u>



## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2021**

#### **NOTE 3 – AGREEMENT WITH THE GREATER TEXOMA UTILITY AUTHORITY (GTUA)**

GTUA is a political subdivision of the State of Texas created to assist cities, towns, and other entities develop water, sewer, and solid waste facilities. In 2004, the Corporation entered into a contract with GTUA for certain water supply services. Pursuant to the agreement, GTUA issued \$1,500,000 of Contract Revenue Bonds in order to fund construction of facilities as provided for in the water supply services contract with the Corporation.

The Corporation has agreed, and is obligated to GTUA, to make monthly payments in amounts sufficient to provide for the payment and redemption of the principal and interest on those revenue bonds as they become due through the year 2028. The Corporation is also obligated to pay an annual administration fee to GTUA. This fee was \$650 in 2021. These payments are recognized as operating expenses by the Corporation and as revenues by GTUA.

Contractual commitments to be paid to GTUA by the Corporation as required by the water supply and service contract are shown in the following schedule:

<u>Year</u>	<u>Amount</u>
2022	\$ 95,624
2023	97,142
2024	99,805
2025	98,579
2026	99,818
Thereafter	<u>127,901</u>
Total	<u>\$ 618,869</u>

Future payments to GTUA will fluctuate because the revenue bonds issued by GTUA are variable rate bonds, and the interest rate changes each year. The payment obligations shown above represent the bond interest rate as of April 1, 2017, which was 2.79%.

The debt obligation for GTUA's revenue bonds is not reflected in the Corporation's financial statements. The liability for the debt obligation is separately presented in the publicly available September 30, 2021 financial statements of GTUA.

#### **NOTE 4 – RESTRICTED INVESTMENTS**

Included in the financial statements at December 31, 2021 is \$135,175 of investments that are restricted under the Corporation's loan agreement with USDA Rural Development for future debt service payments.

The loan agreement requires the Corporation to maintain a reserve fund of at least \$124,092, which is one year of debt service payments on the loan. The reserve fund balance at December 31, 2021 was \$135,175. The reserve fund consists of mutual funds with a fair value at December 31, 2021 of \$135,175.

## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2021**

---

#### **NOTE 5 – INVESTMENTS**

Investments consist of common stocks and mutual funds all of which are readily marketable. All investments are stated at fair value. The fair value of the mutual funds is based on significant other observable inputs (level 2 measurements). The mutual funds consist of both bond funds and equity funds. The fair value of the common stocks is based on quoted prices in active markets (level 1 measurements).

Investments at December 31, 2021 are summarized as follows:

Unrestricted investments included in current assets:

	<u>Cost</u>	<u>Fair Value</u>
Common Stocks	\$ 1,779,383	\$ 2,258,140
Mutual funds	<u>4,001,844</u>	<u>4,369,798</u>
Total	<u>\$ 5,781,227</u>	<u>\$ 6,627,938</u>

Restricted investments (see Note 4):

Mutual funds	<u>\$ 145,201</u>	<u>\$ 135,175</u>
Total	<u>\$ 145,201</u>	<u>\$ 135,175</u>

Total investment return for the year ended December 31, 2021 consisted of \$194,648 of interest and dividend income plus \$142,207 of unrealized losses in the fair value of investments plus \$534,996 of realized losses on the sale of investments for a net investment return of \$587,437.

#### **NOTE 6 – FEDERAL INCOME TAX**

Bolivar Water Supply Corporation is a non-profit organization that qualifies under IRS Code Sec. 501(c)(12) for exemption from Federal income tax.

The Corporation files Form 990 with the Internal Revenue Service, and as of December 31, 2021, the Corporation's tax returns related to the years ended December 31, 2018 through 2020 remain open to possible examination by the Internal Revenue Service; however, no tax returns are currently under examination.

Exempt organizations are required to pay Federal income tax on unrelated business taxable income. For the year ended December 31, 2021, the Corporation had no unrelated business taxable income.

## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2021**

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#### **NOTE 7 – RETIREMENT PLAN**

The Corporation sponsors an SEP retirement plan for eligible employees. The Plan allows for the Corporation to make contributions for eligible employees at a percentage of eligible compensation determined by the Board of Directors. For 2021 the Corporation contributed three percent of eligible compensation. The Corporation's contribution for 2021 was \$24,846. All participating employees are fully vested in the Corporation's contributions.

#### **NOTE 8 – FAIR VALUE OF FINANCIAL INSTRUMENTS**

The carrying amounts of cash and cash equivalents, accounts receivable – trade, accounts payable, and accrued expenses reported in the balance sheet approximate fair values because of the short maturities of those instruments. The carrying amount of long-term debt reported in the balance sheet approximates fair value based on currently available loans with similar terms.

#### **NOTE 9 – CONCENTRATIONS**

The Corporation operates a water system in the Sanger, Texas area including northern Denton County, southern Cooke County, and eastern Wise County, Texas. The Corporation is reliant on customers within this area for its operations.

The Corporation maintains demand checking accounts at Sanger Bank and First United Bank. Deposits at the banks are insured by the FDIC up to \$250,000 per institution. The Corporation maintains balances in excess of FDIC coverage at times. As of December 31, 2021, the bank balance at Sanger Bank was \$776,202. Demand checking and money market accounts at other financial institutions were all below \$250,000 as of December 31, 2021. The Corporation invests excess funds in a money market mutual fund with Edward Jones. Deposits in the Edward Jones money market mutual fund are not federally insured. The balance invested in the Edward Jones money market mutual fund at December 31, 2021 was \$223,144.

#### **NOTE 10 – SUBSEQUENT EVENTS**

Management has reviewed events subsequent to December 31, 2021 through March 8, 2022, which is the date the financial statements were available to be issued. No subsequent events were identified that were required to be recorded or disclosed in the financial statements.

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902 NORTH LOCUST  
P O. BOX 977  
DENTON, TX 76202-0977

TEL (940) 337-3533  
FAX (940) 323-4746

**INDEPENDENT AUDITORS' REPORT ON INTERNAL CONTROL OVER  
FINANCIAL REPORTING AND ON COMPLIANCE AND OTHER MATTERS  
BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED  
IN ACCORDANCE WITH GOVERNMENT AUDITING STANDARDS**

To the Board of Directors  
Bolivar Water Supply Corporation  
Sanger, Texas

We have audited, in accordance with the auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, the financial statements of Bolivar Water Supply Corporation, which comprise the balance sheet as of December 31, 2021, and the related statements of income and retained earnings and cash flows for the year then ended, and the related notes to the financial statements, and have issued our report thereon dated March 8, 2022.

**Internal Control Over Financial Reporting**

In planning and performing our audit of the financial statements, we considered Bolivar Water Supply Corporation's internal control over financial reporting (internal control) to determine the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinions on the financial statements, but not for the purpose of expressing an opinion on the effectiveness of Bolivar Water Supply Corporation's internal control. Accordingly, we do not express an opinion on the effectiveness of the Corporation's internal control.

*A deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. *A material weakness* is a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected on a timely basis. *A significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control that might be material weaknesses or significant deficiencies. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

### **Compliance and Other Matters**

As part of obtaining reasonable assurance about whether Bolivar Water Supply Corporation's financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under *Government Auditing Standards*.

### **Purpose of this Report**

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the Corporation's internal control or on compliance. This report is an integral part of the audit performed in accordance with *Government Auditing Standards* in considering the Corporation's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

Hankins, Eastup, Deaton, Tonn & Seay, PC  
Denton, Texas

March 8, 2022

# **EXHIBIT 3**

**BOLIVAR WATER  
SUPPLY CORPORATION**

**FINANCIAL STATEMENTS  
AND  
INDEPENDENT AUDITORS' REPORT**

**DECEMBER 31, 2020**

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CERTIFIED PUBLIC ACCOUNTANTS

902 NORTH LOCUST  
P.O. BOX 977  
DENTON, TX 76202-0977  
TEL. (940) 387-8563  
FAX (940) 383-4746

**INDEPENDENT AUDITORS' REPORT**

Board of Directors  
Bolivar Water Supply Corporation  
Sanger, Texas

We have audited the accompanying financial statements of Bolivar Water Supply Corporation (a nonprofit corporation), which comprise the balance sheet as of December 31, 2020, and the related statements of income and retained earnings and cash flows for the year then ended, and the related notes to the financial statements.

***Management's Responsibility for the Financial Statements***

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

***Auditor's Responsibility***

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

## Opinion

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Bolivar Water Supply Corporation as of December 31, 2020, and the changes in its net assets and its cash flows for the year then ended in accordance with accounting principles generally accepted in the United States of America.

## Other Reporting Required by *Government Auditing Standards*

In accordance with Government Auditing Standards, we have also issued our report dated March 9, 2021, on our consideration of Bolivar Water Supply Corporation's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements and other matters. The purpose of that report is to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with Government Auditing Standards in considering Bolivar Water Supply Corporation's internal control over financial reporting and compliance.

*Hankins, Eastup, Deaton, Tonn & Seay, PC*

Hankins, Eastup, Deaton, Tonn & Seay, PC  
Denton, Texas

March 9, 2021

# BOLIVAR WATER SUPPLY CORPORATION

## BALANCE SHEET DECEMBER 31, 2020

### ASSETS

Current assets:		
Cash and cash equivalents	\$ 1,505,052	
Accounts receivable - trade (net of allowance), pledged	153,403	
Investments	5,429,702	
Prepaid expenses	7,380	
Inventory, at cost	91,372	
Total current assets		\$ 7,186,909
Investments - restricted		133,621
Property and equipment, pledged:		
Wells and well sites, water distribution system and storage facilities	21,562,753	
Buildings	1,439,861	
Furniture, equipment and vehicles	682,986	
Construction in progress	1,165,442	
	24,851,042	
Less accumulated depreciation	(14,590,972)	
Land, right of way and easements	403,618	
Net property and equipment		10,663,688
Other assets:		
Utility deposits	70	
Total other assets		70
TOTAL ASSETS		<u>\$ 17,984,288</u>

### LIABILITIES AND MEMBERS EQUITY

Current liabilities:		
Accounts payable	\$ 244,705	
Accrued expenses	56,754	
Current portion of long-term debt	68,006	
Total current liabilities		\$ 369,465
Long-term debt, net of current portion		1,084,607
TOTAL LIABILITIES		<u>1,454,072</u>
Members' equity:		
Contributed capital -		
Member accounts	395,473	
Other contributed capital	3,025,098	
Total contributed capital		3,420,571
Retained earnings:		
Restricted	133,621	
Unrestricted	12,976,024	
Total retained earnings		13,109,645
Total members' equity		<u>16,530,216</u>
TOTAL LIABILITIES AND OWNER'S CAPITAL		<u>\$ 17,984,288</u>

See accompanying notes to the financial statements.

# BOLIVAR WATER SUPPLY CORPORATION

## STATEMENT OF INCOME AND RETAINED EARNINGS YEAR ENDED DECEMBER 31, 2020

Revenues:		
Water sales	\$ 2,313,356	
Current period new member additions	330,000	
Installations and road bores	202,600	
Other fees and chages	20,295	
Other income	122,217	
Total revenues		\$ 2,988,468
Operating expenses:		
Depreciation	615,853	
Salaries	822,835	
Payroll taxes	63,288	
Employee insurance	95,793	
Utilities	261,162	
Repairs, maintenance and operations	282,067	
Contracted services - GTUA	94,309	
Interest expense	59,127	
Insurance and bonds	44,895	
Miscellaneous	24,958	
Dues and assessments	5,316	
Bank and credit card charges	41,254	
Office supplies and expense	45,061	
Telephone	11,056	
Professional fees	22,275	
Postage	11,479	
Retirement plan contribution	24,686	
Auto and truck expense	49,539	
Water sample expense	26,511	
Total operating expenses		2,601,464
Net operating income		387,004
Other income (loss):		
Interest and dividend income	86,133	
Realized gain/(loss) on investments	42,446	
Unrealized gain/(loss) on investments	428,730	
Gain on sale of equipment	12,752	
Total other income (loss)		570,061
Net Income		957,065
Retained earnings - beginning of year		12,152,580
Retained earnings - end of year		\$ 13,109,645

See accompanying notes to the financial statements.

# **BOLIVAR WATER SUPPLY CORPORATION**

## **STATEMENT OF CASH FLOWS DECEMBER 31, 2020**

Cash flows from operating activities		\$ 957,065
Net income		
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation	\$ 615,853	
(Increase) decrease in:		
Accounts receivable - trade	7,838	
Prepaid expenses	(552)	
Inventory	8,827	
Increase (decrease) in accounts payable	(48,379)	
Increase (decrease) in accrued expenses	26,589	
Interest and dividend income	(86,133)	
Realized and unrealized gains/losses on investments	(471,176)	
Gain on sale of equipment	(12,752)	
Total adjustments		40,115
Net cash provided by operating activities		997,180
Cash flows from investing activities:		
Proceeds from sale of investments	3,501,033	
Proceeds from sale of equipment	12,752	
Purchase of property and equipment	(1,668,343)	
Purchase of investments	(1,891,230)	
Interest and dividend income	86,133	
Net cash provided by investing activities		40,345
Cash flows from financing activities:		
Principal payments on long-term debt	(64,700)	
Increase in member accounts - net	14,625	
Net cash used by financing activities		(50,075)
Net increase in cash and cash equivalents		987,450
Cash and cash equivalents at beginning of year		517,602
Cash and cash equivalents at end of year		\$ 1,505,052
Supplemental disclosure:		
Cash paid for interest		\$ 59,353

See accompanying notes to the financial statements.

## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2020**

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#### **NOTE 1 – SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES**

##### **Nature of Organization**

Bolivar Water Supply Corporation ("the Corporation") is operated in a manner similar to a private enterprise where the intent is to provide water and related services to the general public with all costs financed primarily through user charges. The Corporation is a nonprofit, member-owned corporation governed by a nine member Board of Directors elected by the members of the Corporation. The Corporation serves individuals residing in the rural areas surrounding Sanger, Texas in northern Denton County, southern Cooke County, and eastern Wise County, Texas.

##### **Revenue and Expense Recognition**

The books and records of the corporation are maintained on the accrual basis of accounting in accordance with accounting principles generally accepted in the United States of America. Revenues are recognized in the accounting period they are earned, and expenses are recognized when incurred.

##### **Property, Equipment and Depreciation**

Depreciation expense included in the accompanying financial statements is recorded on the straight-line method over the estimated useful lives of the assets. Property and equipment in excess of \$2,000 is recorded at cost or, if contributed, estimated cost of materials and installation. Useful lives range from 5 years for light equipment to 40 years for certain system improvements.

##### **Inventory**

Inventory, consisting of supplies and equipment, is stated at cost. Cost is determined primarily by the first-in, first-out method.

##### **Accounts Receivable - Trade**

Accounts receivable consist primarily of receivables related to water sales. Trade accounts receivable are shown net of an allowance for uncollectible amounts of \$30,264. All trade accounts receivable are pledged as security for the U.S.D.A. Rural Development loans. Accounts receivable are not collateralized.

##### **Accounting Estimates**

The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

##### **Cash and Cash Equivalents**

For purposes of financial statement presentation, the Corporation considers all money market funds and highly liquid debt instruments with maturities of three months or less when acquired to be cash equivalents.

# BOLIVAR WATER SUPPLY CORPORATION

## NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2019

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### NOTE 2 – LONG-TERM DEBT

Long-term debt at December 31, 2020, consisted of the following:

United States Department of Agriculture Rural Development:  
5% note payable, dated March 8, 1996, maturing in July  
2033. Due in monthly installments of \$10,341 including  
interest. Secured by the water system. \$ 1,152,613

Total 1,152,613

Less Current Portion (68,006)

Long-Term Debt \$1,084,607

Maturities of Long-Term Debt are as follows:

Years Ended December 31:

2021	\$ 68,006
2022	71,485
2023	75,142
2024	78,987
2025	83,028
Thereafter	<u>775,965</u>
Total	<u>\$1,152,613</u>

## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2020**

#### **NOTE 3 – AGREEMENT WITH THE GREATER TEXOMA UTILITY AUTHORITY (GTUA)**

GTUA is a political subdivision of the State of Texas created to assist cities, towns, and other entities develop water, sewer, and solid waste facilities. In 2004, the Corporation entered into a contract with GTUA for certain water supply services. Pursuant to the agreement, GTUA issued \$1,500,000 of Contract Revenue Bonds in order to fund construction of facilities as provided for in the water supply services contract with the Corporation.

The Corporation has agreed, and is obligated to GTUA, to make monthly payments in amounts sufficient to provide for the payment and redemption of the principal and interest on those revenue bonds as they become due through the year 2028. The Corporation is also obligated to pay an annual administration fee to GTUA. This fee was \$650 in 2020. These payments are recognized as operating expenses by the Corporation and as revenues by GTUA.

Contractual commitments to be paid to GTUA by the Corporation as required by the water supply and service contract are shown in the following schedule:

<u>Year</u>	<u>Amount</u>
2021	\$ 96,571
2022	95,624
2023	97,142
2024	99,805
2025	98,579
Thereafter	<u>227,719</u>
Total	<u>\$ 715,440</u>

Future payments to GTUA will fluctuate because the revenue bonds issued by GTUA are variable rate bonds, and the interest rate changes each year. The payment obligations shown above represent the bond interest rate as of April 1, 2017, which was 2.79%.

The debt obligation for GTUA's revenue bonds is not reflected in the Corporation's financial statements. The liability for the debt obligation is separately presented in the publicly available September 30, 2020 financial statements of GTUA.

#### **NOTE 4 – RESTRICTED INVESTMENTS**

Included in the financial statements at December 31, 2020 is \$133,621 of investments that are restricted under the Corporation's loan agreement with USDA Rural Development for future debt service payments.

The loan agreement requires the Corporation to maintain a reserve fund of at least \$124,092, which is one year of debt service payments on the loan. The reserve fund balance at December 31, 2020 was \$133,621. The reserve fund consists of mutual funds with a fair value at December 31, 2020 of \$133,621.



## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2020**

#### **NOTE 5 – INVESTMENTS**

Investments consist of common stocks and mutual funds, all of which are readily marketable. All investments are stated at fair value. The fair value of the mutual funds is based on significant other observable inputs (level 2 measurements). The mutual funds consist of both bond funds and equity funds. The fair value of the common stocks is based on quoted prices in active markets (level 1 measurements).

Investments at December 31, 2020 are summarized as follows:

Unrestricted investments included in current assets:

	<u>Cost</u>	<u>Fair Value</u>
Common Stocks	\$ 958,096	\$ 1,336,391
Mutual funds	<u>3,542,125</u>	<u>4,093,311</u>
Total	<u>\$ 4,500,221</u>	<u>\$ 5,429,702</u>

Restricted investments (see Note 4):

Mutual funds	<u>\$ 142,031</u>	<u>\$ 133,621</u>
Total	<u>\$ 142,031</u>	<u>\$ 133,621</u>

Total investment return for the year ended December 31, 2020 consisted of \$86,133 of interest and dividend income plus \$428,730 of unrealized gains in the fair value of investments plus \$42,446 of realized gains on the sale of investments for a net investment return of \$557,309. Investment income is reported net of \$53,068 of investment management fees.

#### **NOTE 6 – FEDERAL INCOME TAX**

Bolivar Water Supply Corporation is a non-profit organization that qualifies under IRS Code Sec. 501(c)(12) for exemption from Federal income tax.

The Corporation files Form 990 with the Internal Revenue Service, and as of December 31, 2020, the Corporation's tax returns related to the years ended December 31, 2017 through 2019 remain open to possible examination by the Internal Revenue Service; however, no tax returns are currently under examination.

Exempt organizations are required to pay Federal income tax on unrelated business taxable income. For the year ended December 31, 2020, the Corporation had no unrelated business taxable income.

## **BOLIVAR WATER SUPPLY CORPORATION**

### **NOTES TO THE FINANCIAL STATEMENTS DECEMBER 31, 2020**

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#### **NOTE 7 – RETIREMENT PLAN**

The Corporation sponsors an SEP retirement plan for eligible employees. The Plan allows for the Corporation to make contributions for eligible employees at a percentage of eligible compensation determined by the Board of Directors. For 2020 the Corporation contributed three percent of eligible compensation. The Corporation's contribution for 2020 was \$24,686. All participating employees are fully vested in the Corporation's contributions.

#### **NOTE 8 – FAIR VALUE OF FINANCIAL INSTRUMENTS**

The carrying amounts of cash and cash equivalents, accounts receivable – trade, accounts payable, and accrued expenses reported in the balance sheet approximate fair values because of the short maturities of those instruments. The carrying amount of long-term debt reported in the balance sheet approximates fair value based on currently available loans with similar terms.

#### **NOTE 9 – CONCENTRATIONS**

The Corporation operates a water system in the Sanger, Texas area including northern Denton County, southern Cooke County, and eastern Wise County, Texas. The Corporation is reliant on customers within this area for its operations.

The Corporation maintains demand checking accounts at Sanger Bank and First United Bank. Deposits at the banks are insured by the FDIC up to \$250,000 per institution. The Corporation maintains balances in excess of FDIC coverage at times. As of December 31, 2020, the bank balance at Sanger Bank was \$564,577. Demand checking and money market accounts at other financial institutions were all below \$250,000 as of December 31, 2020. The Corporation invests excess funds in a money market mutual fund with Edward Jones. Deposits in the Edward Jones money market mutual fund are not federally insured. The balance invested in the Edward Jones money market mutual fund at December 31, 2020 was \$836,354.

#### **NOTE 10 – SUBSEQUENT EVENTS**

Management has reviewed events subsequent to December 31, 2020 through March 9, 2021, which is the date the financial statements were available to be issued. No subsequent events were identified that were required to be recorded or disclosed in the financial statements.

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902 NORTH LOCUST  
P.O. BOX 977  
DENTON, TX 76202-0977  
  
TEL. (940) 387-8563  
FAX (940) 383-4746

**INDEPENDENT AUDITORS' REPORT ON INTERNAL CONTROL OVER  
FINANCIAL REPORTING AND ON COMPLIANCE AND OTHER MATTERS  
BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED  
IN ACCORDANCE WITH GOVERNMENT AUDITING STANDARDS**

To the Board of Directors  
Bolivar Water Supply Corporation  
Sanger, Texas

We have audited, in accordance with the auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States, the financial statements of Bolivar Water Supply Corporation, which comprise the balance sheet as of December 31, 2020, and the related statements of income and retained earnings and cash flows for the year then ended, and the related notes to the financial statements, and have issued our report thereon dated March 9, 2021.

**Internal Control Over Financial Reporting**

In planning and performing our audit of the financial statements, we considered Bolivar Water Supply Corporation's internal control over financial reporting (internal control) to determine the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinions on the financial statements, but not for the purpose of expressing an opinion on the effectiveness of Bolivar Water Supply Corporation's internal control. Accordingly, we do not express an opinion on the effectiveness of the Corporation's internal control.

A *deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. A *material weakness* is a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected on a timely basis. A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control that might be material weaknesses or significant deficiencies. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

## Compliance and Other Matters

As part of obtaining reasonable assurance about whether Bolivar Water Supply Corporation's financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under *Government Auditing Standards*.

## Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the Corporation's internal control or on compliance. This report is an integral part of the audit performed in accordance with *Government Auditing Standards* in considering the Corporation's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

*Hankins, Eastup, Deaton, Tonn & Seay, PC*

Hankins, Eastup, Deaton, Tonn & Seay, PC  
Denton, Texas

March 9, 2021

# **EXHIBIT 4**

163-15 bond or other financial assurance in an amount determined by the  
163-16 commission not to exceed the amount of the bond or financial  
163-17 assurance. The order requiring the improvements may be an  
163-18 emergency order if it is issued after the retail public utility has  
163-19 had an opportunity to be heard by the commissioners at a commission  
163-20 meeting. After notice and hearing, the commission may require a  
163-21 retail public utility to obligate additional money to replace the  
163-22 financial assurance used for the improvements.

163-23 SECTION 6.10. Section 13.254, Water Code, is amended to read  
163-24 as follows:

163-25 Sec. 13.254. REVOCATION OR AMENDMENT OF CERTIFICATE.

164-1 (a) The commission at any time after notice and hearing may revoke  
164-2 or amend any certificate of public convenience and necessity with  
164-3 the written consent of the certificate holder or if it finds that:

164-4 (1) the certificate holder has never provided, is no  
164-5 longer providing, or has failed to provide continuous and adequate  
164-6 service in the area, or part of the area, covered by the  
164-7 certificate;

164-8 (2) in an affected county as defined in Section  
164-9 16.341, the cost of providing service by the certificate holder is  
164-10 so prohibitively expensive as to constitute denial of service,  
164-11 provided that, for commercial developments or for residential  
164-12 developments started after September 1, 1997, in an affected county  
164-13 as defined in Section 16.341, the fact that the cost of obtaining  
164-14 service from the currently certificated retail public utility makes  
164-15 the development economically unfeasible does not render such cost  
164-16 prohibitively expensive in the absence of other relevant factors;

164-17 (3) the certificate holder has agreed in writing to  
164-18 allow another retail public utility to provide service within its  
164-19 service area, except for an interim period, without amending its  
164-20 certificate; or

164-21 (4) the certificate holder has failed to file a cease  
164-22 and desist action pursuant to Section 13.252 within 180 days of the

164-23 date that it became aware that another retail public utility was  
164-24 providing service within its service area, unless the certificate  
164-25 holder demonstrates good cause for its failure to file such action  
165-1 within the 180 days.

165-2 (b) Upon written request from the certificate holder, the  
165-3 executive director may cancel the certificate of a utility or water  
165-4 supply corporation authorized by rule to operate without a  
165-5 certificate of public convenience and necessity under Section  
165-6 13.242(c).

165-7 (c) If the certificate of any retail public utility is  
165-8 revoked or amended, the commission may require one or more retail  
165-9 public utilities with their consent to provide service in the area  
165-10 in question. The order of the commission shall not be effective to  
165-11 transfer property.

165-12 (d) A retail public utility may not in any way render retail  
165-13 water or sewer service directly or indirectly to the public in an  
165-14 area that has been decertified under this section without providing  
165-15 compensation for any property that the commission determines is  
165-16 rendered useless or valueless to the decertified retail public  
165-17 utility as a result of the decertification.

165-18 (e) The determination of the monetary amount of  
165-19 compensation, if any, shall be determined at the time another  
165-20 retail public utility seeks to provide service in the previously  
165-21 decertified area and before service is actually provided.

165-22 (f) The monetary amount shall be determined by a qualified  
165-23 individual or firm serving as independent appraiser agreed upon by  
165-24 the decertified retail public utility and the retail public utility  
165-25 seeking to serve the area. The determination of compensation by  
166-1 the independent appraiser shall be binding on the commission. The  
166-2 costs of the independent appraiser shall be borne by the retail  
166-3 public utility seeking to serve the area.

166-4 (g) For the purpose of implementing this section, the value

166-5 of real property shall be determined according to the standards set  
166-6 forth in Chapter 21, Property Code, governing actions in eminent  
166-7 domain and the value of personal property shall be determined  
166-8 according to the factors in this subsection. The factors ensuring  
166-9 that the compensation to a retail public utility for the taking,  
166-10 damaging, or loss of personal property, including the retail public  
166-11 utility's business, is just and adequate shall at a minimum  
166-12 include: the impact on the existing indebtedness of the retail  
166-13 public utility and its ability to repay that debt; the value of the  
166-14 service facilities of the retail public utility located within the  
166-15 area in question; the amount of any expenditures for planning,  
166-16 design, or construction of service facilities that are allocable to  
166-17 service to the area in question; the amount of the retail public  
166-18 utility's contractual obligations allocable to the area in  
166-19 question; any demonstrated impairment of service or increase of  
166-20 cost to consumers of the retail public utility remaining after the  
166-21 decertification; the impact on future revenues and expenses of the  
166-22 retail public utility; necessary and reasonable legal expenses and  
166-23 professional fees; factors relevant to maintaining the current  
166-24 financial integrity of the retail public utility; and other  
166-25 relevant factors.

167-1 (h) The commission shall determine whether payment of  
167-2 compensation shall be in a lump sum or paid out over a specified  
167-3 period of time. If there were no current customers in the area  
167-4 decertified and no immediate loss of revenues or if there are other  
167-5 valid reasons determined by the commission, installment payments as  
167-6 new customers are added in the decertified area may be an  
167-7 acceptable method of payment.

167-8 SECTION 6.11. Section 13.301, Water Code, is amended to read  
167-9 as follows:

167-10 Sec. 13.301. REPORT OF SALE, MERGER, ETC.; INVESTIGATION;  
167-11 DISALLOWANCE OF TRANSACTION. (a) A utility or a water supply or  
167-12 sewer service corporation, on or before the 120th day before the



# **EXHIBIT 5**

## 1 AN ACT

2 relating to certificates of public convenience and necessity for  
3 water service and sewer service.

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

5 SECTION 1. Section 13.002, Water Code, is amended by  
6 amending Subdivision (1) and adding Subdivision (1-a) to read as  
7 follows:

8 (1) "Affected person" means any landowner within an  
9 area for which a certificate of public convenience and necessity is  
10 filed, any retail public utility affected by any action of the  
11 regulatory authority, any person or corporation whose utility  
12 service or rates are affected by any proceeding before the  
13 regulatory authority, or any person or corporation that is a  
14 competitor of a retail public utility with respect to any service  
15 performed by the retail public utility or that desires to enter into  
16 competition.

17 (1-a) "Landowner," "owner of a tract of land," and  
18 "owners of each tract of land" include multiple owners of a single  
19 deeded tract of land.

20 SECTION 2. Section 13.241(a), Water Code, is amended to  
21 read as follows:

22 (a) In determining whether to grant or amend a certificate  
23 of public convenience and necessity, the commission shall ensure  
24 that the applicant possesses the financial, managerial, and

technical capability to provide continuous and adequate service.

SECTION 3. Section 13.242, Water Code, is amended by adding Subsection (d) to read as follows:

(d) A supplier of wholesale water or sewer service may not require a purchaser to obtain a certificate of public convenience and necessity if the purchaser is not otherwise required by this chapter to obtain the certificate.

SECTION 4. Section 13.244, Water Code, is amended to read as follows:

Sec. 13.244. APPLICATION; MAPS AND OTHER INFORMATION; EVIDENCE AND CONSENT. (a) To obtain a certificate of public convenience and necessity or an amendment to a certificate, a [A] public utility or water supply or sewer service corporation shall submit to the commission an application for ~~[to obtain]~~ a certificate ~~[of public convenience and necessity]~~ or for an amendment as provided by this section ~~[of a certificate]~~.

(b) Each ~~[On request by the commission, each]~~ public utility and water supply or sewer service corporation shall file with the commission a map or maps showing all its facilities and illustrating separately facilities for production, transmission, and distribution of its services, and each certificated retail public utility shall file with the commission a map or maps showing any facilities, customers, or area currently being served outside its certificated areas.

(c) Each applicant for a certificate or for an amendment shall file with the commission evidence required by the commission to show that the applicant has received the required consent,

franchise, or permit of the proper municipality or other public authority.

(d) An application for a certificate of public convenience and necessity or for an amendment to a certificate must contain:

(1) a description of the proposed service area by:

(A) a metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;

(B) the Texas State Plane Coordinate System;

(C) verifiable landmarks, including a road, creek, or railroad line; or

(D) if a recorded plat of the area exists, lot and block number;

(2) a description of any requests for service in the proposed service area;

(3) a capital improvements plan, including a budget and estimated timeline for construction of all facilities necessary to provide full service to the entire proposed service area;

(4) a description of the sources of funding for all facilities;

(5) to the extent known, a description of current and projected land uses, including densities;

(6) a current financial statement of the applicant;

(7) according to the tax roll of the central appraisal district for each county in which the proposed service area is located, a list of the owners of each tract of land that is:

(A) at least 50 acres; and

1                   (B) wholly or partially located within the  
2 proposed service area; and

3                   (8) any other item required by the commission.

4           SECTION 5. Subchapter G, Chapter 13, Water Code, is amended  
5 by adding Sections 13.245 and 13.2451 to read as follows:

6           Sec. 13.245. MUNICIPAL BOUNDARIES OR EXTRATERRITORIAL  
7 JURISDICTION OF CERTAIN MUNICIPALITIES. (a) This section applies  
8 only to a municipality with a population of 500,000 or more.

9           (b) Except as provided by Subsection (c), the commission may  
10 not grant to a retail public utility a certificate of public  
11 convenience and necessity for a service area within the boundaries  
12 or extraterritorial jurisdiction of a municipality without the  
13 consent of the municipality. The municipality may not unreasonably  
14 withhold the consent. As a condition of the consent, a municipality  
15 may require that all water and sewer facilities be designed and  
16 constructed in accordance with the municipality's standards for  
17 facilities.

18           (c) If a municipality has not consented under Subsection (b)  
19 before the 180th day after the date the municipality receives the  
20 retail public utility's application, the commission shall grant the  
21 certificate of public convenience and necessity without the consent  
22 of the municipality if the commission finds that the municipality:

23                   (1) does not have the ability to provide service; or

24                   (2) has failed to make a good faith effort to provide  
25 service on reasonable terms and conditions.

26           (d) A commitment described by Subsection (c)(2) must  
27 provide that the construction of service facilities will begin

1 within one year and will be substantially completed within two  
2 years after the date the retail public utility's application was  
3 filed with the municipality.

4 (e) If the commission makes a decision under Subsection (d)  
5 regarding the grant of a certificate of public convenience and  
6 necessity without the consent of the municipality, the municipality  
7 or the retail public utility may appeal the decision to the  
8 appropriate state district court. The court shall hear the petition  
9 within 120 days after the date the petition is filed. On final  
10 disposition, the court may award reasonable fees to the prevailing  
11 party.

12 Sec. 13.2451. EXTENSION BEYOND EXTRATERRITORIAL  
13 JURISDICTION. (a) Except as provided by Subsection (b), if a  
14 municipality extends its extraterritorial jurisdiction to include  
15 an area certificated to a retail public utility, the retail public  
16 utility may continue and extend service in its area of public  
17 convenience and necessity under the rights granted by its  
18 certificate and this chapter.

19 (b) The commission may not extend a municipality's  
20 certificate of public convenience and necessity beyond its  
21 extraterritorial jurisdiction without the written consent of the  
22 landowner who owns the property in which the certificate is to be  
23 extended. The portion of any certificate of public convenience and  
24 necessity that extends beyond the extraterritorial jurisdiction of  
25 the municipality without the consent of the landowner is void.

26 SECTION 6. Section 13.246, Water Code, is amended by  
27 amending Subsections (a), (b), (c), and (d) and adding Subsections

(a-1), (h), and (i) to read as follows:

(a) If an application for a certificate of public convenience and necessity or for an amendment to a certificate is filed, the commission shall cause notice of the application to be given to affected parties and, if requested, shall fix a time and place for a hearing and give notice of the hearing. Any person affected by the application may intervene at the hearing.

(a-1) Except as otherwise provided by this subsection, in addition to the notice required by Subsection (a), the commission shall require notice to be mailed to each owner of a tract of land that is at least 50 acres and is wholly or partially included in the area proposed to be certified. Notice required under this subsection must be mailed by first class mail to the owner of the tract according to the most current tax appraisal rolls of the applicable central appraisal district at the time the commission received the application for the certificate or amendment. Good faith efforts to comply with the requirements of this subsection shall be considered adequate notice to landowners. Notice under this subsection is not required for a matter filed with the commission under:

(1) Section 13.248 or 13.255; or

(2) Chapter 65.

(b) The commission may grant applications and issue certificates and amendments to certificates only if the commission finds that a certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public. The

1 commission may issue a certificate or amendment as requested, or  
2 refuse to issue it, or issue it for the construction of only a  
3 portion of the contemplated system or facility or extension, or for  
4 the partial exercise only of the right or privilege and may impose  
5 special conditions necessary to ensure that continuous and adequate  
6 service is provided.

7 (c) Certificates of public convenience and necessity and  
8 amendments to certificates shall be granted on a nondiscriminatory  
9 basis after consideration by the commission of:

10 (1) the adequacy of service currently provided to the  
11 requested area;

12 (2) [7] the need for additional service in the  
13 requested area, including whether any landowners, prospective  
14 landowners, tenants, or residents have requested service;

15 (3) [7] the effect of the granting of a certificate  
16 or of an amendment on the recipient of the certificate or amendment,  
17 on the landowners in the area, and on any retail public utility of  
18 the same kind already serving the proximate area;

19 (4) [7] the ability of the applicant to provide  
20 adequate service, including meeting the standards of the  
21 commission, taking into consideration the current and projected  
22 density and land use of the area;

23 (5) the feasibility of obtaining service from an  
24 adjacent retail public utility;

25 (6) the financial ability of the applicant to pay for  
26 the facilities necessary to provide continuous and adequate service  
27 and [7] the financial stability of the applicant, including, if



1 applicable, the adequacy of the applicant's debt-equity ratio;

2 (7) [7] environmental integrity;

3 (8) [~~7~~ and] the probable improvement of service or  
4 lowering of cost to consumers in that area resulting from the  
5 granting of the certificate or amendment; and

6 (9) the effect on the land to be included in the  
7 certificated area.

8 (d) The commission may require an applicant for a  
9 certificate or for an amendment [utility] to provide a bond or other  
10 financial assurance in a form and amount specified by the  
11 commission to ensure that continuous and adequate utility service  
12 is provided.

13 (h) Except as provided by Subsection (i), a landowner who  
14 owns a tract of land that is at least 25 acres and that is wholly or  
15 partially located within the proposed service area may elect to  
16 exclude some or all of the landowner's property from the proposed  
17 service area by providing written notice to the commission before  
18 the 30th day after the date the landowner receives notice of a new  
19 application for a certificate of public convenience and necessity  
20 or for an amendment to an existing certificate of public  
21 convenience and necessity. The landowner's election is effective  
22 without a further hearing or other process by the commission. If a  
23 landowner makes an election under this subsection, the application  
24 shall be modified so that the electing landowner's property is not  
25 included in the proposed service area.

26 (i) A landowner is not entitled to make an election under  
27 Subsection (h) but is entitled to contest the inclusion of the

1 landowner's property in the proposed service area at a hearing held  
2 by the commission regarding the application if the proposed service  
3 area is located within the boundaries or extraterritorial  
4 jurisdiction of a municipality with a population of more than  
5 500,000 and the municipality or a utility owned by the municipality  
6 is the applicant.

7 SECTION 7. The heading to Section 13.247, Water Code, is  
8 amended to read as follows:

9 Sec. 13.247. AREA [~~INCLUDED~~] WITHIN MUNICIPALITY [~~CITY,~~  
10 ~~TOWN, OR VILLAGE~~].

11 SECTION 8. Section 13.247, Water Code, is amended by  
12 amending Subsections (a) and (c) and adding Subsection (d) to read  
13 as follows:

14 (a) If an area [~~has been or~~] is [~~included~~] within the  
15 boundaries of a municipality [~~city as the result of annexation,~~  
16 ~~incorporation, or otherwise~~], all retail public utilities  
17 certified or entitled to certification under this chapter to  
18 provide service or operate facilities in that area [~~before the~~  
19 ~~inclusion~~] may continue and extend service in its area of public  
20 convenience and necessity within the [~~annexed or incorporated~~] area  
21 pursuant to the rights granted by its certificate and this chapter,  
22 unless the municipality exercises its power of eminent domain to  
23 acquire the property of the retail public utility under Subsection  
24 (d). Except as provided by Section 13.255 [~~of this code~~], a  
25 municipally owned or operated utility may not provide retail water  
26 and sewer utility service within the area certificated to another  
27 retail public utility without first having obtained from the

1 commission a certificate of public convenience and necessity that  
2 includes the areas to be served.

3 (c) This section may not be construed as limiting the power  
4 of municipalities [~~cities~~] to incorporate or extend their  
5 boundaries by annexation, or as prohibiting any municipality [~~city~~]  
6 from levying taxes and other special charges for the use of the  
7 streets as are authorized by Section 182.025, Tax Code.

8 (d) In addition to any other rights provided by law, a  
9 municipality with a population of more than 500,000 may exercise  
10 the power of eminent domain in the manner provided by Chapter 21,  
11 Property Code, to acquire a substandard water or sewer system if all  
12 the facilities of the system are located entirely within the  
13 municipality's boundaries. The municipality shall pay just and  
14 adequate compensation for the property. In this subsection,  
15 "substandard water or sewer system" means a system that is not in  
16 compliance with the municipality's standards for water and  
17 wastewater service.

18 SECTION 9. Section 13.254, Water Code, is amended by  
19 amending Subsections (a), (e), and (g) and adding Subsections (a-1)  
20 through (a-4) and (g-1) to read as follows:

21 (a) The commission at any time after notice and hearing may,  
22 on its own motion or on receipt of a petition described by  
23 Subsection (a-1), revoke or amend any certificate of public  
24 convenience and necessity with the written consent of the  
25 certificate holder or if it finds that:

26 (1) the certificate holder has never provided, is no  
27 longer providing, is incapable of providing, or has failed to

1 provide continuous and adequate service in the area, or part of the  
2 area, covered by the certificate;

3 (2) in an affected county as defined in Section  
4 16.341, the cost of providing service by the certificate holder is  
5 so prohibitively expensive as to constitute denial of service,  
6 provided that, for commercial developments or for residential  
7 developments started after September 1, 1997, in an affected county  
8 as defined in Section 16.341, the fact that the cost of obtaining  
9 service from the currently certificated retail public utility makes  
10 the development economically unfeasible does not render such cost  
11 prohibitively expensive in the absence of other relevant factors;

12 (3) the certificate holder has agreed in writing to  
13 allow another retail public utility to provide service within its  
14 service area, except for an interim period, without amending its  
15 certificate; or

16 (4) the certificate holder has failed to file a cease  
17 and desist action pursuant to Section 13.252 within 180 days of the  
18 date that it became aware that another retail public utility was  
19 providing service within its service area, unless the certificate  
20 holder demonstrates good cause for its failure to file such action  
21 within the 180 days.

22 (a-1) As an alternative to decertification under Subsection  
23 (a), the owner of a tract of land that is at least 50 acres and that  
24 is not in a platted subdivision actually receiving water or sewer  
25 service may petition the commission under this subsection for  
26 expedited release of the area from a certificate of public  
27 convenience and necessity so that the area may receive service from

1 another retail public utility. The petitioner shall deliver, via  
2 certified mail, a copy of the petition to the certificate holder,  
3 who may submit information to the commission to controvert  
4 information submitted by the petitioner. The petitioner must  
5 demonstrate that:

6 (1) a written request for service, other than a  
7 request for standard residential or commercial service, has been  
8 submitted to the certificate holder, identifying:

9 (A) the area for which service is sought;

10 (B) the timeframe within which service is needed  
11 for current and projected service demands in the area;

12 (C) the level and manner of service needed for  
13 current and projected service demands in the area; and

14 (D) any additional information requested by the  
15 certificate holder that is reasonably related to determination of  
16 the capacity or cost for providing the service;

17 (2) the certificate holder has been allowed at least  
18 90 calendar days to review and respond to the written request and  
19 the information it contains;

20 (3) the certificate holder:

21 (A) has refused to provide the service;

22 (B) is not capable of providing the service on a  
23 continuous and adequate basis within the timeframe, at the level,  
24 or in the manner reasonably needed or requested by current and  
25 projected service demands in the area; or

26 (C) conditions the provision of service on the  
27 payment of costs not properly allocable directly to the

petitioner's service request, as determined by the commission; and

(4) the alternate retail public utility from which the petitioner will be requesting service is capable of providing continuous and adequate service within the timeframe, at the level, and in the manner reasonably needed or requested by current and projected service demands in the area.

(a-2) A landowner is not entitled to make the election described in Subsection (a-1) but is entitled to contest the involuntary certification of its property in a hearing held by the commission if the landowner's property is located:

(1) within the boundaries of any municipality or the extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or retail public utility owned by the municipality is the holder of the certificate; or

(2) in a platted subdivision actually receiving water or sewer service.

(a-3) Within 90 calendar days from the date the commission determines the petition filed pursuant to Subsection (a-1) to be administratively complete, the commission shall grant the petition unless the commission makes an express finding that the petitioner failed to satisfy the elements required in Subsection (a-1) and supports its finding with separate findings and conclusions for each element based solely on the information provided by the petitioner and the certificate holder. The commission may grant or deny a petition subject to terms and conditions specifically related to the service request of the petitioner and all relevant information submitted by the petitioner and the certificate holder.

1 In addition, the commission may require an award of compensation as  
2 otherwise provided by this section.

3 (a-4) Chapter 2001, Government Code, does not apply to any  
4 petition filed under Subsection (a-1). The decision of the  
5 commission on the petition is final after any reconsideration  
6 authorized by the commission's rules and may not be appealed.

7 (e) The determination of the monetary amount of  
8 compensation, if any, shall be determined at the time another  
9 retail public utility seeks to provide service in the previously  
10 decertified area and before service is actually provided. The  
11 commission shall ensure that the monetary amount of compensation is  
12 determined not later than the 90th calendar day after the date on  
13 which a retail public utility notifies the commission of its intent  
14 to provide service to the decertified area.

15 (g) For the purpose of implementing this section, the value  
16 of real property owned and utilized by the retail public utility for  
17 its facilities shall be determined according to the standards set  
18 forth in Chapter 21, Property Code, governing actions in eminent  
19 domain and the value of personal property shall be determined  
20 according to the factors in this subsection. The factors ensuring  
21 that the compensation to a retail public utility [~~for the taking,~~  
22 ~~damaging, or loss of personal property, including the retail public~~  
23 ~~utility's business,~~] is just and adequate shall [~~at a minimum~~]  
24 include: the amount of the retail public utility's debt allocable  
25 for service to the area in question [~~the impact on the existing~~  
26 ~~indebtedness of the retail public utility and its ability to repay~~  
27 ~~that debt~~]; the value of the service facilities of the retail

1 public utility located within the area in question; the amount of  
2 any expenditures for planning, design, or construction of service  
3 facilities that are allocable to service to the area in question;  
4 the amount of the retail public utility's contractual obligations  
5 allocable to the area in question; any demonstrated impairment of  
6 service or increase of cost to consumers of the retail public  
7 utility remaining after the decertification; the impact on future  
8 revenues lost from existing customers [~~and expenses of the retail~~  
9 ~~public utility~~]; necessary and reasonable legal expenses and  
10 professional fees; [~~factors relevant to maintaining the current~~  
11 ~~financial integrity of the retail public utility,~~] and other  
12 relevant factors. The commission shall adopt rules governing the  
13 evaluation of these factors.

14 (g-1) If the retail public utilities cannot agree on an  
15 independent appraiser within 10 calendar days after the date on  
16 which the retail public utility notifies the commission of its  
17 intent to provide service to the decertified area, each retail  
18 public utility shall engage its own appraiser at its own expense,  
19 and each appraisal shall be submitted to the commission within 60  
20 calendar days. After receiving the appraisals, the commission  
21 shall appoint a third appraiser who shall make a determination of  
22 the compensation within 30 days. The determination may not be less  
23 than the lower appraisal or more than the higher appraisal. Each  
24 retail public utility shall pay half the cost of the third  
25 appraisal.

26 SECTION 10. Section 13.255, Water Code, is amended by  
27 amending Subsection (g) and by adding Subsection (g-1) to read as



1 follows:

2 (g) For the purpose of implementing this section, the value  
3 of real property owned and utilized by the retail public utility for  
4 its facilities shall be determined according to the standards set  
5 forth in Chapter 21, Property Code, governing actions in eminent  
6 domain; the value of personal property shall be determined  
7 according to the factors in this subsection. The factors ensuring  
8 that the compensation to a retail public utility [~~for the taking,~~  
9 ~~damaging, and/or loss of personal property, including the retail~~  
10 ~~public utility's business,~~] is just and adequate, shall, at a  
11 minimum, include: impact on the existing indebtedness of the  
12 retail public utility and its ability to repay that debt, the value  
13 of the service facilities of the retail public utility located  
14 within the area in question, the amount of any expenditures for  
15 planning, design, or construction of service facilities outside the  
16 incorporated or annexed area that are allocable to service to the  
17 area in question, the amount of the retail public utility's  
18 contractual obligations allocable to the area in question, any  
19 demonstrated impairment of service or increase of cost to consumers  
20 of the retail public utility remaining after the single  
21 certification, the impact on future revenues lost from existing  
22 customers [~~and expenses of the retail public utility~~], necessary  
23 and reasonable legal expenses and professional fees, factors  
24 relevant to maintaining the current financial integrity of the  
25 retail public utility, and other relevant factors.

26 (g-1) The commission shall adopt rules governing the  
27 evaluation of the factors to be considered in determining the

1 monetary compensation under Subsection (g). The commission by rule  
2 shall adopt procedures to ensure that the total compensation to be  
3 paid to a retail public utility under Subsection (g) is determined  
4 not later than the 90th calendar day after the date on which the  
5 commission determines that the municipality's application is  
6 administratively complete.

7 SECTION 11. Subchapter G, Chapter 13, Water Code, is  
8 amended by adding Section 13.2551 to read as follows:

9 Sec. 13.2551. COMPLETION OF DECERTIFICATION. (a) As a  
10 condition to decertification or single certification under Section  
11 13.254 or 13.255, and on request by an affected retail public  
12 utility, the commission may order:

13 (1) the retail public utility seeking to provide  
14 service to a decertified area to serve the entire service area of  
15 the retail public utility that is being decertified; and

16 (2) the transfer of the entire certificate of public  
17 convenience and necessity of a partially decertified retail public  
18 utility to the retail public utility seeking to provide service to  
19 the decertified area.

20 (b) The commission shall order service to the entire area  
21 under Subsection (a) if the commission finds that the decertified  
22 retail public utility will be unable to provide continuous and  
23 adequate service at an affordable cost to the remaining customers.

24 (c) The commission shall require the retail public utility  
25 seeking to provide service to the decertified area to provide  
26 continuous and adequate service to the remaining customers at a  
27 cost comparable to the cost of that service to its other customers

1 and shall establish the terms under which the service must be  
2 provided. The terms may include:

3 (1) transferring debt and other contract obligations;  
4 (2) transferring real and personal property;  
5 (3) establishing interim service rates for affected  
6 customers during specified times; and

7 (4) other provisions necessary for the just and  
8 reasonable allocation of assets and liabilities.

9 (d) The retail public utility seeking decertification shall  
10 not charge the affected customers any transfer fee or other fee to  
11 obtain service other than the retail public utility's usual and  
12 customary rates for monthly service or the interim rates set by the  
13 commission, if applicable.

14 (e) The commission shall not order compensation to the  
15 decertificated retail utility if service to the entire service area  
16 is ordered under this section.

17 SECTION 12. Section 13.257, Water Code, is amended by  
18 amending Subsections (a), (b), and (d) and adding Subsections (r)  
19 and (s) to read as follows:

20 (a) In this section, "utility service provider" means a  
21 retail public utility other than a district subject to Section  
22 49.452 of this code~~[, a water supply or sewer service corporation,~~  
23 ~~or a special utility district organized and operating under Chapter~~  
24 ~~65].~~

25 (b) If a person proposes to sell or convey ~~[unimproved]~~ real  
26 property located in a certificated service area of a utility  
27 service provider, the person must give to the purchaser written

1 notice as prescribed by this section. An executory contract for the  
2 purchase and sale of real property that has a performance period of  
3 more than six months is considered a sale of real property under  
4 this section.

5 (d) The notice must be executed by the seller and read as  
6 follows: "The real property, described below, that you are about to  
7 purchase may be ~~[is]~~ located in a certificated ~~[the]~~ water or sewer  
8 service area ~~[of \_\_\_\_\_]~~ , which is ~~[the utility~~  
9 ~~service provider]~~ authorized by law to provide water or sewer  
10 service to the properties in the certificated area. If your  
11 property is located in a certificated area there ~~[. No other retail~~  
12 ~~public utility is authorized to provide water or sewer service to~~  
13 ~~your property. There]~~ may be special costs or charges that you will  
14 be required to pay before you can receive water or sewer service.  
15 There may be a period required to construct lines or other  
16 facilities necessary to provide water or sewer service to your  
17 property. You are advised to determine if the property is in a  
18 certificated area and contact the utility service provider to  
19 determine the cost that you will be required to pay and the period,  
20 if any, that is required to provide water or sewer service to your  
21 property.

22 "The undersigned purchaser hereby acknowledges receipt of  
23 the foregoing notice at or before the execution of a binding  
24 contract for the purchase of the real property described in the  
25 notice or at closing of purchase of the real property.

26 \_\_\_\_\_  
27 Date

Signature of Purchaser

"[~~(Note: Correct name of utility service provider is to be placed in the appropriate space.)~~] Except for notices included as an addendum to or paragraph of a purchase contract, the notice must be executed by the seller and purchaser, as indicated."

(r) A utility service provider shall:

(1) record in the real property records of each county in which the service area or a portion of the service area is located a certified copy of the map of the certificate of public convenience and necessity and of any amendment to the certificate as contained in the commission's records, and a boundary description of the service area by:

(A) a metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;

(B) the Texas State Plane Coordinate System;

(C) verifiable landmarks, including a road, creek, or railroad line; or

(D) if a recorded plat of the area exists, lot and block number; and

(2) submit to the executive director evidence of the recording.

(s) Each county shall accept and file in its real property records a utility service provider's map presented to the county clerk under this section if the map meets filing requirements, does not exceed 11 inches by 17 inches in size, and is accompanied by the

1 appropriate fee. The recording required by this section must be  
2 completed not later than the 31st day after the date a utility  
3 service provider receives a final order from the commission  
4 granting an application for a new certificate or for an amendment to  
5 a certificate that results in a change in the utility service  
6 provider's service area.

7 SECTION 13. The following provisions of the Water Code are  
8 repealed:

9 (1) Section 13.254(h); and

10 (2) Section 13.2541.

11 SECTION 14. A holder of a certificate of public convenience  
12 and necessity on the effective date of this Act must comply with  
13 Section 13.257, Water Code, as amended by this Act, not later than  
14 January 1, 2007.

15 SECTION 15. The changes in law made by this Act apply only  
16 to:

17 (1) an application for a certificate of public  
18 convenience and necessity or for an amendment to a certificate of  
19 public convenience and necessity submitted to the Texas Commission  
20 on Environmental Quality on or after January 1, 2006; and

21 (2) a proceeding to amend or revoke a certificate of  
22 public convenience and necessity initiated on or after January 1,  
23 2006.

24 SECTION 16. The Texas Commission on Environmental Quality  
25 shall promulgate rules implementing the changes in law effected by  
26 this Act by January 1, 2006, or shall report to the governor,  
27 lieutenant governor, and speaker of the house any failure to comply

1 with this deadline.

2 SECTION 17. This Act takes effect September 1, 2005.

David Keenleyside

President of the Senate

Jim Cusick

Speaker of the House

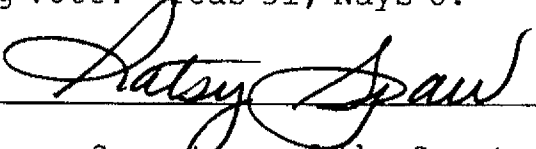
I certify that H.B. No. 2876 was passed by the House on May 12, 2005, by a non-record vote; that the House refused to concur in Senate amendments to H.B. No. 2876 on May 27, 2005, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 2876 on May 29, 2005, by a non-record vote.

Robert Haney

Chief Clerk of the House



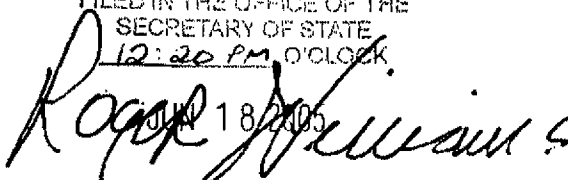
I certify that H.B. No. 2876 was passed by the Senate, with amendments, on May 25, 2005, by the following vote: Yeas 31, Nays 0; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 2876 on May 29, 2005, by the following vote: Yeas 31, Nays 0.

  
Secretary of the Senate

APPROVED: 18 JUNE 05

Date

  
Governor

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
12:20 PM O'CLOCK  
JUN 18 2005  
  
Secretary of State

# **EXHIBIT 6**

SUBJECT: Application for and revocation of CCNs for water and sewer service

COMMITTEE: Natural Resources — committee substitute recommended.

VOTE: 7 ayes — Puente, Callegari, Campbell, Hardcastle, Hilderbran, Hope, Laney

0 nays

2 absent — Bonnen, Geren

WITNESSES: *(On original version:)*

For — Joe Allen, Landowners of Texas; James Box, Texas Association of Builders; Richard Forsythe, Mary Sahs, The Forsythe Company; Michael G. Page, BST Timberlands of Texas, L.P.; Alan Sadler, Montgomery County; Jim Schwertner, Schwertner Farm, Inc.; Angela Stepherson, Law Offices of Clay E. Crawford, P.C.; Jim Holcomb; William Hudson (*On committee substitute*: Ken Petersen, Texas Rural Water Association)

Against — John Burke, Aqua Water Supply Corporation; Jerry Chapman, Greater Texoma Utility Authority; Stephen Cooney, Nitsch and Son Utilities and Southern Water Corporation; J.W. Dyer, East Rio Hondo Water Supply Company; Clay Hodges, Cash Special Utility District; Kelley Neumann, San Antonio Water System; Ken Petersen, Texas Rural Water Association; G.K. Sprinkle, Daily Court Review; Kent Watson, Wickson Creek Special Utility District; Mark Zeppa, Law Offices of Mark H. Zeppa, PC

On — Commissioner Susan Combs, Texas Department of Agriculture; Bart Jennings, Austin Water Utility; Paul R. Nelson, City of Houston; Gregory Rothe, San Antonio River Authority

BACKGROUND: Water Code, ch. 13, subch. G governs certificates of convenience and necessity (CCNs) for water and sewer service providers. Sec. 13.242 prohibits a water utility or supplier from rendering service to the public without first obtaining from the Texas Commission on Environmental Quality (TCEQ) a certificate that public convenience and necessity will require that service. A retail public utility cannot service any area to which

service is being provided by another utility without first having obtained a CCN.

**DIGEST:** CSHB 2876 would make numerous changes to laws governing CCNs for water service.

The bill would include any landowner within an area for which a CCN had been filed as an "affected person." The bill would prohibit a wholesale water or sewer service provider from requiring a purchaser to obtain a CCN if the purchaser was not otherwise required to obtain the certificate.

**CCN application.** The bill would require a CCN application or amendment to contain:

- a description of the proposed service area by a certified metes and bounds survey, the Texas State Plane Coordinate System, verifiable landmarks, or lot and block numbers;
- a description of requests for service in the proposed service area.
- a capital improvement plan;
- a description of funding sources for all facilities;
- a description of current and projected land uses;
- a financial statement;
- a list of owners of land in the area that is at least 50 acres, according to the central appraisal district tax roll; and
- any other information required by TCEQ.

When evaluating a CCN application, TCEQ would have to consider whether any landowners had requested service, whether the applicant could provide adequate service, and the effect of the proposal on land in the area.

**CCN decertification.** An owner of a tract of land of at least 100 acres that was not in a platted subdivision receiving water or sewer service could petition TCEQ to release the area from a CCN so that the area could receive service from another utility. The petitioner would have to demonstrate that:

- a written request for service had been made;
- the certificate holder had been allowed 90 days to respond;

- the certificate holder had refused to provide service, was incapable of providing service, or conditioned service upon payment greater than should be required; and
- an alternate utility was capable of providing service.

TCEQ would grant such a petition within 90 days unless it found that the petitioner had not met the requirements.

A landowner in a municipality of at least 650,000 or its ETJ that was receiving water service could not make such a petition, but could contest involuntary certification to TCEQ.

TCEQ could require compensation from a utility providing service in a decertified area for property rendered useless as a result of decertification. Monetary compensation would have to be determined no later than 90 days after a utility notified TCEQ of its intent to provide service in the decertified area. The bill would specify a procedure for obtaining an independent appraisal of property upon whose value the utilities could not agree.

TCEQ could require a utility seeking to provide service in a decertified area to provide service the entire area and could transfer the CCN of the area to the utility. This transition could require the transfer of debt and property the newly certified utility. TCEQ could require that costs for the transfer be limited to customers affected by the transfer.

TCEQ would have to adopt rules to implement these provisions.

**Notice requirements.** In addition to current law requiring that TCEQ ensure notification of affected parties when a CCN application was filed, notice of an application would have to be given to each land owner of at least 50 acres included in the proposed area. Notice would have to be given by mail to owners based upon tax appraisal rolls.

A landowner who owned a tract of at least 25 acres could elect to exclude his or her property from the service area under the proposed CCN. The landowner would have to provide written notice to that effect to TCEQ within 30 days of receiving notice of the CCN application. A landowner could not make such an election if he or she was located in the extraterritorial jurisdiction (ETJ) of a municipality of at least 650,000 (Houston, Dallas, San Antonio, and Austin) and the municipality was the

applicant, but could contest the inclusion of his or her property at a TCEQ hearing.

**CCNs in municipalities of at least 650,000.** For municipalities of at least 650,000, TCEQ could not grant a CCN to a retail public utility for service in the city's boundaries or ETJ without the consent of the municipality. The municipality could not withhold consent unreasonably, but could require water and sewer facilities to be constructed in accordance with municipal standards.

If consent was not provided within 180 days of a municipality's receipt of an application, TCEQ would grant the CCN if it found that the municipality lacked the ability to provide the service or had not committed funds available to provide the service. A municipality could appeal this decision in district court. A commitment by a municipality would have to provide that construction would begin within one year after the retail public utility's application was filed and be substantially completed within two years.

A municipality of at least 650,000 could exercise eminent domain to acquire a water or sewer system that was not up to its standards that was located in its boundaries. The municipality would have to pay just compensation for such an acquisition.

If a municipality extended its jurisdiction to include an area certificated to a retail public utility, the utility could continue or extend service to this area. A municipality's CCN area only could be extended beyond its ETJ with written consent from affected landowners. Any CCN beyond a municipality's ETJ would be void without consent of landowners in the extended area.

**Property records.** A utility would have to record a map of its CCN in the property records of each applicable county. A certificate holder would have to comply with this requirement by January 1, 2007.

**Effective date.** The bill would take effect September 1, 2005, and would apply to applications and proceedings initiated after January 1, 2006.

SUPPORTERS  
SAY:

CSHB 2876 would address abuses of CCN authority by several water utilities across the state. A CCN dictates that a single utility is the sole water and sewer service in an area, prohibiting other utilities from

servicing any property in the area. A CCN is an encumbrance on landowners — it dictates how, when, and by whom service will be provided to a property. Landowners have little recourse if a CCN holder is unable or unwilling to extend service to their land, as the process for removal from a CCN through the TCEQ appeals process can be extremely time-consuming and expensive.

CSHB 2876 would address numerous problems with CCNs in the state. The bill would ensure that true and adequate notice by mail was provided to owners of land of at least 50 acres when a CCN application was filed. Currently, notice only must be made in a general circulation newspaper. Upon receiving notice, a landowner could choose to have his or her property excluded from the CCN service area. The bill also would allow owners of land of at least 100 acres that was not receiving water service to be released from CCN authority, so that the person could receive service from another utility. Landowners now have few rights in the CCN process, and this bill would protect private property rights by unwanted imposition of a CCN on a landowner.

Given the unwieldy TCEQ appeals process, a landowner could get stuck under a CCN holder and have virtually no recourse or ability to obtain retail utility service on his or her property. CSHB 2876 would direct TCEQ to consider in the approval process whether a CCN applicant had the ability to provide service throughout the proposed service area. Currently, a landowner looking to develop his or her land might find that although the land was in a CCN, that utility was unable or unwilling to extend service to his or her property. In some cases, the CCN has conditioned service on exorbitant fees, well above what it reasonably should cost to serve the area. TCEQ also would have to consider whether landowners had requested service before approving an application or amendment.

CSHB 2876 would normalize policy governing CCNs in and around major cities in Texas. The bill would allow large municipalities to condemn substandard utilities within its boundaries and require that new CCNs granted to municipal utility districts meet municipal fire, safety, and service quality standards. These provisions would address problems where residents of MUDs with substandard service are unable to receive improvements from a municipally owned utility that is unable to encroach upon a CCN within its municipal boundary.

The bill also would address a major problem that exists currently by requiring all CCN holders to file a uniformly recognizable map of its service area in county records. In many cases, landowners have great difficulty even confirming if they are in a CCN.

The bill would incorporate safeguards to protect responsible CCN holders. A utility moving into a decertified area would have to compensate the previous utility for any stranded costs associated with facilities that already had been built out in the area. Debt, property, and service obligations also could be transferred to the new provider. The bill would strike an appropriate balance between the rights of landowners and the responsible CCNs providing vital water and sewer service in rural areas of the state.

**OPPONENTS  
SAY:**

The requirements under CSHB 2876 would restrict the ability of large, municipally owned utilities to plan for growth and provide quality service outside its boundaries. A city needs the ability to extend its CCN beyond its ETJ in order to manage growth and ensure that areas that were likely to be annexed had adequate infrastructure and service in place. Requiring written landowner consent before extending service beyond the ETJ could slow CCN expansion into areas provided substandard service by MUDs. In addition, requiring a city to provide service in a CCN area within two years would place the burden for providing service on the municipality, rather than on the community that would be served. This could lead to current ratepayers subsidizing extension of service to exurbs.

**OTHER  
OPPONENTS  
SAY:**

CSHB 2876 more explicitly should specify that all costs paid for by an existing CCN holder would have to be covered when a new utility moved into the area.

**NOTES:**

The committee substitute made numerous changes to the bill as filed. The bill as filed would have required written consent from landowners before a CCN application could be approved. Notice of an application would have been required to have been sent to all landowners within the proposed service area, not just to those with at least 50 acres. The committee substitute more explicitly would describe the criteria by which the TCEQ would evaluate an application for decertification of a CCN by a landowner.