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City of Las Cruces[®]
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Council Action and Executive Summary

Item # 7 Ordinance/Resolution# 15-017

For Meeting of _____
 (Ordinance First Reading Date)

For Meeting of August 4, 2014
 (Adoption Date)

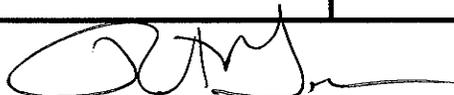
Please check box that applies to this item:

QUASI JUDICIAL LEGISLATIVE ADMINISTRATIVE

TITLE: A RESOLUTION RECOMMENDING APPROVAL BY THE CITY COUNCIL OF AN AGREEMENT FOR PURCHASE AND SALE OF WATER UTILITY ASSETS OF THE MESA DEVELOPMENT CENTER WATER COMPANY; PROVIDING FOR THE PHASED UPGRADE OF WATER COMPANY DISTRIBUTION LINES AND EXTENSION OF CITY WATER SERVICE; AND, FURTHER PROVIDING FOR CUSTOMER CONVERSION AND CUSTOMER BILLING.

PURPOSE(S) OF ACTION:

To approve an agreement.

COUNCIL DISTRICT: N/A		
Drafter/Staff Contact: Marcia B. Driggers	Department/Section: Legal/City Attorney	Phone: 541-2128
City Manager Signature:		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

Las Cruces City Council Resolution No. 12-106 authorized City staff to negotiate the purchase of Mesa Development Center, Inc. ("Mesa"), a public water utility regulated by the New Mexico Public Regulation Commission (the "PRC"), based on an appraisal to be prepared by Robert Pender, who is a public utility appraisal specialist. R. E. Pender, Inc. prepared a Summary Appraisal Report dated October 23, 2012, which appraisal enabled staff to resume negotiations to acquire Mesa.

Negotiations to acquire Mesa had been stalled for years in large part due to ongoing litigation with Moongate Water Company ("Moongate"). In 2006, a State District Court Judge ruled that Moongate had an exclusive service area against the City within one-half (1/2) mile of Moongate's infrastructure. This ruling potentially meant that Moongate could claim the exclusive right to provide water utility service within Mesa's service area if the City acquired it because Moongate encircles within one-half (1/2) mile of most, if not all, of Mesa's existing service area. The City Attorney's Office could not recommend that staff proceed to negotiate the acquisition of

(Continue on additional sheets as required)

Mesa if there was a possibility that Moongate would claim an exclusive right to serve within Mesa's former service area after acquisition by the City.

The attorney for Mesa has approved the Agreement. The Utilities Board, in Resolution No. 14-15-LCU005 has further recommended City Council approval of the Agreement in substantially the same form as shown on Exhibit "A".

SUPPORT INFORMATION:

1. Resolution.
2. Exhibit "A", Agreement for Purchase and Sale of Water Utility Assets of the Mesa Development Center Water Company; Providing for the Phased Upgrade of Water Company Distribution Lines and Extension of City Water Service; and, Further Providing for Customer Conversion and for Customer Billing (with Exhibits "A" through "E" attached to the Agreement).

SOURCE OF FUNDING:

Is this action already budgeted?	Yes	<input checked="" type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____.
		<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)
	<input type="checkbox"/>	Proposed funding is from fund balance in the _____ Fund.	
Does this action create any revenue?	Yes	<input type="checkbox"/>	Funds will be deposited into this fund: _____ in the amount of \$_____ for FY__.
	No	<input checked="" type="checkbox"/>	There is no new revenue generated by this action.

BUDGET NARRATIVE

The proposed expenditure of \$625,000 includes \$425,000 to be paid after approval by the New Mexico Public Regulation Commission and \$200,000 to be paid after approval by the New Mexico Office of the State Engineer as referenced respectively in the Agreement.

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
5378-WT NMFA 07	53538550- 854300-83082	\$625,000	\$1,620,914	\$995,914	Expenses related to Mesa

(Continue on additional sheets as required)

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve the Agreement.
2. Vote "No"; this will not approve the Agreement.
3. Vote to "Amend"; this could allow Council to modify the Agreement as necessary which modifications would have to be accepted by Mesa.
4. Vote to "Table"; this could postpone approval.

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

N/A

RESOLUTION NO. 15-017

A RESOLUTION RECOMMENDING APPROVAL BY THE CITY COUNCIL OF AN AGREEMENT FOR PURCHASE AND SALE OF WATER UTILITY ASSETS OF THE MESA DEVELOPMENT CENTER WATER COMPANY; PROVIDING FOR THE PHASED UPGRADE OF WATER COMPANY DISTRIBUTION LINES AND EXTENSION OF CITY WATER SERVICE; AND, FURTHER PROVIDING FOR CUSTOMER CONVERSION AND CUSTOMER BILLING.

The City Council is informed that:

WHEREAS, Las Cruces City Council Resolution No. 12-106 authorized City staff to negotiate the purchase of Mesa Development Center, Inc. ("Mesa"), a public water utility regulated by the New Mexico Public Regulation Commission (the "PRC"), based on an appraisal to be prepared by Robert Pender, who is a public utility appraisal specialist. R. E. Pender, Inc. prepared a Summary Appraisal Report dated October 23, 2012, which appraisal enabled staff to resume negotiations to acquire Mesa; and

WHEREAS, negotiations to acquire Mesa had been stalled for years in large part due to ongoing litigation with Moongate Water Company ("Moongate"). In 2006, a State District Court Judge ruled that Moongate had an exclusive service area against the City within one-half (1/2) mile of Moongate's infrastructure. This ruling potentially meant that Moongate could claim the exclusive right to provide water utility service within Mesa's service area if the City acquired it because Moongate encircles within one-half (1/2) mile of most, if not all, of Mesa's existing service area; and

WHEREAS, The City Attorney's Office could not recommend that staff proceed to negotiate the acquisition of Mesa if there was a possibility that Moongate would claim an exclusive right to serve within Mesa's former service area after acquisition by the City; and

WHEREAS, the City appealed the District court decision in 2007 and the New Mexico Court of Appeals ruled in August 2011 that Moongate did not have an exclusive service area against the City, which meant that, if the City was to acquire Mesa, Moongate could not claim that it had the exclusive right to the service area, thereby ousting the City from what it had purchased; and

WHEREAS, Moongate filed with the New Mexico Supreme Court seeking review of the Court of Appeals' decision. The Supreme Court upheld the Court of Appeals' decision in May 2013 and ruled that Moongate did not have a right to provide water utility service within its PRC-recognized service area to the exclusion of the City; and

WHEREAS, following the New Mexico Supreme Court decision, the parties proceeded to negotiate a draft Agreement for Purchase and Sale (the "Agreement"). Finalizing the Agreement was further delayed by House Bill 246 introduced during the 2014 New Mexico Legislative Session, with the support of Moongate and Jornada Water Company; and

WHEREAS, an existing state statute provides that, if cities over 200,000, which would only be Albuquerque, extended municipal utility service into an area within the service area of a PRC-regulated water utility, the PRC is empowered to determine whether the city with a population over 200,000 or the regulated utility can serve; and

WHEREAS, HB 246 sought to reduce the population requirement from 200,000 to 95,000 so that the above referenced statute would apply to Las Cruces. HB 246 was not approved in 2014 but staff is concerned that if a bill similar to HB 246 were to be approved in 2015 or later, the City may become subject to PRC jurisdiction if it opted to provide City water or wastewater service at the request of a developer within the claimed service area of a PRC regulated utility such as Moongate because Moongate may claim that Mesa's

service area would become part of Moongate's service area after purchase by the City; and

WHEREAS, staff therefore amended the draft Agreement to provide that the City needs to be fully satisfied with the terms of the abandonment of water utility service by Mesa and a transfer of ownership and operation to the City that may be proposed by PRC staff because the City needs to be able to offer utility service within all of Mesa's service area without making itself subject to PRC jurisdiction; and

WHEREAS, the Agreement provides for payment in the amount of \$425,000 for the water utility assets identified in Paragraph 1 entitled "Assets Transferred", which assets include approximately 107 acre feet of perfected groundwater rights, plus an additional payment in the amount of \$200,000 if the City is able to perfect additional groundwater rights as provided in Paragraph 5 entitled "Payment for Unperfected Water Rights"; and

WHEREAS, the Utilities Board recommended approval of the Agreement in Board Resolution No. 14-15-LCU005 in substantially the same form as shown on Exhibit "A" attached to this Resolution.

NOW, THEREFORE, Be it resolved by the governing body of the City of Las Cruces:

(I)

THAT the City Council approves the Agreement for Purchase and Sale of Water Utility Assets of the Mesa Development Central Water Company; Providing for the Phased Upgrade of Water Company Distribution Lines and Extension of City Water Service; and Further Providing for Customer Conversion and for Customer Billing in substantially the same form as shown on Exhibit "A" attached to this Resolution.

(II)

THAT City staff is hereby authorized to do all deeds as necessary in the accomplishment of the herein above.

DONE AND APPROVED on this _____ day of _____, 20_____.

APPROVED:

Mayor

ATTEST:

City Clerk

(SEAL)

VOTE:

- Mayor Miyagishima: _____
- Councillor Silva: _____
- Councillor Smith: _____
- Councillor Pedroza: _____
- Councillor Small: _____
- Councillor Sorg: _____
- Councillor Levatino: _____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:

[Handwritten Signature]
Asst City Attorney

**AGREEMENT FOR PURCHASE AND SALE OF WATER UTILITY ASSETS OF THE
MESA DEVELOPMENT CENTER WATER COMPANY; PROVIDING FOR
THE PHASED UPGRADE OF WATER COMPANY DISTRIBUTION LINES AND
EXTENSION OF CITY WATER SERVICE; AND, FURTHER PROVIDING FOR
CUSTOMER CONVERSION AND FOR CUSTOMER BILLING**

THIS AGREEMENT is entered into on this _____ day of _____, 2014 between the **City of Las Cruces** ("City"), a New Mexico municipal corporation, on behalf of the **City of Las Cruces Utilities**, and **Mesa Development Center, Inc.** ("Water Company"), a New Mexico corporation and a public water utility regulated by the New Mexico Public Regulation Commission ("PRC").

WHEREAS, City Council Resolution No. 12-106 authorized City staff to negotiate the purchase of the Water Company based on an appraisal to be prepared by Robert Pender, who is a public utility appraisal specialist; and

WHEREAS, the Summary Appraisal Report (the "Appraisal") prepared by R. E. Pender, Inc. (the "Appraiser") dated October 23, 2012 stated that the fair market value of the Water Company including its perfected water rights and some of its surplus water rights deemed required by the Appraiser for continued operation as of July 1, 2012 was \$425,000, and that the fair market value of the remainder of the Water Company's surplus water rights (aka inchoate or unperfected water rights) deemed not required by the Appraiser for continued operation as of July 1, 2012 was \$1,246,100 for a total valuation of \$1,661,100; and

WHEREAS, legal counsel for the City has raised concerns as to the Appraisal's \$1,600 per acre foot ("AF") value for the Water Company's surplus water rights because (1) a conditionally approved Application for Permit to Change Location of the Water Company's Well LRG-5039 will expire on February 1, 2014 if a proof of application to beneficial use is not filed with the New Mexico Office of the State Engineer ("OSE") on or before January 31, 2014; and (2) the surplus water rights have to be put to beneficial use within Section 14 and unspecified parts of Section 23 by that date, which concerns were set forth in Footnote 24 on page 6-9 of the Appraisal; and

WHEREAS, legal counsel for the City has further concerns not conveyed to the Appraiser that arose after the Appraisal was completed when counsel discovered that the New Mexico Public Service Commission (a predecessor to the PRC) in Case No. 2047 reduced the Water Company's service area, which is where a public regulated utility is legally entitled to provide regulated utility

service, from all of Section 14, T22S, R2E, to approximately the west ½ of Section 14, and allowed Moongate Water Company to serve within approximately the east ½ of Section 14; and

WHEREAS, the Appraiser understood that the Water Company's service area was bordered by Mesa Grande Drive to the west, Porter Drive to the east, Peachtree Hills Road to the north, and U.S. Highway 70 to the south, which service area would include all of Section 14 and a portion of Section 23 north of Highway 70, as referenced on Appraisal page 3-1, and, upon information and belief, did not realize that its service area that been reduced by the Public Service Commission. This reduced service area arguably reduces the area where the Water Company's unperfected water rights may be put to beneficial use and thereby perfected; and

WHEREAS, the City is willing to purchase the Water Company's water utility assets on the terms set forth herein, which assets include the perfected water rights; and is further willing to separately purchase the unperfected water rights that the City can perfect within the undeveloped portions of the approximate west ½ of Section 14 within forty (40) years or within the time allowed by the OSE, whichever is less; and

WHEREAS, the Water Company has been unable to secure an extension of the March 1, 2011 OSE Order, which obligates the Water Company to file both an Application of Water to Beneficial Use and Proof of Completion of Well on or before January 31, 2014; and

WHEREAS, the City understands that the Water Company's failure to timely file the Proof of Completion of Well will result in a denial and cancellation of its Application for Permit to Change Location of Well Permit No. LRG-5039, and that its ability to perfect any additional LRG-5039 rights will be capped at the acre feet perfected as of January 31, 2014, which is approximately 107 AF; and

WHEREAS, the City filed an Application for Permit to Repair and/or Deepen Well (Non 72-12-1) with the OSE on November 27, 2013 in which the City seeks authorization to repair and/or deepen one or more of the Water Company's three (3) wells subject to conditions which may be imposed by the OSE. The City understands that filing the Application may operate to extend the January 31, 2014 deadline set forth in the March 1, 2011 OSE Order as referenced above and to provide the City with additional time in which to perfect the unperfected water rights within the reduced service area; and

WHEREAS, the City also desires to provide for the phased upgrade of the Water Company's infrastructure with infrastructure that meets City water utility standards and for the phased extension and connection of the City's water utility system to the upgraded water

distribution infrastructure within the approximate west ½ of Section 14, all in accordance with a phasing plan to be developed by Las Cruces Utilities; and for the conversion of Water Company customers to become City water utility customers and to provide for City billing for water service; and

WHEREAS, the City expects to invest substantial sums of money for the phased upgrade of the Water Company's water production and water distribution infrastructure (except for those distribution lines previously replaced by the City within Genesis Lane, Sierra Vista Avenue and Midway Avenue), which existing infrastructure needing to be upgraded is of no value to the City's water utility system even though the City is paying to acquire the Water Company's existing physical plant infrastructure; and

WHEREAS, a reasonable surcharge may be added to the City's water utility bills charged to former Water Company service addresses within the approximate west ½ of Section 14 (which is the service area recognized by the PRC) to partially offset some of the City's costs for upgrading the water distribution lines and for extending City water utility infrastructure to the west ½ of Section 14.

IT IS THEREFORE AGREED between the parties as follows:

1. **Assets Transferred**. The Water Company will sell to the City free and clear of all liabilities all of its water utility assets excluding accounts receivable and including but not necessarily limited to the following, and will execute deeds, right-of-way easements, and any other document necessary to fully transfer said assets and physical access to said assets to the City:

A. The physical plant including three (3) well sites (each site consisting of a well, tank or tanks, and pump house/storage building); utility piping; customer water meters, and all other components of the water production and water distribution systems and excluding the office building located at 5051 Jimmie Lane, Las Cruces, New Mexico 88012; and

B. Perfected groundwater rights consisting of approximately 107 AF permitted under State Engineer Declaration Nos. LRG-5039, LRG-5039-S, and LRG-5039-S-2 (the "LRG-5039 series of wells") and approved by the OSE. Perfected groundwater rights are those rights that have been placed to beneficial within the OSE permitted place of use. The maximum that the Water Company has put to beneficial use was 106.78 AF diverted in 2003 which has been rounded up to 107 AF; and

C. Rights-of-way and easements used or needed for the water production and distribution system, whether or not previously recorded; and

D. All Water Company account records including but not limited to a listing by name, by service address, and by billing address if different from service address for all current customers. The accounts receivable will remain owned by and an asset of the Water Company.

2. **Purchase Price.** The Purchase Price for the above referenced water utility assets is \$425,000 based in part on the Appraisal and includes the perfected and excludes the unperfected groundwater rights as further explained and identified in paragraph 3. The Purchase Price will be paid from the appropriate City water utility funds within thirty (30) days after the Effective Date referenced in paragraph 26 herein.

3. **Water Rights Explanation.**

A. **The \$425,000 Appraisal Included Perfected and Some Unperfected Water Rights But the \$425,000 Purchase Price Includes Only Perfected Not Unperfected Water Rights.**

(i) **Perfected Water Rights Included in Purchase Price.** The Water Company claims the right to develop up to 967.8 AF of groundwater rights under its LRG-5039 series of wells within a place of use described by the OSE as both Section 14, T22S, R2E and the Water Company's service area. SEE OSE Water Rights Summary attached as Exhibit "A". Metered diversions from the LRG-5039 series of wells indicate a maximum diversion of 106.78 AF per year in 2003 (rounded up to 107 AF) meaning that the Water Company has perfected 107 AF out of the 967.8 AF claimed. The 107 AF of perfected groundwater rights are included within the \$425,000 Purchase Price.

(ii) **Unperfected Water Rights Excluded from Purchase Price.** The Appraiser classified the unperfected water rights into two (2) categories:

(a) **Required:** The Appraiser included within the \$425,000 Appraisal 82 AF of the Water Company's unperfected water rights that he deemed "required for the continued operation of the utility as an on-going business enterprise. We believe these water rights are an integral part of the utility system and should not, therefore, be separately valued." SEE Appraisal, pages 6-7. Although the Appraiser's justification for including some of the unperfected water rights within the \$425,000 Appraisal to provide for additional water consumption by existing customers and for in-fill is professionally well-founded, solely for purposes of this Agreement, the \$425,000 Purchase Price does not include any unperfected water rights.

(b) Surplus: The Appraiser excluded from the \$425,000 Appraisal 778.8 AF (being 967.8 AF minus 189 AF) of the Water Company's unperfected groundwater rights that he deemed to be "surplus to the current and future needs of the utility. . . . We view the value of these rights to be separate and distinct from the value of the utility as an on-going business enterprise. That is, the surplus rights are not essential to the continued operation of MDC and could therefore be separately marketed and sold." SEE Appraisal, pages 6-7. The Appraiser valued what he called "surplus water rights", which are unperfected inchoate rights, at \$1,600 per acre foot for an additional Appraisal valuation of \$1,246,080 (being \$1,600 per AF X 778.8 AF). The City rejects this additional Appraisal valuation and will compensate the Water Company in the amount of \$200,000 for water rights that the City is able to perfect above 107 AF per year as more specifically set forth hereafter in Paragraph 5.

B. OSE Order, Hearing No. 10-028. The Water Company filed an Application for Permit to Change Location of Well No. LRG-5039 with the OSE on June 13, 2001. The OSE entered an Order dated March 1, 2011 concerning that Application. The Order approved one final extension of time through January 31, 2014 for the Water Company to file proof of completion of the well and to file proof of application of inchoate water rights to beneficial use for the well. If the Water Company is unable to secure an extension of the 2011 Order, its Application to drill the replacement well will be denied, and the Water Company will not be allowed to perfect any additional LRG-5039 ground water rights after January 31, 2014. A copy of the 2011 Order is attached as Exhibit "B".

C. Application for Permit to Repair and/or Deepen Well (Non 72-12-1). The City filed an Application for Permit to Repair and/or Deepen Well (Non 72-12-1) with the OSE on November 27, 2013 in which the City seeks authorization to repair and/or deepen one or more of the Water Company's three (3) wells subject to conditions which may be imposed by the OSE. The City understands that filing the Application may operate to extend the January 31, 2014 deadline set forth in the March 1, 2011 OSE Order referenced in paragraph 3(B) above, and may provide the City with additional time in which to perfect the unperfected water rights. However, the OSE has requested that the Water Company support the City's November 27, 2013 Application because the City does not own the wells or the land in which the wells are located. A copy of the

November 27, 2013 Application is attached as Exhibit "C". Further, it may be necessary for the City to hire a well driller or engineer to examine the condition of the three (3) wells in order for the City to assess the cost of repairing and/or deepening of each well. The Water Company will cooperate and coordinate with the City to support the City's November 27, 2013 Application and for each well examination.

4. **Water Company Service Area Recognized by the New Mexico Public Regulation Commission.** Pursuant to the Order Adopting Recommended Decision of the Hearing Examiner with Supplementation issued in 1986 in New Mexico Public Service Commission Case No. 2047 (a predecessor to the PRC), the Water Company's PRC recognized service area was reduced to approximately the west ½ of Section 14. The 1986 Order gave Moongate Water Company the PRC recognized service area in the east ½ of Section 14 and, upon information and belief, the PRC continues to recognize the east ½ of Section 14 as Moongate's service area as between these two (2) PRC regulated water utilities. A copy of the 1986 Order is attached as Exhibit "D". The 1986 Order was confirmed in a Petition for Investigation filed by staff of the New Mexico Public Service Commission in 1986 in New Mexico Public Service Commission in Case No. 2082. The Appraiser without knowledge of the 1986 Order mistakenly identified the Water Company's service area as bordered by Mesa Grande Drive to the west, Porter Drive to the east, Peach Tree Hills Road to the north, and U.S. Highway 70 to the south, which are the boundaries of Section 14, not the boundaries of the west ½ of Section 14.

5. **Payment for Unperfected Water Rights.** If the OSE deems that the Application for Permit to Repair and/or Deepen Well extends the January 31, 2014 deadline and provides the City with additional time in which to perfect the Water Company's unperfected water rights, not to exceed 860.8 AF (being 967.8 AF unperfected minus 107 AF perfected); and if the OSE approves the City's Application for Permit to Repair and/or Deepen one or more of the Water Company's wells and imposes approval conditions that are acceptable to the City, the City will pay the Water Company an additional sum of \$200,000 for all of its unperfected water rights within 60 days after the City's formal acceptance of the OSE approval conditions and after PRC regulatory approval, whichever comes later. The City is concerned that, if the OSE approves the Application, it may impose conditions that the City is unable or unwilling to satisfy, including but limited to prohibiting local impairment of adjacent wells and providing for cure if impairment does occur. The City as the applicant has the burden of proof concerning impairment, and, if impairment is an issue, then the City will have to hire a hydrogeologist or engineer to assess

potential impairment to adjacent wells. The City will work diligently and in good faith to determine whether the conditions of approval imposed by the OSE are acceptable to the City in its sole discretion. If the City determines that the OSE's approval conditions attached to the Application are not acceptable, the City will so inform the Water Company, and will not owe or pay the Water Company the additional sum of \$200,000.

6. **No City Obligation for Outstanding Debts of the Water Company.** The water utility assets acquired by the City from the Water Company pursuant to this Agreement will be delivered free of any lien or encumbrance. Any and all debts and other financial obligations of the Water Company, including but not limited to gross receipts taxes and any other obligations owed to the State of New Mexico, are unaffected by this Agreement and remain the entire obligation of the Water Company, and the City shall have no liability for payment thereof.

7. **Debts and Releases of Mortgages.**

A. **Debts to Third Parties.** The Water Company warrants that there are no outstanding debts or liabilities which affect its ability to convey its water utility assets referenced herein to the City free and clear of any debt or creditor claim.

B. **Mortgages.** The Water Company has secured the release of the Real Estate Mortgage from the Water Company to Western Bank recorded on November 14, 1989 in Book 461, Pages 694-696 of the records of Doña Ana County, New Mexico. Assets of the Water Company including 100 acre feet of water rights were pledged as security for said 1989 Mortgage. The Release of Mortgage was recorded on April 29, 2014 as Instrument No. 1408638 of the records of Dona Ana County, New Mexico. The Water Company need not secure the release of the Mortgage from the Water Company to Community First National Bank recorded on September 21, 2004 in Book 552, Pages 679-685 of the records of Dona Ana County, New Mexico because it believes that the debt secured by the 2004 Mortgage has been paid and further because the real property located at 5051 Jimmie Lane, which was pledged as security for the 2004 Mortgage, is excluded from the assets being transferred to the City.

C. **Debt to City.** The Water Company owes the City for three (3) unpaid invoices, being Invoice No. 24729 dated August 2, 2012 in the amount of \$2,765.34 for repairs to damaged Water Company water lines at Mesa Drive and Sunny Acres Drive; Invoice No. 25596 dated November 6, 2012 in the amount of \$2,219.93 for repair of a Water Company service line leak at 5448 Sierra Vista Avenue; and Invoice No. 25597 dated November 6, 2012 in the amount of \$1,324.78 for repair of a service line leak at 5201 Sierra Vista Avenue, in the total amount of

\$6,310.05. Said sum will be paid by the Water Company to the City by separate check prior to or at closing on the City's purchase of the Water Company's water utility assets.

8. **Franchise Fee Balance.**

A. **Promissory Note Balance.** On April 22, 2002, Grover Pettes as President on behalf of the Water Company executed a promissory note to the City in the original amount of \$20,305.75 for unpaid franchise fees owed by the Water Company to the City for calendar years 1988 through 2000. Payments were to be made in the amount of \$282 per month. Interest was waived if monthly payments were timely made. Based on a City Accounts Receivable statement, City records indicate that \$12,972 was paid and that \$7,051.72 was owed as of March 28, 2006. Further, based on a City invoice detail report dated May 14, 2014, City records indicated that an additional \$6,205.72 was paid on that Promissory Note as of September 24, 2008 being the last payment date. The City is unable to locate any monthly payments of \$282 after that date. However, the City waives the interest owing on the Promissory Note after September 24, 2008 and deems that payments totaling \$19,177.72 (being \$12,972 + \$6,205.72) have been paid, and that \$1,128.03 is owed as the date of this Agreement.

B. **Post-2002 Franchise Fees:** Based on a City invoice detail report dated May 14, 2014, the City deems that the Water Company has paid franchise fees for calendar years 2001 through 2007, and owes franchise fees for calendar years 2008 through 2013 plus payment for calendar year 2014 and possibly for calendar year 2015 depending on when the purchase is completed. The Water Company has been paying the City the sum of \$1,969 per year for franchise fees based on its own calculations, which calculations are accepted by the City. Therefore, the City deems that the Water Company owes it the sum of \$11,814 for franchise fees for calendar years 2008 through 2013 (being \$1,969 per year X 6 years) plus payment for calendar year 2014 and possibly for calendar 2015.

C. **Payment.** The combined balance owing on the 2002 Promissory Note in the amount of \$1,128.03 and on post-2002 franchise fees in the amount of \$11,814, which total \$12,942.03, plus payment for calendar year 2014 and possibly for calendar year 2015 will be paid by the Water Company to the City by separate check prior to or at closing on the City purchase of the Water Company's water utility assets. Upon receipt of payment, the City will cancel the April 22, 2002 Promissory Note and return same to the Water Company.

9. **Litigation and Claims.** The Water Company warrants that no claims or litigation is pending or threatened against it or against any of the owners of the Water Company concerning

the Water Company. The Water Company further warrants that neither the Estate of Jimmie L. Pettes, deceased, nor the heirs of Jimmie L. Pettes claim any interest in the Water Company, and that the Water Company is legally entitled to sell the aforementioned water utility assets free and clear of any claim from the Estate of Jimmie L. Pettes, deceased, or from the heirs of Jimmie L. Pettes.

10. **Uniform Commercial Code.** The transfer and conveyance of the Water Company's water utility assets to the City is not subject to the New Mexico Uniform Commercial Code.

11. **Subdivision Compliance.** The Company will be required to comply with all City subdivision requirements to validly subdivide the parcels on which the well sites are located, if any subdivision is necessary, in order to deed the three (3) existing well sites to the City.

12. **Transfer Documents and Account Documents.** The Water Company will execute the following transfer and account documents to the City:

A. Change of Ownership of Water Right for LRG-5039, LRG-5039-S, and LRG-5039-S-2 from the Water Company to the City to be prepared by the City and filed with the OSE at City expense after execution by the Water Company or by the City depending on when the Warranty Deed or Special Warranty Deed (Groundwater Rights) is recorded with the County Clerk.

B. Proof of final payment of all water utility related accounts payable including but not limited to El Paso Electric Company and to the City of Las Cruces.

C. Warranty Deeds for the three (3) well sites including access to the well sites with individual metes and bounds legal descriptions prepared by a licensed surveyor at the Water Company's expense. Said legal descriptions will be reviewed and approved by the City's surveyor in advance of execution of the Warranty Deeds. The legal description for each well site will include the existing chain link fences around each well site and the areas within the chain link fences, as well as access to the well sites if the well sites do not abut public rights of way.

D. Warranty Deed or Special Warranty Deed (Groundwater Rights) for LRG-5039, LRG-5039-S, and LRG-5039-S-2.

13. **Customer Lists.** The Water Company will provide the City with a detailed listing of all current water customers with the name of the customer, the service address, and the billing address if different from the service address. Said list will be attached as Exhibit "E" to this Agreement and will be updated prior to the Effective Date. After the Effective Date of the

Agreement, any customers desiring City water service in the west ½ of Section 14 will have to sign up for City water utility service as set forth herein.

14. **Water Company's Place of Use and Service Area.**

A. **State Engineer's Office Place of Use.** Based on the Water Company's LRG-5039 series of well declarations filed with the Office of the State Engineer, the Water Company can only put groundwater from said wells to beneficial use within the area referenced in said well declarations, which area is Section 14 and the "service area for Mesa Development Center, Inc." SEE OSE Water Right Summary attached as Exhibit "A". That place of use designation by the OSE is ambiguous because Mesa's present PRC recognized service area does not include all of Section 14.

B. **PRC Service Area.** Based on the 1986 Order attached as Exhibit "B", the Water Company's PRC recognized service area is approximately the west ½ of Section 14.

C. **Conflict Between Place of Use and Service Area.** There exists legal uncertainty as to whether the Water Company can perfect LRG-5039 water rights outside of its PRC recognized service area since the Water Company is a PRC regulated public utility that can only provide water utility service where authorized by the PRC.

D. **Warranty.** The Water Company warrants that it has never provided water utility service to any customer outside of approximately the west ½ of Section 14, and that all water from said well declarations on file with the OSE has been put to beneficial use within approximately the west ½ of Section 14.

15. **Regulatory Approval.**

A. The Water Company will obtain regulatory permission and approval from the PRC for the Water Company to abandon all regulated water utility service as required by NMSA 1978, § 62-9-5 (2005) and to transfer ownership and operation thereof to the City. The Water Company will thereafter provide written proof of such regulatory permission and approval to the City as a condition precedent for the City paying the \$425,000 Purchase Price to the Water Company. The City will cooperate with the Water Company to provide any testimony, documentation or evidence reasonably required by the PRC as to the City's continued provision of water service to Water Company customers upon the transfer of the water utility assets to the City.

B. Each party will pay its own costs incurred in connection with the Water Company's application to the PRC to abandon regulated water utility service as provided in this paragraph 15.

C. If the terms of the abandonment of regulated utility service by the Water Company and the transfer of ownership and operation thereof to the City as may be proposed by PRC staff as part of the regulatory approval process are not fully satisfactory to the Water Company, it may withdraw its Petition for Approval and terminate the Agreement without claim by the City. If the terms of the abandonment of regulated utility service by the Water Company and the transfer of ownership and operation thereof to the City as may be proposed by PRC staff as part of the regulatory approval process are not fully satisfactory to the City, it may terminate the Agreement with the approval of the City Manager without claim by the Water Company.

D. The closing on the City's purchase of the water utility assets and the City's obligation to pay the Water Company the Purchase Price of \$425,000 as provided in Paragraph 26 entitled "Effective Date for Paying \$425,000 Purchase Price" shall be stayed until the completion of any appeal that may be filed by an intervenor in the PRC regulatory case. Either party may terminate this Agreement without claim by the non-terminating party if the appellate decision is not fully satisfactory to the party seeking termination.

16. **Franchise Termination.** The City's franchise with the Water Company approved in Ordinance No. 1019 expired on January 1, 2003, and has continued on a month-to-month basis thereafter. The expired franchise is in the process of being renewed. Any franchise that the City may have with the Water Company will be terminated as of the Effective Date referenced in paragraph 26 herein, and from that date forward, the Water Company has no legal right to operate a water utility system within the City limits.

17. **Phased Upgrade.** The City will develop a phased upgrade to the Water Company's production and distribution systems to meet City standards, which plan will be provided to Water Company customers in a mailing followed up with one or more public meetings at a site in the vicinity of Section 14. The City will continue providing water utility service using the Water Company's existing infrastructure and without any guaranty of fire flow until such time as the upgrades can be made by the City.

18. **Becoming City Water Utility Customers.**

A. **Application Process.** All customers of the Water Company will be required to become City water utility customers by executing the required customer service application at

the City's Customer Service office located in City Hall if they desire continued water utility service in accordance with the City's transfer plan.

B. Application Payments. The Water Company customers will not be required to pay the City's standard utility deposit even if they are not current City utility customers, nor will they be required to pay the City's utility account activation and processing fee. The City's general fund will pay the account activation and processing fee.

C. Failure to Timely Apply. The Water Company customers who do not execute the required application to become City water utility customers within thirty (30) days after the availability of City water utility service to their properties will have water service terminated. They will then have to pay the standard City utility deposit, if required, and the account activation and processing fee to have City water service provided.

19. Customer Notification. The Water Company will send a written notification prepared by the City to all of the Water Company's current customers before the Effective Date and will otherwise comply with any PRC notification requirements. The notification will advise the current customers of the terms of this Agreement and will further advise them of their obligation to execute the necessary customer service applications with the City in order to obtain continuous water service. The notification letter will be timely delivered by the City to the Water Company to enable the Water Company to send the letter with a routine monthly billing.

20. Water Utility Rates.

A. City Utility Rates. The City will charge all customers of the Water Company that become City water utility customers as well as new City water utility customers within the west ½ of Section 14 the same water utility rates charged to comparable City water customers.

B. Surcharge. The City may charge all such customers within the west ½ of Section 14 a reasonable monthly surcharge in an amount to be determined by the Utilities Board to partially offset some of the City's costs for upgrading the Water Company's water distribution lines and for extending City water utility infrastructure to the west ½ of Section 14.

21. Payment of City Water Development Impact Fees, Water Rights Fees, and Connection Charges.

A. Water Development Impact Fees. Current Water Company customers will not be assessed any of the City's water development impact fees charged to new City water utility

connections when these current customers become City water customers. The City will internally transfer funds that would otherwise be required for water development impact fees.

B. Water Rights Fees. Current Water Company customers will not be assessed the City's water rights fees, which are presently \$383 for a 5/8" residential water meter, when these current customers become City water customers.

C. New Customers - New Service Locations. Builders and customers, who sign up for City water utility service within the west ½ of Section 14 after the date of this Agreement for properties where service had not previously been provided by the Water Company, will be charged the applicable shares of the City's water development impact fees in accordance with City procedures as well as the City's water rights fee and the usual deposit and account activation processing fees in effect at that time.

22. Payment. Payment of the Purchase Price and any separate payment for unperfected water rights will be made to Mesa Development Center, Inc.

23. Merger. This Agreement incorporates all of the understandings of the parties concerning the purchase of the Water Company, the purchase of the unperfected water rights, the phased upgrade of the Water Company distribution lines and extension of City service to the area, customer conversion and customer billing. All such understandings have been merged into this Agreement. No prior agreement or understanding, verbal or otherwise, of the parties or their agents as to the subject matter hereof will be enforceable unless included within this Agreement.

24. Third Party Beneficiary. It is not intended that any provisions of this Agreement create on behalf of the public or any member of the public, including but limited to current and former Water Company customers, the status of a third party beneficiary, or to authorize anyone not a party to this Agreement to maintain a suit based on this Agreement.

25. Board Review and City Council Approval. This Agreement is not binding on the City until it has been reviewed by the Utilities Board and approved by Resolution of the City Council.

26. Effective Date for Paying \$425,000 Purchase Price. The Purchase Price shall be paid to the Water Utility at closing on the City's purchase of the water utility assets, which shall be within thirty (30) days after the Water Company secures the permission and approval from the PRC as referenced and conditioned in paragraph 15 and after the Water Company otherwise complies with its conditions precedent to the transfer of the water utility assets as set forth herein, whichever comes last.

27. **Voluntariness; Drafting Presumption; Reliance on Inducements.** The parties have been given the opportunity to thoroughly discuss all aspects of this Agreement with their attorneys and that they understand all of the provisions contained herein and are voluntarily entering into this Agreement. No presumption shall be drawn against the drafter of this Agreement as both parties had an opportunity for counsel to participate in its development. In entering into this Agreement, the parties have not relied upon any inducements, promises, or representations made by each other or their attorneys except as expressly set forth herein.

28. **Amendments.** This Agreement shall not be altered, modified, or amended except by instrument in writing executed by all parties.

29. **Assignment.** The Water Company shall not assign any rights or delegate any duties contained in this Agreement without the written consent of the City.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

CITY OF LAS CRUCES

By: _____
Robert L. Garza, P.E.
City Manager

PREPARED AND APPROVED BY:

Marcia B. Driggers
Utilities Attorney

MESA DEVELOPMENT CENTER, INC.

By: _____
Grover Pettes
President

File No.



NEW MEXICO OFFICE OF THE STATE ENGINEER

APPLICATION FOR PERMIT TO REPAIR AND/OR DEEPEN WELL (Non 72-12-1)



For fees, see State Engineer website: <http://www.ose.state.nm.us/>

1. APPLICANT(S)

Name: City of Las Cruces	Name:
Contact or Agent: Utilities Director <input type="checkbox"/> check here if Agent	Contact or Agent: <input type="checkbox"/> check here if Agent
Mailing Address: P.O. Box 20000	Mailing Address:
City: Las Cruces	City:
State: NM Zip Code: 88004	State: Zip Code:
Phone: <input type="checkbox"/> Home <input type="checkbox"/> Cell Phone (Work): 575-528-3511	Phone: <input type="checkbox"/> Home <input type="checkbox"/> Cell Phone (Work):
E-mail (optional):	E-mail (optional):

2. CURRENT OSE FILE INFORMATION

OSE File No(s): **LRG-5039**

3. WELL INFORMATION

Well Location Required: Coordinate location must be reported in NM State Plane (NAD 83), UTM (NAD 83), or Lat/Long (WGS84)

NM State Plane (NAD83) (Feet)
 UTM (NAD83) (Meters)
 Latitude/Longitude (Lat/Long - WGS84 to the nearest 1/10th of second)

NM West Zone
 Zone 12N
 NM East Zone
 Zone 13N
 NM Central Zone

Well Number:	X or Easting or Longitude:	Y or Northing or Latitude:	Optional: Complete boxes labeled "Other" below with PLSS (Public Land Survey System, i.e. Quarters, Section, Township, Range); Hydrographic Survey Map & Tract; Lot, Block & Subdivision; OR Land Grant Name if known.
LRG-5039	1,499,051	505,860	
LRG-5039-S	1,499,057	508,680	
LRG-5039-S-2	1,499,137	509,795	

Well is on Land Owned by: **Mesa Development Inc. To Be Acquired By City Of Las Cruces**

Other description relating well to common landmarks, streets, or other: **West of Jimmie Street**

Driller Information: Driller Name: **Clarence Rodgers** Driller License Number: **WD-225**

01 16 11 20 11 00Z

FOR OSE INTERNAL USE

Application for Permit, Form wr-04, Rev 12/14/11

File Number:	Trn Number:
Log Due Date:	Sub-Basin:

EXHIBIT C



New Mexico Office of the State Engineer

Water Right Summary



WR File Number: LRG 05039
 Primary Purpose: MDW COMMUNITY TYPE USE - MDWCA, PRIVATE OR COMMERCIAL SUPPLIED
 Primary Status: PMT PERMIT
 Total Acres: 0
 Total Diversion: 967
 Owner: MESA DEVELOPMENT CENTER INC.

Documents on File

Trn #	Doc	File/Act	Status		Transaction Desc.	From/ To	Acres	Diversion	Consumptive
			1	2					
211190	CLW	2001-08-17	PMT	ET	LRG 05039	T	0	0	
211190	CLW	2001-08-17	PMT	ET	LRG 05039	F	0	0	
149159	SUPPL	1985-05-08	PMT	ET	LRG 05039-S-2	T	0	967	
149158	DCL	1984-08-24	DCL	PRC	LRG 05039-S	T	0	967.8	
149157	DCL	1984-08-24	DCL	PRC	LRG 05039	T	0	967.8	

Current Points of Diversion

(NAD83 UTM in meters)

POD Number	Source	Q	Q	Q	Q	4	Sec	Tws	Rng	X	Y	Other Location Desc
LRG 05039	Shallow	3	3	4	14	22S	02E			339375	3584840*	
LRG 05039 S	Shallow	1	3	2	14	22S	02E			339391	3585849*	
LRG 05039 S-2	Shallow	1	2	14	22S	02E				339500	3586155*	

An () after northing value indicates UTM location was derived from PLSS - see Help

Place of Use

Q	Q	Q	Q	4	Sec	Tws	Rng	Acres	Diversion	CU	Use	Priority	Status	Other Location Desc
256	64	16	4	14	22S	02E			967.8		MDW		DCL	SERVICE ARE FOR MESA DEVELOPMENT CENTER INC.

Source

Acres	Diversion	CU	Use	Priority	Source Description
0	967		MDW		GW

EXHIBIT A

The data is furnished by the NMOSE/ISC and is accepted by the recipient with the expressed understanding that the OSE/ISC make no warranties, expressed or implied, concerning the accuracy, completeness, reliability, usability, or suitability for any particular purpose of the data.

STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER

IN THE MATTER OF THE APPLICATION)
BY MESA DEVELOPMENT CENTER, INC.,)
FOR EXTENSION OF TIME IN WHICH TO)
FILE PROOF OF COMPLETION OF WELL)
AND FILE PROOF OF APPLICATION OF)
WATER TO BENEFICIAL USE WITHIN THE)
LOWER RIO GRANDE UNDERGROUND)
WATER BASIN IN THE STATE OF NEW)
MEXICO)

Hearing No. 10-028

OSE File No. LRG-5039

ORDER

WHEREAS, on April 12, 2010, the District IV office of OSE denied the request of Mesa Development Center, Inc. ("Applicant") for an extension of time for "...failure to demonstrate due diligence;"

WHEREAS, within thirty (30) days of the Applicant's receipt of said denial, the Water Rights Division ("WRD") received written notice from the Applicant stating that Applicant was aggrieved by the decision and that a hearing was requested;

WHEREAS, the WRD "due diligence" requirement is intended to limit endless Extensions of Time;

WHEREAS, WRD is of the opinion that one *final* extension of time to put water to beneficial use by January 31, 2014 would serve the purpose of the "due diligence" requirement;

WHEREAS, the Applicant has withdrawn its request for a hearing; and

WHEREAS, on the 7th day of February 2011, the Hearing Examiner issued an order remanding the application to the Water Rights Division for disposition in accordance with the Joint Motion to Remand.

NOW, THEREFORE, the State Engineer of the State of New Mexico hereby approves Application LRG-5039, subject to the following Conditions of Approval.

STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER

IN THE MATTER OF THE APPLICATION)	
BY MESA DEVELOPMENT CENTER, INC.,)	
FOR EXTENSION OF TIME IN WHICH TO)	Hearing No. 10-028
FILE PROOF OF COMPLETION OF WELL)	
AND FILE PROOF OF APPLICATION OF)	
WATER TO BENEFICIAL USE WITHIN THE)	
LOWER RIO GRANDE UNDERGROUND)	OSE File No. LRG-5039
WATER BASIN IN THE STATE OF NEW)	
MEXICO)	

CONDITIONS OF APPROVAL

This application is approved for one final extension of time to place water to beneficial use by January 31, 2014, subject to the following Conditions of Approval:

Permittee: Mesa Development, Inc.

Permit Number: LRG- 5039

Application File Date: March 23, 2010 (most recent Extension of Time request)

Source: Ground water

1. This extension of time shall expire on January 31, 2014, and Mesa will be limited to the amount of water that is put to beneficial use according to all applicable laws and regulations. No further extensions of time will be accepted for filing nor approved as agreed by both parties in this Order.
2. Proof of Application of Water to Beneficial Use will be filed in this office on or before January 31, 2014.
3. Proof of Completion of Well will be filed in this office after completion and installation of equipment, but in no event later than January 31, 2014. If the well is not drilled and the required paperwork is not filed by that date, Change Location of Well Permit No. LRG-5039, approved on August 17, 2001 will be cancelled.

Witness my hand and seal this 1st day of March, A.D., 2011.

JOHN R. D'ANTONIO, JR., P.E.
NEW MEXICO STATE ENGINEER



Archie Fuchs
Archie Fuchs
Water Resource Supervisor

DL

BEFORE THE NEW MEXICO PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE EXTENSION)	
OF SERVICE FILING BY MOONGATE)	
WATER COMPANY, INC.,)	CASE NO. 2047
)	
APPLICANT.)	

ORDER ADOPTING RECOMMENDED DECISION WITH SUPPLEMENTATION

THIS MATTER having come before the New Mexico Public Service Commission ("Commission") at its regular open meeting of September 15, 1986, upon the Recommended Decision of the Hearing Examiner Leonard A. Helman, and the Commission finding and concluding that it has jurisdiction over the parties and the subject matter herein and that the Recommended Decision of the Hearing Examiner is well taken and should be adopted with supplementation, and being otherwise fully informed of the premises, the Commission adopts the following Order:

DISCUSSION:

Although the Commission agrees with the Recommended Decision of the Hearing Examiner in this case, it needs supplementation in three respects: 1) comment on the procedural problems in this case; 2) discussion of additional reasons for approval of the recommended decision; and 3) adoption of the Commission Staff's proposed modification to Moongate Water Company's line extension policy in this case.

A. Procedure

The Statement of the Case in the Recommended Decision is accurate up to the time of its preparation. Thereafter, however, counsel for Mesa Development Center (Mesa) filed a motion for

EXHIBIT D

extension of time to file exceptions. This motion was denied. Nevertheless, Mesa mailed exceptions on the date that exceptions were due to be filed. The exceptions received from Mesa did not include a certification of service to other parties in the case, and, in fact stated that the exceptions were served on the State Corporation Commission rather than the Public Service Commission. Mesa should understand that such procedural mistakes will not be excused by the Commission and that the Commission's rules of practice and procedure, General Order No. 1, will be strictly enforced.

B. Reasons for Adopting the Recommended Decision

In addition to the reasons enumerated in the Recommended Decision, the Commission has found other factors persuasive in permitting Moongate Water Company to serve the territory at issue in this case. First, the Commission understands that the territory proposed to be served is not within either Moongate's or Mesa's currently certified service area. Thus, neither has a "right" to serve. Under the Commission's statutory mandate, the service "agreement" between Mesa and Moongate does not limit the Commission in considering the public convenience and necessity in determining which utility should serve. The question before the Commission is which utility should be allowed to serve based on considerations of the public interest. The evidence in this case indicates that service by Moongate is most in the public interest. Aside from the pattern of delays and complaints arising from Mesa's line extensions and the contrasting absence of such difficulties with Moongate, it appears that Moongate can

serve the territory at lower cost. Moongate is more capable, qualified and cost effective to serve the new territory.

C. Line Extension Policy

The Recommended Decision did not address Staff's proposed modification of Moongate's line extension policy in this case. The Commission has determined that the proposal has merit. Under Moongate's current line extension policy, initial participants in the line pay an equal share of the cost of materials for the line as outlined in Moongate's application. Subsequent participants, that is, customers hooking up after the line is completed, would pay their share for materials and labor up to the point that the line cost is fully paid. Staff proposed that for five years after the line is completed in this case, subsequent customers on the line be required to pay their pro-rata share of materials and labor including the initial material costs in their line extension fees. The initial material cost portion of their line extension fees would then be refunded to prior participants pro rata, as more fully outlined in the testimony of Phillip Baca, TR. 191-192.

It appears that portions of the new territory may be subdivided soon, but subsequent to completion of the line. Therefore, Staff's proposed modification of the line extension policy will distribute the initial material costs of the line among the initial participants and subdivision participants more justly and reasonably than the current policy. The Commission, therefore, has decided to adopt Staff's proposal.

WHEREFORE, THE COMMISSION FINDS:

1. The findings and conclusions of the Hearing Examiner as set forth in the Recommended Decision issued on August 20, 1986 which is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein, are Adopted, Approved and Accepted as the findings and conclusions of the Commission.

2. Staff's proposed modifications of Moongate's line extension policy as set forth on pages 191 through 192 of the transcript of proceedings is just and reasonable, required by the public convenience and necessity, and should be adopted and implemented for the line extension and service into Section 14 as approved in this case for a period of 5 years after the line extension is completed. Moongate's compliance with the policy should be monitored.

3. It is just and reasonable and required by the public convenience and necessity to approve Moongate's line extension application under G.O. 10 and to authorize Moongate to serve the territory known as Section 14 at issue here.

NOW, THEREFORE, IT IS ORDERED by the New Mexico Public Service Commission that:

A. The Orders recommended by the Hearing Examiner as set forth in Exhibit A attached hereto and incorporated by reference as if fully set forth herein, are ADOPTED, APPROVED and ACCEPTED as the orders of the Commission.

B. The Recommended Decision of the Hearing Examiner is ADOPTED, APPROVED and ACCEPTED.

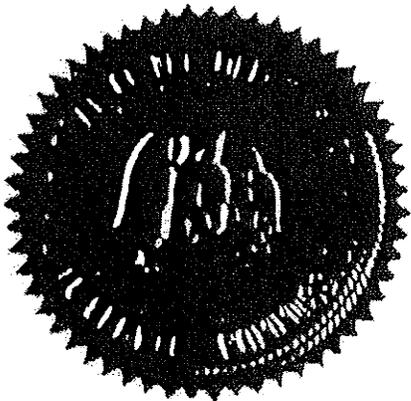
C. Staff's proposed modification of Moongate's line extension policy as specified in Finding No. 2 is approved and

adopted. Moongate shall by September 30, 1986, file an addendum to its line extension policy applicable to the line extension approved here. The addendum shall be effective for five years following completion of the line. The addendum shall reflect Staff's proposed modification and shall be subject to approval by Commission Staff prior to filing. Moongate shall file an annual compliance report reflecting implementation of the policy modification and its refund provisions.

D. This Order is effective immediately.

E. A copy of this Order shall be mailed to the Company, to counsel of record for all parties to this case and to any parties appearing without counsel.

I S S U E D under the Seal of the Commission at Santa Fe, New Mexico this 16th day of September, 1986.



NEW MEXICO PUBLIC SERVICE COMMISSION

Marilyn C. O'Leary

MARILYN C. O'LEARY, CHAIRMAN

Joan T. Ellis

JOAN T. ELLIS, COMMISSIONER

Bruce H. Rolstad

BRUCE H. ROLSTAD, COMMISSIONER

DL

BEFORE THE NEW MEXICO PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE EXTENSION
OF SERVICE FILING BY MOONGATE CASE
WATER COMPANY, INC.,

Case No. 2047

Applicant.

RECOMMENDED DECISION OF THE HEARING EXAMINER

COMES NOW, Leonard A. Helman, Esq. Hearing Examiner in the above-styled cause and submits his Recommended Decision to the New Mexico Public Service Commission for its consideration and review.

STATEMENT OF THE CASE:

On May 19, 1986, Moongate Water Company ("Moongate") filed with the New Mexico Public Service Commission ("Commission") an Extension of Service form, together with a map of the area where the utility was requesting permission to serve. The Extension of Service form was filed pursuant to General Order No. 10. Notice of the proposed line was sent to Mesa Development Center ("Mesa"), and Jornada Water Company ("Jornada").

On May 26, 1986, Mesa sent a letter to the Commission Staff ("Staff") by which Mesa protested the proposed line extension by Moongate.

On June 30, 1986, the Commission issued its Order docketing the Line Extension application. The Commission found that:

1. The proposed line extension would extend the utility's lines into Section 14, contiguous to the service territories of Moongate, Mesa and Jornada.

2. All three utilities were under the jurisdiction of the Commission.

3. A proceeding should be held to determine whether Moongate or Mesa should provide service into the area.

The Commission Ordered that the Extension of Service form filed by Moongate should be docketed as a proceeding and that the letter of May 26, 1986 on behalf of Mesa should be considered to be a complaint in protest of the requested line extension.

In the same Order, the Commission appointed Leonard A. Helman, Esq. to preside over the hearing in this case, to take all actions necessary and convenient within the limits of his authority and to submit proposed findings of fact and conclusions of law regarding this cause to the Commission.

On July 8, 1986, the Hearing Examiner issued his Order of Hearing. He found good cause to order a hearing in the matter of the extension of service filing by Moongate. He ordered that:

1. A public hearing on this matter be held at the conference room of the City of Las Cruces, New Mexico on Monday July 14, 1986 at 1:00 p.m. The purpose of the hearing would be to take testimony in support of, or in opposition to Moongate's application to extend service under G.O. 10. The hearing was expedited due to the emergency nature of the proceeding.

At the announced time and designated place, the hearing was held. Publication of a notice of the hearing was not required by the Hearing Examiner as all the affected parties had been notified by a receipt of the Notice of the hearing or being notified by the Hearing Examiner and/or the utilities. In addition, all parties to the proceeding waived any right to 20 days notice prior to hearing.

APPEARANCES:

For Moongate Water Company, Inc.

Norman E. Todd, Esq.
Las Cruces, New Mexico

For Mesa Development Center, Inc.

Michael Romero, Esq.
Las Cruces, New Mexico

The Commission Staff

Charles Noble, Esq.
Santa Fe, New Mexico

Other Appearances

None

Persons who testified included both the owners and operators of the utilities and persons who owned land in the area and who would be affected by whatever utility served and when service would be provided.

A summary of their statements and positions is as follows:

- A. Louis Gariano
President, Moongate Water Company
Las Cruces, New Mexico

Mr. Gariano stated that:

1. Moongate had entered into an agreement with Mesa in 1983 with respect to any future development in the area contiguous to Mesa. First of all, Moongate had written to Mesa a letter dated November 30, 1983 in which Moongate stated its intention not to serve any existing or future customers in Section 14, Dona Ana County, other than Mesa Grande Subdivision, which was owned by Mr. Edward Green. Moongate stated that it would not cross any existing lines that are in the ground. Moongate agreed to give to Mesa the first right of refusal on any future customers in Section 14. Tr. p.21.

This agreement was further documented in a letter dated December 13, 1983 to Robert Castillo, Utility Engineer, Commission Staff, attached to Exhibit B of the Commission Order Docketing Line Extension Application. The letter contained the same essential elements as the agreement of November 30, 1983.

Having made these commitments, Moongate made every effort to abide by them. When persons came to Moongate for water service in Section 14, Moongate would send them to Mesa. However, for extended periods of time, Mesa had not provided service to some persons requesting service in Section 14. Tr. 19. Moongate saw no progress taking place. Meanwhile, persons were complaining constantly to Moongate about the failure of Mesa to provide service and the need for water service into Section 14. Moongate decided that Mesa had indeed exercised its right of first

refusal, by its failure to provide service into Section 14. Tr. 19-22. In order to force the situation as to service into Section 14, Moongate filed its General Order 10. Tr. 23-26.

Moongate stated that it was ready immediately to provide service into Section 14; that it had contacted the potential customers as to costs, easements, etc; that it had the figures as to cost of the line and how the costs would be prorated. Moongate also said that it would build the line for the cost of the materials alone and would provide labor free to those persons who contributed to the cost of the line at the time of construction. Anybody hooking on after the line was built would have to pay for the labor costs and materials cost (prorated among the various lots). Tr. pp.28-31; 31-62.

Mr. Gariano concluded by saying that he felt that he had honored the agreement by referring potential customers to Mesa, that Mesa had failed to act, that a need to provide service existed and that Moongate would be in a position immediately to begin construction of a line to serve Section 14. Tr. 21.

B. Mr. James Rogers
President, Jornada Water Company
Las Cruces, New Mexico

Mr. Rogers stated that Jornada had no intention to serve that portion of Section 14 which was West of I-70; however, a portion of Section 14 was on the East side of I-70 and Jornada would be serving that area, except for service to a Mrs. McCollum which was to be provided by Moongate. Jornada would be willing to serve

Section 14 (West) except that no one had asked them for such service. Jornada took no position as to whether it favored Mesa or Moongate in the controversy. Jornada expressed concerns about adequate system to meet fire protection standards and sizing of pipe sufficiently large to provide adequate service. Tr. 63-77.

C. Mr. Grover Pettes
President, Mesa Development Center
Las Cruces, New Mexico

Mr. Pettes stated that Mesa was prepared and ready to provide service into Section 14; however before providing such service Mesa needed plats, roads and easements and other details to be provided by the potential customers before Mesa could start its work on the project. Tr. 105-106. However, Pettes did say that a figure of \$114,000 had been established as to cost of the lines and additional equipment to provide service into Section 14. Tr. 86. Mesa felt that the agreement with Moongate still obtained, that Mesa had not violated its agreement, and therefore Mesa had not exercised its right of first refusal. Tr. 79. Mesa was prepared and ready to serve Section 14 as soon as the necessary information was supplied by the persons seeking service. Page 77-114.

D. Wayne H. Joyner
Commander, VFW Post 6917
Las Cruces, New Mexico

Commander Joyner testified that he had contacted Moongate for water service. Moongate referred him to Mesa. Mesa constantly

delayed service. Mesa stalled and stated that it needed permission to dig an additional well to provide service to Section 14. However Joyner discovered that Mesa did in fact have the well permit at the time Mesa was saying it was waiting for the authorization to dig an additional well to serve Section 14. Tr. 152.

Joyner concluded by saying that he had been very frustrated in his dealings with Mesa and that he and the members of VFW wanted Moongate to supply water service. Tr. 150-159.

E. Warren Chilton
Developer

Mr. Chilton testified that he was agent for his father and another investor who wanted to develop some 20 acres of land in Section 14. Chilton said that he had first contacted Mesa in 1980 when water service was requested. Tr. 134-135. In February 1984, he wrote to Mesa and requested water service. Additional requests were made and each time Mesa responded by asking for further information such as plats of the area. Chilton referred to correspondence with the Commission in which letters Mesa stated that it needed to study the matter further and needed more information. Tr. 135-136. In such a letter dated September 10, 1984, Mesa said that it was making a feasibility study but the study could not be completed until Chilton furnished the information requested. Tr. 136. Chilton furnished the

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information, but after several months, no decision was forthcoming.

Finally in October 18, 1985 Chilton wrote the Commission stating that he had contacted Mesa a number of times, yet Mesa failed to respond. Mesa refused to answer Chilton in writing as to such issues as whether Mesa received permission from the State Engineers' office to construct a third well. Tr. 137.

Chilton testified that Mesa had effectively denied him service. Tr. 142.

E. Ramon Carnero
Resident of Section 14

The next person to testify was Ramon Carnero. He was assisted by Arturo Cadena who was the tenant of a mobile home in Section 14. Mr. Carnero testified that he has repeatedly asked for water service, that Mesa wanted a total payment of \$114,000 for the provision of water and that Mesa wanted Mr. Carnero to go and raise the money. Mr. Carnero was not fluent in English and resented such a request being made of him. Carnero felt that the duty was on the utility to organize the customers and allocate the costs between the potential customers for the new system. Mr. Arturo Cadena also spoke and echoed the same sentiments. Tr. 160-169.

G. Three other persons spoke. They were:

R.J. Herbert, for the County of Dona Ana. He appeared as witness for Hearing Examiner. He spoke of the rules of the County with respect to subdivision laws. Tr. 7-11.

Brian Denmark, Planner, City of Las Cruces who also talked about subdivision laws in the City of Las Cruces. Tr. 12-17).

Ken Needham-City Utilities Director. Needham did not offer a position as to whether Mesa or Moongate should serve. He did say that the minimum main should be 6 inches; that Section 14 was in the City Limits as of March 1986, that Needham had the authority to approve plans and plats within two weeks of submission to his office. The City would not oppose a subdivision in Section 14. Tr. 115-133.

After these presentations, the Commission Staff presented its case. The following witnesses testified:

1. Philip Baca, Staff Engineer

Mr. Baca stated that the State Engineer's Report established that the two present wells of Mesa are being used only to a 11% capacity. That is, about 89% of capacity is presently being unutilized-therefore there is no need for a third well; moreover to add a third well to the system would be an economic hardship to the existing customers. Baca stated that Mesa could serve all potential customers in Section 14 from the existing wells. Baca felt that the requirement for a third well was completely unjustified and may have only been an excuse to stall Mesa's responsibility to serve.

Baca also testified on Moongate's proposal with respect to size and quality of pipe. He said that both the proposed pipe size and quality of materials were satisfactory. Baca supported Moongate's application. Tr. 188-202.

2. Keith Moheban, Compliance Officer

Mr. Moheban elaborated on the number of complaints that had been filed against Mesa with respect to failure to provide service; the dilatory manner in which Mesa has handled the requests for service in Section 14 and the obstacles that Mesa has put into the way of those who wanted service. Tr. 169-187.

The Hearing Examiner allowed Mesa to put on rebuttal testimony. However the rebuttal testimony did not address the specific issues raised; rather it was in support of Mesa as having served in the area for twenty years and the good quality of service which Mesa has offered. Tr. 213-218.

The testimony is overwhelming that Mesa has pursued a dilatory approach to serving Section 14; that it wanted potential customers to pay for a well that was not needed at a time when it had vast overcapacity; that Moongate had acted according to the agreement and that Mesa in fact by its refusal to take action or provide leadership has indeed exercised its right of first refusal.

A utility by New Mexico Public Utility Act 62-7-1 et seq. has a duty to serve and it cannot escape that duty by delaying tactics; by asking its customers to pay for wells which are needed or by trying to get a person deficient in English to raise

\$140,000 when all that person wanted was simple service to a trailer for his nephew. The only argument in support of Mesa's position is that it does not want to put water lines into an area which has not been platted or divided; however, even by the map which Mesa submitted as evidence in this case, it is clear that a central line between the various lots, a line running North-South could be built now and would be ideal to serve future growth in the area.

Having considered the evidence, listened to the testimony of the witnesses and heard the argument of learned counsel, the Hearing Examiner Recommends that the Commission F I N D S and C O N C L U D E S that:

1. The Statement of the Case, above is adopted by these Findings of Fact and Conclusions of Law.

2. Mesa Development Water Company, Moongate Water Company and Jornada Water Company serve retail customers in Dona Ana County, New Mexico, and as such is under the jurisdiction of this Commission.

3. An area known as Section 14 which is north of Las Cruces, New Mexico on both sides of I-70 is presently not been fully served. The Eastern side has been designated as service territories for Jornada Water Company except for a small section which the parties have agreed Moongate shall serve. However the larger portion of the Section which is directly north of Mesa Development Center service area is still not being served.

4. An agreement entered into by Mesa and Moongate provides that Mesa shall have the first right of refusal to serve that area. However the overwhelming evidence exists that Mesa has pursued a policy of delaying service to that area and has made demands such as an additional well which are unreasonable and not required. Further the costs that Mesa wants for the installation of the line into Section 14 are unreasonable and not required. Mesa has effectively denied service to persons in Section 14.

5. Moongate Water Company is prepared to serve immediately. It has fulfilled its part of the agreement by asking potential customers to contact Mesa first. Moongate will offer the leadership to put together the water system, will charge reasonable costs for the construction of the lines and will provide adequate water service at reasonable rates.

6. It is in the best interests of future consumers and in the public interest to authorize Moongate to serve the area known as Section 14.

7. Moongate shall use minimum size 6 inch transmission pipes of the quality acceptable to the Commission staff for use in Section 14.

The Hearing Examiner recommends that the Commission
O R D E R that:

1. Moongate Water Company be allowed to extend its plant, lines and system to provide Service to the east side of Section 14, North of Highway 70, in Dona Ana County, New Mexico, as requested by Moongate's Application in this case.

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2. Moongate shall provide the Commission with details of costs, materials and areas of such a line before the line is constructed.

3. Moongate shall file a revised line extension policy acceptable to Staff prior to extensions into Section 14.

This Order is effective immediately.

I S S U E D at Santa Fe, New Mexico this 20th day of August, 1986.

Respectfully submitted,

Leonard A. Helman

LEONARD A. HELMAN
Hearing Examiner

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BEFORE THE NEW MEXICO PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE EXTENSION)
 OF SERVICE FILING BY MOONGATE CASE)
 WATER COMPANY, INC.,)
)
 Applicant.)
)

Case No. 2047

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing Recommended Decision of the Hearing in the above-styled case, issued August 20, 1986 was mailed by First Class, postage prepaid to the following persons:

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Ms. Donna Keith
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El Paso, TX 79901

DATED this 20th day of August, 1986.

NEW MEXICO PUBLIC SERVICE COMMISSION

Leonard A. Helman

LEONARD A. HELMAN
Hearing Examiner

Customer List

EXHIBIT E