

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

November 13, 2009

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-09-6172; TCEQ Docket No. 2009-1224-UCR; In Re: Petition of Bolivar Water Supply Corporation, CCN No. 11257, Requesting a Cease-and-Desist Order Against the City of Denton

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 3, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than December 14, 2009.

This matter has been designated **TCEQ Docket No. 2009-1224-UCR; SOAH Docket No. 582-09-6172**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "William G. Newchurch".

William G. Newchurch  
Administrative Law Judge

WGN:nl  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**  
300 West 15th Street Suite 502  
Austin, Texas 78701  
Phone: (512) 475-4993  
Fax: (512) 475-4994

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** BOLIVAR WATER SUPPLY CORP.  
**SOAH DOCKET NUMBER:** 582-09-6172  
**REFERRING AGENCY CASE:** 2009-1224-UCR

---

**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**  
**ALJ WILLIAM G. NEWCHURCH**

---

**REPRESENTATIVE / ADDRESS**

**PARTIES**

MARK ZEPPA  
ATTORNEY  
LAW OFFICE OF MARK H. ZEPPA, P.C.  
4833 SPICEWOOD SPRINGS RD., SUITE 202  
AUSTIN, TX 78759-8436  
(512) 346-4011 (PH)  
(512) 346-6847 (FAX)  
markzeppa@austin.rr.com

BOLIVAR WATER SUPPLY CORP.

---

BLAS J. COY, JR.  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF PUBLIC INTEREST COUNSEL  
P.O. BOX 13087, MC-103  
AUSTIN, TX 78711-3087  
(512) 239-6363 (PH)  
(512) 239-6377 (FAX)  
bcoy@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

---

BRIAN MACLEOD  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
P.O. BOX 13087, MC-175  
AUSTIN, TX 78711-3087  
(512) 239-0750 (PH)  
(512) 239-0606 (FAX)  
bmacleod@tceq.state.tx.us

EXECUTIVE DIRECTOR

---

GEORGIA CRUMP  
LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.  
816 CONGRESS AVENUE, SUITE 1900  
AUSTIN, TX 78701-2478  
(512) 322-5800 (PH)  
(512) 472-0532 (FAX)  
gcrump@lglawfirm.com

CITY OF DENTON

---

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-6172  
TCEQ DOCKET NO. 2009-1224-UCR

PETITION OF BOLIVAR WATER	§	BEFORE THE STATE OFFICE
SUPPLY CORPORATION, CCN NO.	§	
11257, REQUESTING A CEASE-AND-	§	OF
DESIST ORDER AGAINST THE CITY	§	
OF DENTON	§	ADMINISTRATIVE HEARINGS
	§	

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

Bolivar Water Supply Corporation (Bolivar) seeks an emergency and permanent order from the Texas Commission on Environmental Quality (TCEQ or Commission) directing the City of Denton (Denton) to cease and desist all activities to extend water and provide utility service to any portion of Bolivar's certificated area in Denton County, Texas. Denton responds that it has done nothing to give the Commission jurisdiction to issue a cease-and-desist order. Denton asks that Bolivar's petition be denied for lack of merit.

Denton admits that it has annexed a portion of Bolivar's certificate of convenience and necessity (CCN) area into its municipal limits, intends to provide retail water service to the area in the future, seeks an agreement with Bolivar to provide that service, and has written a letter to Bolivar informing it of those facts. However, Denton claims that it has not built or extended water-utility facilities into or provided or offered retail water service to anyone in Bolivar's CCN area. Bolivar does not argue that Denton has built or extended facilities in or provided or offered service in its territory, but it claims that Denton's letter and plans have sufficiently interfered with its operations that it is entitled to a cease-and-desist order at this time.

The parties agree that there are no significant factual disputes and that the remaining dispute is solely one of law. The Executive Director (ED) and the Office of Public Interest Counsel (OPIC) have taken no position on the petition.

The Administrative Law Judge (ALJ) agrees with Denton that it has done nothing to trigger the Commission's jurisdiction to issue a cease-and-desist order. He recommends that the Commission deny Bolivar's petition as a matter of law.

## II. CASE HISTORY AND PARTIES

On June 11, 2009, Bolivar filed its petition for an emergency and permanent cease-and-desist order against Denton.<sup>1</sup> On June 18, 2009, Denton filed its response, asking that the petition be denied. On August 5, 2009, the ED asked the Commission's Chief Clerk to refer this case to State Office of Administrative Hearings (SOAH) for hearing, which she did on August 24, 2009. After the required notice of hearing was given<sup>2</sup> and an uncontested continuance was granted with notice to all parties, a preliminary hearing was held by the ALJ on November 6, 2009.

The following appeared at the preliminary hearing and were admitted as parties:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Bolivar	Mark H. Zeppa
Denton	Georgia N. Crump
ED	Brian MacLeod
OPIC	did not appear

---

<sup>1</sup> ED Ex. A.

<sup>2</sup> ED Ex. B.

### III. BACKGROUND

On February 17, 2009, Denton annexed an 865.92-acre tract of land in Denton County (Disputed Tract). Denton currently holds water CCN No. 10195, but the Disputed Tract does not lie within Denton's water CCN area.<sup>3</sup> Instead, it lies within the area of Bolivar's water CCN No. 11257.

On June 9, 2009, Denton's City Manager sent a letter (Notice Letter) to Bolivar's President.<sup>4</sup> In it, the City Manager:

- noted that Denton currently provided water and sewer service to customers in Denton's corporate limits and extraterritorial jurisdiction under its water and sewer CCNs;
- informed Bolivar that Denton recently annexed the Disputed Tract within Bolivar's water-CCN boundaries;
- stated that Denton intended to provide retail water service to the Disputed Tract; and
- stated that Denton looked forward to discussing with Bolivar the terms of an agreement whereby Denton would extend water service to the Disputed Tract.

On June 11, 2009, Bolivar filed its petition for a cease-and-desist order against Denton. It claimed, based on the Notice Letter, that Denton intended to enter Bolivar's service area and commence retail public water utility service for compensation in violation of TEX. WATER CODE ANN. (Water Code) § 13.242(a), which states:

Unless otherwise specified, a utility . . . may not in any way render retail water . . . utility service directly or indirectly to the public without first having obtained from the commission a certificate that the present or future public convenience and necessity will require that installation, operation, or extension, and except as otherwise provided by this subchapter, a retail public utility may not furnish, make available, render, or extend retail water or sewer utility service to any area

---

<sup>3</sup> The Disputed Area does lie within the limits of Denton's sewer CCN No. 20072.

<sup>4</sup> ED Ex. A, sub-Ex. B.

to which retail water or sewer utility service is being lawfully furnished by another retail public utility without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

There is no dispute that both Denton and Bolivar are utilities and retail public utilities as those terms are defined for purposes of Water Code Chapter 13. Moreover, Denton does not deny that the prohibition of Water Code § 13.242(a) applies to it. However, Denton argues that it has not and does not intend to violate the prohibition.

In response to Bolivar's petition and at the preliminary hearing, Denton claimed that it had not extended any line, built any physical plant, provided water service to any customer, or offered water service to any customer within the Disputed Tract. Bolivar and the other parties did not dispute that was true.

Although the Notice Letter did not state it, Denton stated in its response to Bolivar's petition and at the preliminary hearing that it sent the Notice Letter to Bolivar in accordance with Water Code § 13.255. Under that section, a notice letter from a municipality to a utility currently holding a CCN for an area within the municipality's corporate limits commences a process that entitles the municipality to obtain a CCN as the exclusive provider of water or sewer service in the area upon the payment of adequate and just compensation to the utility currently holding the CCN.

Bolivar argues that Denton is not likely to succeed in obtaining a CCN for the Disputed Area. Bolivar argues that it is indebted to the federal government, and 7 U.S.C. § 1926(b) precludes curtailment of its right to serve the Disputed Area during the term of that loan.<sup>5</sup>

---

<sup>5</sup> *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. Tex. 1996). Denton notes that Water Code § 13.255(g) requires a municipality seeking single certification to compensate the CCN-holding utility that would be displaced and specifies that the impact on that utility's indebtedness and ability to repay its debt are factors to be considered in determining compensation. In *North Alamo*, the Court did not address how 7 U.S.C. § 1926(b) applies when compensation is provided.

Bolivar also claims that its CCN for the Disputed Area is not subject to cancellation under Water Code § 13.254, because it has, can, and will provide continuous and adequate service to the Disputed Area. It contends that certificating the Disputed Area to Denton under Water Code § 13.246 while Bolivar continues to hold a CCN for the area is very unlikely, since there is no need for additional service. Bolivar also argues that Denton has no duty under the Local Government Code to provide water service in the Disputed Area, even though it is within Denton's corporate limits, because the area is already served by an approved water utility, namely Bolivar.

Denton claims that these arguments about whether it can obtain a CCN are premature. It argues that the only question at this point is whether it has done anything that the Commission has legal authority to order it to cease and desist. The ALJ agrees with Denton on that point.

#### IV. DISCUSSION

Water Code § 13.252 is the only provision that might give the Commission jurisdiction to issue the cease-and-desist order, and it is the only jurisdictional statute to which Bolivar points. Water Code § 13.252 states:

If a retail public utility in constructing or extending a line, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other retail public utility, or furnishes, makes available, renders, or extends retail water or sewer utility service to any portion of the service area of another retail public utility that has been granted or is not required to possess a certificate of public convenience and necessity, the commission may issue an order prohibiting the construction, extension, or provision of service or prescribing terms and conditions for locating the line, plant, or system affected or for the provision of the service.

That is a very complicated sentence. It authorizes the Commission to issue a cease-and-desist order against a utility that does one of two things:

1. The utility “in constructing or extending a line, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other retail public utility;” or
2. The utility “furnishes, makes available, renders, or extends retail water or sewer utility service to any portion of the service area of another retail public utility.”

The first one does not apply because it requires some type of physical construction or extension of a line, plant, or system. Denton denies that it has done that within the Disputed Area. Even Bolivar agrees that it has no reason to think that Denton has.

As to the second ground for issuance of a cease-and-desist order, Denton contends that it has no water customers in the Disputed Area and has not offered water service to anyone there. At the preliminary hearing, Bolivar agreed that Denton had no customers there and conceded that it had no reason to believe that Denton had offered water service to any customer in that area. In the words of Water Code § 13.252, Bolivar agreed that Denton has not furnished, made available, or rendered service in the Disputed Area.

However, Bolivar claimed that Denton was extending water service into the Disputed Area. To support that argument, but without further explanation, Bolivar pointed to the definition of “service” in Water Code § 13.002(21), which provides:

"Service" means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

That, too, is a very complicated sentence. The interchange of facilities is not at issue in this case. That leaves the possibility that Denton is extending “service” into the Disputed Area by doing one of several things “in the performance of its duties under [Water Code Chapter 13]” to one of several groups. For Bolivar to be correct, Denton must have performed an act to fulfill some duty that it had to someone.

The only acts of Denton to which Bolivar points are its planning to provide water service to the Disputed Area in the future and sending the Notice Letter to Bolivar. There is nothing to indicate that Denton did either of those things pursuant to a duty under chapter 13 of the Water Code. It is true that by sending the Notice Letter to Bolivar, Denton took the first step that might lead to its seeking single certification of the Disputed Area under Water Code § 135.255(b). But nothing in the Water Code requires Denton to seek single certification; hence, nothing in the Water Code required Denton to send the Notice Letter. Denton simply chose to send the letter. Similarly, nothing in the Water Code obligated Denton to plan to serve the Disputed Area. Once again, Denton simply chose to. In the absence of a duty performed by Denton, the ALJ cannot find that Denton has extended “service” to the Disputed Area.

Based on the above, the ALJ concludes that Denton has not done anything that would authorize the Commission to issue the cease-and-desist order that Bolivar seeks.<sup>6</sup>

## V. GROUNDS FOR SUMMARY DISPOSITION

Commission rule 30 TAC § 80.137(c) states:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

---

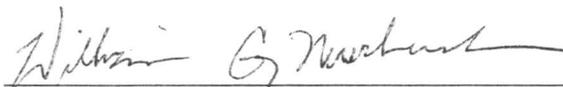
<sup>6</sup> In at least one prior case with similar facts, the Commission granted a motion for summary disposition and denied a petition for a cease-and-desist order. *In The Matter Of Wellborn Special Utility District's Application For A Texas Water Code § 13.252 Cease And Desist Order Against The City Of College Station, Texas*, SOAH Docket No. 582-04-2840, TCEQ Docket No. 2003-1518-UCR (Final Order, Mar. 11, 2005).

Given the lack of factual dispute, Denton's motion to deny Bolivar's petition amounts to a motion for summary disposition. The ALJ concludes that it should be granted.

#### VI. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached proposed order and deny Bolivar's petition for a cease-and-desist order against Denton.

SIGNED November 13, 2009.



---

WILLIAM G. NEWCHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
DENYING THE PETITION OF  
BOLIVAR WATER SUPPLY CORPORATION,  
CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11257,  
REQUESTING A CEASE-AND-DESIST ORDER AGAINST THE CITY OF DENTON  
TCEQ DOCKET NO. 2009-1224-UCR  
SOAH DOCKET NO. 582-09-6172**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered a Proposal for Decision (PFD) in this case presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. On February 17, 2009, the City of Denton (Denton) annexed an 865.92-acre tract of land in Denton County (Disputed Tract) into its corporate limits. Denton currently holds water Certificate of Convenience and Necessity (CCN) No. 10195, but the Disputed Tract does not lie within Denton's water CCN area.
2. The Disputed Tract lies within the area of Bolivar Water Supply Corporation's (Bolivar's) water CCN No. 11257.

3. On June 9, 2009, Denton's City Manager sent a letter (Notice Letter) to Bolivar's President. In it, the City Manager:
  - a. noted that Denton currently provided water and sewer service to customers in Denton's corporate limits and extraterritorial jurisdiction under its water and sewer CCNs;
  - b. informed Bolivar that Denton recently annexed the Disputed Tract within Bolivar's water-CCN boundaries;
  - c. stated that Denton intended to provide retail water service to the Disputed Tract; and
  - d. stated that Denton looked forward to discussing with Bolivar the terms of an agreement whereby Denton would extend water service to the Disputed Tract.
4. Denton sent the Notice Letter to Bolivar in accordance with TEX. WATER CODE ANN. (Water Code) § 13.255. Under that section, a notice letter from a municipality to a utility currently holding a CCN for an area within the municipality's corporate limits commences a process that entitles the municipality to obtain a CCN as the exclusive provider of water or sewer service in the area upon the payment of adequate and just compensation to the utility currently holding the CCN.
5. On June 11, 2009, Bolivar filed its petition for a cease-and-desist order against Denton. It claimed, based on the Notice Letter, that Denton intended to enter Bolivar's service area and commence retail public water utility service for compensation in violation of Water Code § 13.242(a).
6. Bolivar seeks an order directing Denton to cease and desist all activities to extend water and provide utility service to any portion of Bolivar's certificated area in Denton County, Texas.

7. On June 18, 2009, Denton filed a response to Bolivar's petition and asked that it be denied for lack of merit. Denton asserted that it had done nothing to give the Commission jurisdiction to issue a cease-and-desist order.
8. The Executive Director (ED) and the Office of Public Interest Counsel (OPIC) have taken no position on the petition.
9. Denton has not extended any line, built any physical plant, provided water service to any customer, or offered water service to any customer within the Disputed Tract.
10. On August 5, 2009, the ED asked the Commission's Chief Clerk to refer this case to State Office of Administrative Hearings (SOAH) for hearing, which she did on August 24, 2009.
11. After the required notice of hearing was given and an uncontested continuance was granted with notice to all parties, a preliminary hearing was held by the ALJ on November 6, 2009.
12. The following appeared at the preliminary hearing and were admitted as parties:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Bolivar	Mark H. Zeppa
Denton	Georgia N. Crump
ED	Brian MacLeod
OPIC	did not appear

13. At the preliminary hearing, the parties agreed that there were no significant factual disputes and that the remaining dispute was solely one of law that was ready to be ruled on.

## II. CONCLUSIONS OF LAW

1. Denton and Bolivar are utilities and retail public utilities as those terms are defined for purposes of Water Code Chapter 13.
2. Notice of the preliminary hearing was given as required by the Water Code, the Texas Government Code, and the rules of the TCEQ and SOAH.
3. Water Code § 13.252 authorizes the Commission to issue a cease-and-desist order against a utility that does one of two things:
  - a. The utility in constructing or extending a line, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other retail public utility; or
  - b. The utility furnishes, makes available, renders, or extends retail water or sewer utility service to any portion of the service area of another retail public utility.
4. Bolivar has failed to show facts that Denton has taken an action that Water Code § 13.252 would authorize the Commission to order Denton to cease and desist.
5. No other law authorizes the Commission to issue a cease-and-desist order against Denton like that which Bolivar seeks in this case.
6. Commission rule 30 TAC § 80.137(c) states:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.
7. Based on the above Findings of Fact and Conclusions of Law, Denton's motion to deny Bolivar's petition should be granted.

### III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Bolivar's petition for a cease-and-desist order against Denton is denied.
2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
3. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
4. The Commission's Chief Clerk shall forward a copy of this Order to each party.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

**Bryan W. Shaw, Ph.D., Chairman**  
**For the Commission**