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Deepwater Distribution Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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In The Matter of the Application of	)	DOCKET NO. 86-999-08
Deepwater Deepwater Distribution	)	
Company, Inc. for Exemption	)	REQUEST FOR AGENCY
	)	REVIEW AND REHEARING
	)	

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Pursuant to Utah Code Ann. §§ 54-7-15 and 63G-4-301, Deepwater Distribution Company ("Deepwater"), by and through its undersigned counsel of record, hereby respectfully requests Agency Review and Rehearing of It's Application for Exemption. The grounds for review are more particularly set forth below.

I.  
INTRODUCTION

Deepwater seeks review of, and rehearing on, the Report and Order of the Public Service Commission (the "Order"), dated August 11, 2009, denying its application for exemption. The

grounds for the request are: (1) that the Public Service Commission (“PSC”) Order fails to apply the correct test for determining whether Deepwater is a “public utility” and subject to PSC jurisdiction; (2) that the commonality of interest rule relied upon by the PSC in claiming jurisdiction exceeds the commission’s statutory authority as applied in this case; and (3) even accepting application of the commonality of interest rule, Deepwater meets all of the requirements for exemption from PSC regulation. Accordingly, the PSC’s Order should be vacated and Deepwater’s Application for Exemption approved.

## II. ARGUMENT

### A. The Order of the Public Service Commission Ignores the Crucial Step of Determining Whether the Commission has Jurisdiction to Assert Regulatory Authority over Deepwater Distribution Company.

The boundaries of PSC jurisdiction are well defined in the enabling statute and through case law addressing and interpreting that statute. Utah Code Ann. Section 54-4-1 vests the PSC “with power and jurisdiction to supervise and regulate every **public utility** in this state ...” (emphasis added). Accordingly, the threshold question presented in this case is whether Deepwater is a “public utility” as defined in Utah Code Ann. Section 54-2-1(16)(a). *See also Garkane Power Co. Inc., v. Public Service Commission*, 98 Utah 466, 100 P.2d 571, 571-2 (1940). Section 54-2-1(16)(a) provides:

“Public Utility” includes every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Subsection (16)(d), **where the service is performed for, or the commodity delivered to, the public generally**, or in the case of a gas corporation or electrical

corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.

(Emphasis added).<sup>1</sup> According to the express statutory language, the key factor in defining an entity as a “public utility” turns on the question of whether or not the goods or services are provided to the public generally as distinguished from mere private service. *See Garkane* at 572.

The distinction between private and public service has been dispositive in at least six cases before the Utah Supreme Court where the Court found the PSC had no jurisdiction under its enabling statute.<sup>2</sup> The controlling principle in each of these cases was the distinction made by the Court that the services rendered were not to an indefinite public, but to a restrictive group or limited class. As held in *State of Utah ex. rel. Public Service Commission v. Nelson*, 65 Utah 457, 238 P. 237, 239 (1925), “if the business or concern is not public service, where the public has a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission....” *Garkane* and subsequent jurisdictional cases reaffirm that, “the test ... is ... whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner.” *Garkane* at 573 (quoting *Farmers’ Market Co., v. R.R. Co.*, 142 Pa. 580, 21 A. 902, 989, 990 (date)). The *Garkane* court further distilled the test: “The essential feature of a public use is that it is not confined to privileged individuals but is open to the indefinite public. It is this

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<sup>1</sup> *See also* Utah Code Ann. Section 54-2-1(29) (incorporating the same standard of providing a public service in defining a “water corporation”).

<sup>2</sup> *State of Utah ex. rel. Public Utilities Commission v. Nelson*, 65 Utah 457, 238 P.237 (1925); *Garkane Power Co. Inc. v. Public Service Commission*, 98 Utah 466, 100 P.2d 571 (1940); *San Miguel Power Ass’n. v. Public Service Commission*, 4 Utah 2d 252, 292 P.2d 511 (1956); *Medic-Call, Inc., et al. v. Public Service Commission of Utah*, 24 Utah 2d, 273, 470 P.2d 258 (1970); *Cottonwood Mall Shopping Center Inc. v. Public Service Commission of Utah, et al.*, 558 P.2d 1331 (Utah 1977); *Hohmgren et al. v. Utah-Idaho Sugar Co.*, 582 P.2d 856 (1978).

indefiniteness or unrestricted quality that gives it its public character.” *Thayer v. California Dev. Bd.*, 164 Cal. 117, 127, 128 P. 21, 25 (1912).

The fundamental flaw in the PSC’s order is that it assumes away the jurisdictional analysis mandated by the courts as a prerequisite to further inquiry. In *Nelson*, the Court held that: “It is only by the presence of such factor or element [public service] that the commission has power or authority to regulate or control such business. Eliminating it, its power and jurisdiction are gone.” *Nelson* at 239.

Neither the Division of Public Utilities Recommendation nor the PSC Order contains any facts or analysis demonstrating that Deepwater provides water service to the public generally. In fact, it appears undisputed that water delivery provided by Deepwater is restricted only to members (shareholders) of the corporation. The corporate documents of Deepwater specifically limit water service to company shareholders. No water service has been or can be provided to the public generally. Consistent with Supreme Court precedent, the fact that Deepwater does not provide water to the general public but to a discreet group of shareholders, removes it from PSC jurisdiction.

The Supreme Court has consistently rebuffed the PSC’s attempts to assert jurisdiction over entities with service restrictions similar to those contained in Deepwater’s charter documents. For example, in *Garkane* the PSC argued that membership in Garkane Power Company “is easy to obtain and actually the corporation solicits membership and has apparently accepted thus far all who paid their fee and agree to pay the monthly minimum.” *Garkane* at 573. In dismissing that argument, the Court found that “so long as [the non profit corporation]

has the right to select those who become members, ordinarily it matters not that 5 or 1,000 people are members or that a few or all the people in a given area are accorded membership...” *Id.* at 573. In this case, Deepwater’s membership requirements are even more restrictive than those addressed in *Garkane*. Membership in Deepwater is confined to a discreet class of individuals who meet very specific requirements. Notably, the PSC Order does not address membership restrictions as an issue in this case.

Because Deepwater is a non-profit corporation whose service is limited to its members, the PSC lacks authority to assert jurisdiction over the company or its members.

B. The PSC Improperly Substitutes its Commonality of Interest Rule for Decades of Judicial Precedent.

Both the PSC Order and DPU Recommendation asserting authority based solely upon an administrative rule that is in direct conflict with the enabling statute. See R746-331. As clearly defined in the cases cited above, an entity that does not provide service to the public generally is exempt from PSC jurisdiction. See *Nelson* at 239. Contrary to that controlling precedent, the PSC has implemented and applied an administrative rule that improperly narrows the class of entities exempt from PSC jurisdiction. This unlawful constriction is achieved by imposing a commonality of interest standard as the sole test for regulation.

By contradicting the language of the statute and Supreme Court precedent, the PSC rule violates fundamental principles of administrative law. See, e.g. *In the Matter of 47 Ave. B. East, Inc., v. New York State Liquor Authority*, No. 4880, slip op. at 6 (N.Y. App. Div. May 21, 2009) (“It is a fundamental principle of administrative law that an administrative agency has no

authority to create rules and regulations without a statutory predicate. ... When the [administrative agency] has acted ultra vires by exercising impermissible substantive rule making, the courts have declared those rules null and void.”); *District of Columbia v. Jones*, 287 A.2d 816, ¶ 15 (D.C. 1972) (“It is well established that the rule-making power of administrative officers and agencies ‘is not the power to make law ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.”); *see also id.* at ¶ 24 (“One must bear in mind that the rule-making power is not a power to legislate. It is not a power to add to a statute. ... The rule-making power is merely power to fill in details within the limitations of the statute.”).

The *Nelson* court preemptively rejected this very type of attempted administrative expansion of jurisdiction and state regulation. “In other words, the State may not ... by regulating orders of a commission, convert mere private contracts or mere private business into public utility ...” *Nelson* at 239 (citations omitted). As applied, the commonality of interest rule abandons the jurisdictional standards and has the practical effect of allowing the PSC to unlawfully assert control over entities specifically excluded from regulation by the legislature.

C. Even Assuming the Commonality of Interest Rule Should Apply, Deepwater Clearly Qualifies for Exemption from PSC Regulation.

The administrative rule prescribing conditions for exemption from PSC regulation allows exemption where:

[T]he Commission finds that the entity is an existing non-profit corporation, in good standing with the Division of Corporations; that the entity owns or otherwise

adequately controls the assets necessary to furnish culinary water service to its members, including water sources and plant; and that voting control of the entity is distributed in a way that each member enjoys a complete commonality of interest, as a consumer, such that rate regulation would be superfluous, then the Commission shall issue its finding that the entity is exempt from Commission jurisdiction, and the proceeding shall end. Issuance of the finding shall not preclude another Commission inquiry at a later time if changed circumstances or later-discovered facts warrant another inquiry.

R746-331-1(c) (2009). Based on a careful reading of the PSC Order, the only prong of the PSC analysis at issue is whether there is a commonality of interest among the voting shareholders. Specifically, the PSC found that, “the voting control of the entity is not distributed in such a way that there is a complete ‘commonality of interest, as a consumer, such that rate regulation would be superfluous...’” Order at 4. That finding is based on two primary factors: (1) lack of specificity regarding the number and types of future shareholders; (2) the various classes of shares with differing cost responsibilities and different voting rights attached to each class. Order at 3. It is apparent from the Order that the PSC did not have or consider all of the relevant information with respect to the two factors it identifies as controlling.

On the first point, the number of future potential shareholders are clearly defined in the corporate documents as well as the specific rights and responsibilities accorded to each class of stock. Although not specifically cited in the PSC Order, the Bylaws specifically enumerate the number of shares covered under each class of stock and expressly define the voting and delivery rights for each of the classes of stock. Bylaws, Article V. Nothing in the Order suggests that there is an actual conflict between the classes of stock that destroys commonality of interest. Moreover, the number of shareholders is irrelevant to the determination of jurisdiction under the

commonality of interest rule. This issue was already disposed of by the Court in *Garkane*. *Garkane* at 573 (“So long as a cooperative serves only its owner-members, and so long as it has the right to select those who become members, ordinarily it matters not that 5 or 1000 people are members...”). There are numerous exempt non-profit mutual water companies that have both more shareholders and more classes of stock than provided for in Deepwater’s corporate documents.

At their core, both of the factors identified by the PSC relate to a concern over protecting the Class “B” shareholders, who are responsible for paying the assessments covering the operation and maintenance expenses. As a rule of law, that concern is inapplicable and has been rejected by courts as applied to entities like Deepwater. *Garkane* at 573. In rejecting the same arguments the PSC raises here, the Utah Supreme Court held:

The theory of public utility regulation is based on a recognition that most public utilities are monopolistic, that their services are necessary or convenient to the residents of the area, and that because of the conflict of interest between the utility and its customers or consumers there is likely to arise situations where rates are so high as to deny service to many, or so low as to deny a fair return on its investment to the utility and its stockholders which in turn would tend to result in inadequate service. Therefore, regulation is desirable to harmonize and balance these interests. The services of *Garkane* may tend to be monopolistic in the area served because there is no other adequate utility to serve the residents there and its services will be convenient and useful if not vital to those residents, but the third element is totally lacking. **There is no conflict of consumer and producer interests – they are one and the same.** If rates are too high the surplus collected is returned to the consumers pro rata. If rates are too low the consumers must accept curtailed service or provide financial contribution to the Corporation. If service is not satisfactory the consumer-members have it in their power to elect other directors and demand certain changes. Resort to equity, as in the case of all mutuals, may be had if one group of members seeks to over-reach the others. **The function of the Commission in approving rates, capital structure, etc., is unneeded by *Garkane*, its members, or the communities which it will serve.**

*Garkane* at 573 (emphasis added).



In focusing on the fact that there is no conflict of consumer and producer interests, the *Garkane* Court recognizes that the primary purpose of becoming a member of the non-profit corporation is the ability to obtain a desired service. Like *Garkane*, the sole purpose of Deepwater is to allow its members to receive water delivery from the company consistent with the governing corporate documents. Regardless of class, all of the shareholders of Deepwater have a vital interest in ensuring that the company continues to deliver water at the lowest possible cost and in the most efficient manner.<sup>3</sup> In other words, all shareholders inherently have a commonality of interest.

Rather than destroying that commonality, the distinction in classes of Deepwater stock simply recognizes the practical requirements for becoming a Class “B” (use) shareholder in the corporation. The holders of Class “A” (development) stock must meet the requirements of water rights, source capacity, storage and pipeline capacity prior to being eligible for Class “B” water delivery. As a non-profit corporation, the rates charged to Class “B” shareholders are determined solely by the cost of maintaining and operating the system. As an entity, Deepwater is prohibited under the Utah Revised Non-profit Corporations Act from realizing a profit from the assessments of the corporation.

Moreover, the *Garkane* Court was unconcerned with the particular voting structure so long as the shareholders maintained the ability to elect corporate directors and vote for corporate change. Deepwater’s voting structure maintains that ability. In addition to already having met

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<sup>3</sup> Class “C” (irrigation) shares are not subject to any assessment by the corporation that exceeds the underlying costs of the water rights that include River Commissioner assessments or contract charges that would be imposed regardless of whether or not the water rights were held individually or by the corporation. Similarly, Class “A” shareholders are not subject to operation and use assessments because Class “A” shares are not entitled to water delivery and thereby derive no benefit from the operation of the system.

the requirements of *Garkane*, Deepwater has taken additional steps by amending its By-laws to provide that a majority of the Board of Directors are elected from the pool of Class "B" shareholders. See attached Exhibit "A". By giving majority representation to those shareholders who are subject to maintenance and operation costs, the interests of the Class "B" shareholders are further protected, eliminating the PSC's concern that "development shareholders could determine actions that would be paid for only by use shareholders." Order at 4 (internal citations omitted).


Deepwater's corporate structure satisfies the *Garkane* commonality standard by eliminating any potential consumer-producer conflict and preserving the rights of the shareholders to govern the corporation. Accordingly, as repeatedly held by the Utah Supreme Court, PSC regulation would be superfluous.

### III. CONCLUSION AND REQUEST FOR RELIEF

Based on the glaring absence of jurisdictional analysis mandated by controlling case law, a rehearing on Deepwater's Application for Exemption is clearly warranted. As issued, the Order is devoid of the necessary facts or analysis to support PSC regulation of Deepwater. Accordingly, Deepwater respectfully requests that the PSC review its administrative action and grant Deepwater the opportunity to be heard at a rehearing. Furthermore, the decision of the PSC should be vacated and Deepwater's Application for Exemption be Granted.

DATED this 10<sup>th</sup> day of September, 2009.

FLITTON & SWENSEN



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John S. Flitton

Attorneys for Deepwater Distribution Company

DEEPWATER DISTRIBUTION COMPANY



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Sean Brown

President

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Midway, Utah 84049

P.O. Box 2443  
Park City, Utah 84060

**CERTIFICATE OF MAILING**

I hereby certify that on this 10<sup>th</sup> day of September, 2009, I transmitted by U.S. Mail, postage prepaid, a copy of DEEPWATER DISTRIBUTION COMPANY'S REQUEST FOR AGENCY REVIEW AND REHEARING to the following:

Ted Boyer, Chairman  
Public Service Commission of Utah  
Heber M. Wells Building, 4<sup>th</sup> Floor  
160 East 300 South  
Salt Lake City, Utah 84111

Ric Campbell, Commissioner  
Public Service Commission of Utah  
Heber M. Wells Building, 4<sup>th</sup> Floor  
160 East 300 South  
Salt Lake City, Utah 84111

Ron Allen, Commissioner  
Public Service Commission of Utah  
Heber M. Wells Building, 4<sup>th</sup> Floor  
160 East 300 South  
Salt Lake City, Utah 84111

Ron Slusher  
Division of Public Utilities  
Heber M. Wells Building, 4<sup>th</sup> Floor  
160 East 300 South  
Salt Lake City, Utah 84111

Ruben H. Arredondo  
Administrative Law Judge  
Public Service Commission of Utah  
160 East 300 South, 4<sup>th</sup> Floor  
Salt Lake City, Utah 84111

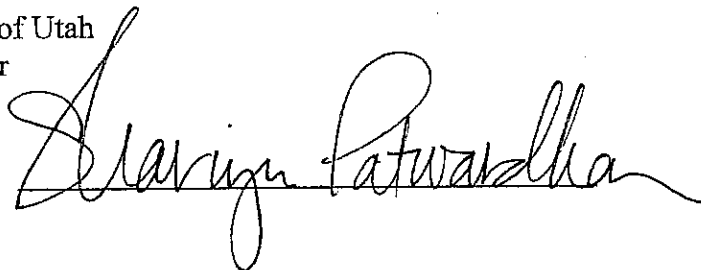


EXHIBIT "A"

SECOND AMENDED  
BY-LAWS  
OF  
DEEPWATER DISTRIBUTION COMPANY  
(A UTAH NON-PROFIT MUTUAL WATER COMPANY)

**ARTICLE I - OFFICES**

The principal office of the company in the State of Utah shall be located at 5234 North Grandview Road, Midway, Utah. The company may have such other offices, either within or without the State of incorporation as the Board of Directors may designate or as the business of Deepwater may from time to time require.

**ARTICLE II - STOCKHOLDERS**

1. ANNUAL MEETING.

The annual meeting of the stockholders shall be held on the 2nd Thursday of October of each year at the hour of 2:00 p.m., for the purpose of electing directors and for the transaction of such other business as may come before the meeting. If the day fixed for the annual meeting shall be a legal holiday, such meeting shall be held on the next succeeding business day. If not held as scheduled it shall be held as soon thereafter as it can reasonably be scheduled and notice thereof given.

2. SPECIAL MEETING.

Special meetings of the stockholders, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the president or by two directors, and shall be called by the president at the request of the holders of not less than 25 percent of all outstanding shares of Class A and B stock of Deepwater entitled to vote at the meeting.

3. PLACE OF MEETING.

Unless otherwise designated, the annual and special meetings shall be held at the principal corporate office, but the directors may designate any place within the State of Utah, unless otherwise prescribed by statute, as the place of meeting for any annual meeting or for any special meeting called by the directors. A waiver of notice signed by all stockholders entitled to vote at a meeting may designate any place, either within or without the State, unless otherwise prescribed by statute, as the place for holding such meeting.

#### 4. NOTICE OF MEETING.

Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than 15 nor more than 30 days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officer, to each stockholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail, addressed to the stockholder at his address as it appears on the stock transfer books of Deepwater, with postage thereon prepaid. Notice may be waived in writing by any stockholder.

#### 5. CLOSING OF TRANSFER BOOKS OR FIXING OF RECORD DATE.

For the purpose of determining stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or in order to make a determination of stockholders for any other proper purpose, the directors of Deepwater may provide that the stock transfer books shall be closed for the purpose of determining stockholders, such books shall be closed up to 40 days immediately preceding such meeting. In lieu of closing the stock transfer books, the directors may fix in advance a date as the record date for any such determination of stockholders, such date to be between 20 and 40 days prior to the date on which the particular meeting requiring such determination of stockholders is to be held. If the stock transfer books are not closed and no record date is fixed for the determination of stockholders entitled to notice of or to vote at a meeting of stockholders, the date on which the resolution of the directors sets the meeting shall be the record date for such determination of stockholders. When a determination of stockholders entitled to vote at any meeting of stockholders has been made as provided in this section, such determination shall apply to any adjournment thereof.

#### 6. VOTING LISTS.

The officer or agent having charge of the stock transfer book for shares of Deepwater shall make, at least 20 days before each meeting of stockholders, a complete list of the stockholders entitled to vote at such meeting, or any adjournment thereof, arranged in alphabetical order, with the address as listed on the books and the number of shares held by each, which list, for a period of 20 days prior to such meeting, shall be kept on file at the principal office of Deepwater and shall be subject to inspection by any stockholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the

meeting and shall be subject to the inspection of any stockholder during the whole time of the meeting. The original stock transfer book shall be prima facie evidence as to the identity of stockholders entitled to examine such list or transfer books or to vote at the meeting of stockholders.

7. QUORUM.

At any meeting of the stockholders, a simple majority of the outstanding shares of Deepwater entitled to vote, represented in person or by proxy, shall constitute a quorum.

8. PROXIES.

At all meetings of stockholders, a stockholder may vote by proxy executed in writing by the stockholder or by his duly authorized attorney in fact. Such proxy shall be filed with the secretary of Deepwater before or at the time of the meeting.

9. VOTING.

Each stockholder entitled to vote in accordance with the terms and provisions of the Articles of Incorporation and these By-Laws shall be entitled to one vote, in person or by proxy, for each share of Class A or Class B stock held by such stockholders. Upon the demand of any stockholder, the vote for directors and upon any question before the meeting shall be by ballot. A share of stock need not actually be issued to entitle the shareholder to vote so long as the individual asserting the right to vote shows as a shareholder entitled to the issuance of certificates of stock on the stock transfer books.

All elections for directors and all other questions voted upon shall be decided by a simple majority vote, except as may be otherwise provided by the Articles of Incorporation or by the statutes of this State.

10. ORDER OF BUSINESS.

The order of business at all meetings of the stockholders shall be as follows:

1. Roll Call
2. Proof of Notice of Meeting or Waiver of Notice
3. Reading of Minutes of Preceding Meeting
4. Reports of Officers
5. Reports of Committees
6. Election of Directors (as required)
7. Unfinished Business



8. New Business

ARTICLE III – BOARD OF DIRECTORS

1. GENERAL POWERS.

The business and affairs of Deepwater shall be managed by its Board of Directors. The directors shall in all cases act as a board, and they may adopt such rules and regulations for the conduct of their meetings and the management of Deepwater, as they may deem proper, not inconsistent with the Articles of Incorporation, these By-Laws, contractual obligations of Deepwater and the laws of this State.

2. NUMBER, TENURE AND QUALIFICATIONS.

The Board of Directors shall be comprised of both Class "A" and Class "B" shareholders, with a majority holding Class "B" shares. The number of directors of Deepwater shall be no less than three (3), with one director to be elected for a three-year term by the shareholders at each annual meeting. The current directors and the expiration of their term include:

<u>Name of Director:</u>	<u>Term Expires:</u>	<u>Class:</u>
Sean Brown	Annual Meeting 2009	"B"
Gary Brad Lewis	Annual Meeting 2010	"A"
Robert Powel	Annual Meeting 2011	"B"

Each director shall hold office until his successor has been elected and duly qualified.

3. REGULAR MEETINGS.

A regular meeting of the directors shall be held without other notice than this By-Law immediately after, and at the same place as, the annual meeting of stockholders. The directors may provide, by resolution, the time and place for the holding of additional regular meetings without other notice than such resolution.

4. SPECIAL MEETINGS.

Special meetings of the directors may be called by or at the request of the president or by any member of the Board of Directors. The person or persons authorized to call special meetings of the directors may fix the place for holding any special meeting of the directors called by them.

5. NOTICE.

Notice of any special meeting shall be given at least 15 days previously thereto by written notice delivered personally, or by telecopy or mailed to each director at his business address or at such other address as he may notify the secretary in writing. If mailed, such notice shall be

deemed to be delivered when deposited in the United States mail so addressed, with postage thereon prepaid. If notice be given by telecopy, such notice shall be deemed to be delivered when the telecopy is transmitted. The attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

#### 6. QUORUM.

At any meeting of the directors, a majority of the directors present at the meeting shall constitute a quorum for the transaction of business, but if less than said number is present at a meeting, a majority of the directors present may adjourn the meeting from time to time without further notice. A director shall be deemed present at a meeting if he attends in person or by telephone.

#### 7. MANNER OF ACTING.

The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the directors, unless otherwise required by the Articles or by law.

#### 8. NEWLY CREATED DIRECTORSHIPS AND VACANCIES.

Newly created directorships resulting from an increase in the number of directors, as may be determined by the shareholders pursuant to an amendment of the Articles of Incorporation, and vacancies occurring on the Board for any reason may be filled by a vote of a majority of the directors then in office, although less than a quorum exists, in the event the vacancy occurs or new directorship is created other than at the time of a shareholder meeting. A new director or a director elected or appointed to fill a vacancy by the Board shall be elected or appointed to hold office until the next meeting of shareholders at which directors are to be elected. If elected by the shareholders said director shall serve for the unexpired term of his predecessor, if filling a vacancy, or for the term stated by the resolution creating a new directorship, if a new director.

#### 9. REMOVAL OF DIRECTORS.

Any or all of the directors may be removed for cause by vote of the stockholders or by action of the Board. Directors may be removed without cause only by vote of the stockholders.

#### 10. RESIGNATION.

A director may resign at any time by giving written notice to the Board, the president or the secretary of Deepwater. Unless otherwise specified in the notice, the resignation shall take

effect upon receipt thereof by the Board or such officer, and the acceptance of the resignation shall not be necessary to make it effective.

11. COMPENSATION.

Compensation may be paid to any of the directors for their service as a director of Deepwater but the amount of such compensation shall be based on the number of hours worked.

12. PRESUMPTION OF ASSENT.

A director of Deepwater who is present at a meeting of the directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of Deepwater immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

ARTICLE IV - OFFICER

1. NUMBER.

The officers of Deepwater shall be a president, vice president and secretary/treasurer, each of whom shall be elected by the directors. Such other officers and assistant officers as may be deemed necessary may be elected or appointed by the directors.

2. ELECTION AND TERM OF OFFICE.

The officers of Deepwater shall be elected by the directors at the annual meeting or at a special meeting called for that purpose, and shall be elected for a term of two years. Each officer shall hold office until his successor shall have been duly elected and qualified, or until his death or until he shall resign or shall have been removed in the manner provided by the Articles of Incorporation and these By-Laws.

3. REMOVAL.

Any officer or agent elected or appointed by the directors may be removed in accordance with Article XI of the Articles of Incorporation.

#### 4. VACANCIES.

A vacancy in any office because of death, resignation, removal, disqualification or otherwise, may be filled by appointment of the directors at any regular or special meeting for the unexpired portion of the term.

#### 5. PRESIDENT.

The president shall be the principal executive officer of Deepwater and, subject to the control of the directors, shall in general supervise and control all of the business and affairs of Deepwater. He shall, when present, preside at all meetings of the stockholders and of the directors. He may sign, with the secretary or any other proper officer of Deepwater thereunto authorized by the directors, certificates for shares of Deepwater, any deeds, mortgages, bonds, contracts, or other instruments which the directors have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the directors or by these By-Laws to some other officer or agent of Deepwater, or shall be required by law to be otherwise signed or executed; and in general shall perform all duties incident to the office of the president and such other duties as may be prescribed by the directors from time to time.

#### 6. VICE PRESIDENT.

In the absence of the president or in event of death, inability or refusal to act, the vice president shall perform the duties of president, and when so acting, shall have all the powers of and be subject to all the restrictions upon the president. The vice-president shall perform such other duties as from time to time may be assigned to him by the president or by the directors.

#### 7. SECRETARY.

The secretary shall keep the minutes of the stockholders' and of the directors' meetings in one or more books provided for that purpose, see that all notices regarding annual stock assessments, delinquencies and stock sales are duly given in accordance with the provisions of these By-Laws or in accordance with the laws of the State of Utah, be custodian of the corporate records and of the seal of Deepwater, keep a register of the post office address of each stock holder, have general charge of the stock transfer books of Deepwater and in general perform all duties incident to the office of secretary and such other duties as from time to time may be assigned to him by the president or by the directors. The secretary may serve simultaneously as another officer other than president.

## 8. TREASURER.

If required by the directors, the treasurer shall give a bond for the faithful discharge of his duties in such sum and with such surety or sureties as the directors shall determine. He shall have charge and custody of and be responsible for all funds and securities of Deepwater; and give receipts for monies due and payable to Deepwater from any source whatsoever, and deposit all such moneys in the name of Deepwater in such banks, trust companies or other depositories as shall be selected in accordance with these by-laws and in general perform all of the duties incident to the office of treasurer and such other duties as from time to time may be assigned to him by the president or by the directors. The treasurer may serve simultaneously as another officer other than president.

## 9. SALARIES.

The salaries of the officers shall be fixed from time to time by the directors and no officer shall be prevented from receiving such salary by reason of the fact that he is also a director of Deepwater. All salaries shall be reasonable and shall be commensurate with the duties and time spent by such officer.

ARTICLE V - STOCK

## 1. APPURTENANCY OF STOCK.

A. Class A (development) stock shall become appurtenant to the land upon which it is intended for use once Deepwater commitments are made thereon. Thereafter, such stock shall pass as an appurtenance to the land upon transfer or sale of the property or any portion thereof. Upon approval of development plans or recordation of subdivision plat plans, Deepwater shall restrict the use of said shares of stock supporting such endeavor for use on the project and as security for any performance obligations Deepwater may have.

B. Class B (use) stock shall be appurtenant to the land upon which it is placed to use with each stock certificate stamped with the legal description of such appurtenance.

## 2. ASSESSMENTS.

All assessments, whether under Class A, B, or C may be made on other than a pro rata basis where actual costs of water delivery, attorneys and engineering fees, underlying water use charges, or the like result in increased costs being borne by Deepwater for work, deliveries, charges, etc., directly attributable to a particular shareholder. Those shareholders for whom the increased costs are incurred shall be responsible for paying the increased costs incurred by

Deepwater, with such costs becoming part of their shareholder assessment. All assessments shall be levied and collected at the times, in the amounts, and in the manner provided by law and as the Board of Directors may direct.

A. Class A (development) shares are not chargeable with the general assessment for operation and maintenance of system facilities, but are subject to special assessment as provided in the Articles of Incorporation, which provide for assessment of:

(i) Those holding costs incurred to maintain the applicable water rights in good standing or such other needed or requested work, e.g. attorney's fees, engineering fees, etc.

(ii) Any special assessments or contract charges associated with the underlying water rights supporting such Class A shareholder's water use, e.g. Midway Irrigation stock assessment and Pincreek charge.

B. Class B (use) stock is fully assessable as follows:

(i) Class B shares will not be subject to general assessment until said shares are placed into use or activated by the owner thereof calling for delivery of water. In lieu of the general assessment, Deepwater will impose a stand-by fee as set forth in Article V, Section 4(B) below.

(ii) Upon activation, the Class B shares will bear a general assessment for the operation, maintenance, repair and replacement of the water distribution system, including charges attributable to the underlying water right which supports shareholder's water use, e.g. Brighton Estates Water User's Association charge, for all late fees, resumption of use fees, additional pumping fees, and other fees which may be imposed under Article V, Section 2 hereof, and for all administrative and other costs incurred by Deepwater, including engineering and attorney(s) fees.

(iii) For special assessments involving requested or necessary work involving specific shares and not fairly attributable to all shareholders.

C. Class C (irrigation) stock is not subject to the general assessment, but is responsible for special assessments as follows:

(i) at a rate determined by the Board of Directors that reflects the costs attributable to the underlying water right including costs associated with maintaining the status of the water rights;

(ii) for all late fees, resumption of use fees, etc. which may be imposed;

- (iii) for operation and maintenance of the irrigation system, if applicable;
- (iv) for a proportionate share of Deepwater's administrative costs fairly allocable to managing the water use under the Class C (irrigation) stock; and
- (v) for all attorneys and engineering fees fairly attributable to efforts performed by Deepwater benefiting or involving the subject irrigation stock.

### 3. DELINQUENCIES.

Delinquent accounts shall be subject to levy and foreclosure in the manner provided for in the Delinquency Policy established and adopted by the Board of Directors, and as provided by law.

### 4. FEES.

#### A. Connection Fees.

(i) Residential Connection Fee. A residential connection fee shall be assessed to cover costs of installation, connection and contingency on each residence connected onto the Deepwater system. The amount of the fee as of date of adoption hereof shall be determined as set forth in Exhibit "A", which is attached hereto and which may be amended from time to time by the Board of Directors.

(ii) Commercial Connection Fee. Commercial connection fee shall be charged to cover costs of installation, connection and contingency on the basis set forth in the attached Exhibit "A" and which may be amended from time to time by the Board of Directors.

B. Stand By Fee. Because Deepwater must be capable of providing water service to Class B users upon demand, a stand-by fee shall be imposed upon inactive Class B shares as set forth in Exhibit "A", to cover company expenses in maintaining system capacity (water rights, source capacity, storage facilities, pump stations, infrastructure) on call. Stand-by fees may be amended from time to time by the Board of Directors.

C. Additional Pumping Fees. Due to the expansion of the water system into areas of higher elevation, and the determination that it is inappropriate for all shareholders of Deepwater to pay for the additional pumping costs to these special areas, all areas incurring pumping charges in excess of a single pump shall pay fees as set forth in Exhibit "A" attached hereto and which may be amended from time to time by the Board of Directors.

D. Conversion Fee. A conversion fee as set forth in Exhibit "A", attached hereto and which may be amended from time to time by the Board of Directors, shall be assessed against all

shares converted from Class A to Class B stock. This conversion fee will enable Deepwater to have sufficient funds at the end of the year of conversion to pay its water rights assessments without drawing from its working capital sources, as well as offset administrative costs.

E. Stock Transfer Fee. Any reissuance of a Class B certificate shall carry with it a fifty dollar (\$50.00) fee. This fee is to offset the administrative costs of reissuing share certificates.

F. Water Development Fee. Deepwater shall have the authority to enter into contracts with shareholders who construct new water distribution facilities for the imposition of a water development fee upon those or other shareholders at the time of conversion of said shareholders' Class A shares to Class B shares. The water development fee will be used to help said shareholders recover the costs of facilities not otherwise recoverable by other fees and shall be used by Deepwater to help secure any repayment obligation on the water distribution facilities contributed by the shareholder.

5. METERS REQUIRED.

All users of water from Deepwater's system shall be metered, except for fire protection water, which will not be metered.

6. ONE STRUCTURE PER METER.

Not more than one structure or building shall be connected to any one meter without the prior written approval of Deepwater.

7. VACANT LOTS.

Application for water service will be accepted from shareholders who own vacant lots and present the requisite number or portion thereof Class A development shares required to meet the contemplated use. Such applications shall be accompanied by the required connection and other fees at the then current rate, which shall entitle the shareholder to have a meter installed for servicing of his premises and the conversion of his shares to Class B (use) shares.

8. DEEPWATER DISTRIBUTION COMPANY TO HOLD TITLE TO WATER SYSTEM.

Deepwater shall hold title for and on behalf of its shareholders to all reservoirs, wells, pumps, pumphouse, pressure reduction valves, treatment plants, main distribution lines, delivery and service lateral lines and connections from the water mains to the curb stop of each individual shareholder water user, including the meter, outside readout, curb-stop valve box and shut-off



valve, and any other facilities constituting the water system. Deepwater shall maintain, repair and replace the same in perpetuity. Each individual shareholder shall own and shall bear the sole responsibility for repair, upkeep and maintenance of the service lateral from the property side of the curb stop box and shut-off valve to the premises being service excluding the water meter and outside readout. Deepwater shall not accept nor bear any responsibility for any leaks or damages caused by leakage on the water user side of the shut-off valve; and Deepwater shall no obligation to repair, replace or maintain the service lateral on the shareholder's side of the shut-off valve. Deepwater may, without incurring liability, make emergency repairs to service laterals, in order to mitigate damage, prevent waste of water, and to prevent contamination of the water supply, but any such repairs shall be at the shareholder's sole expense.

#### 9. SERVICE TO INDIVIDUAL STRUCTURES.

Each individual shareholder requesting domestic water service shall make formal written application to Deepwater for service, on a form provided by Deepwater, and shall comply with the following:

A. No lot owner/shareholder shall be permitted to connect onto Deepwater's system or receive water service until a formal written application for service has been received and accepted by Deepwater. The application shall be on a form provided by Deepwater and shall provide that each lot owner/shareholder shall comply with the rules and regulations and by-laws of Deepwater.

B. Each lot owner/shareholder requesting service shall surrender the requisite number, or portion thereof, of shares of Class A development stock for conversion to Class B (use) stock sufficient to meet the proposed use, and shall pay the stock transfer fee.

C. Each shareholder requesting service shall pay, at the time of making the application, the connection fee required at the then current rate.

D. Deepwater's obligation for operation and maintenance of service laterals shall terminate at the street side of the shut off valve. The shareholder shall be responsible for the maintenance of the service lateral from the property side of the shut off valve to the meter installed within the structure receiving water service. The meter itself, the meter gauges and the shut-off valve shall remain the sole property of Deepwater and Deepwater shall have the obligation to maintain and repair the same.

E. In the event of a sale or transfer of ownership of a residence or other unit, each such selling or buying shareholder shall immediately report in writing, to Deepwater's business office, the sale of the residential dwelling unit or other unit. Immediately upon receipt of this written notice, Deepwater shall either terminate or administratively suspend water service to the unit or facility until compliance with the following is obtained:

(1) The new owner, on a form provided by Deepwater, agrees to comply with Deepwater's rules, regulations and by laws in the use of water.

(2) A properly endorsed share certificate, together with the stock transfer fee, is presented to Deepwater transferring ownership of the share certificate from the previous owner to the new owner.

(3) The new owner pays any resumption of use fees which may be applicable to cover the costs incurred by Deepwater in re-establishing water service to a particular unit.

(4) All past due stock assessments attributable to said stock certificate are fully paid.

Deepwater shall not reissue or transfer ownership of stock certificates until all of the above listed items are accomplished. Upon compliance with the terms and conditions of this subsection, water service shall be restored to the premises and the stock transfer accomplished. The subsequent purchaser shall, as a shareholder, be subject to annual stock assessments. It shall be the burden and responsibility of each subsequent purchaser to obtain the prorated amount of stock assessment, if any, from the prior owner. Deepwater will assist in determining the prorated amount but will not endeavor to collect the same from the prior owner of the share certificate. The assessments are levied against the stock certificate - not individual owners - and will be collected accordingly.

#### 10. LANDLORDS OR LESSORS SHALL BE HELD PRIMARILY LIABLE FOR ALL ASSESSMENTS.

The legal owner of any rented property being served by Deepwater shall appear as the record owner of the share of stock representing that water connection within Deepwater, and shall be held primarily responsible to Deepwater for payment of the annual stock assessment.

#### 11. METER READERS AND METER MAINTENANCE.

Shareholder-water users shall not hinder or obstruct in any way the ability of the authorized company personnel to gain entry to a shareholder's structure or premises, upon

reasonable notice, and at a reasonable time of day, for the purpose of periodic meter reading and maintenance of the water meters. The cost of removing any physical obstructions may be charged to the shareholder and Deepwater, upon notice, may discontinue the delivery of water to the shareholder without liability in the event the shareholder denies Deepwater's personnel access to the water meter. The delivery of water shall not be resumed until Deepwater has been provided with the required access to the water meter.

#### 12. EXPANSION OF WATER DELIVERY SYSTEM.

The Board of Directors may establish such rules and regulations as they deem appropriate for expansion of Deepwater's water delivery system, including the issuance of stock. Any such expansion shall be consistent with the Articles and contracts of Deepwater. The Board of Directors may also approve entering into such contracts as may be deemed appropriate to protect the investment of the shareholder(s) incurring the cost of such expansion. Said agreement shall specifically identify the pipelines, storage facilities, source capacity, water rights, etc. being contributed by said shareholder and establish shareholders' rights therein. In recognition of the fact that certain shareholders have assumed significant risks and undertaken substantial uncompensated efforts in planning, inspecting, constructing and creating the existing system capacity, including excess system capacity and system efficiencies, Deepwater, as approved by the Board of Directors, may protect their investment of time, effort and risk by, among other things, reserving the excess system capacity for such shareholders' benefit and agree to protect their interests in the event of dissolution, sale, condemnation, or the like. The protections granted may include, but are not limited to, contractual reservations of excess capacity for the contributing shareholder(s), and a commitment to obtain fair market value or replacement value for all such excess system capacity, water sources, water rights facilities, etc. in the event of sale, condemnation or the like.

#### 13. EMERGENCY SITUATIONS.

In times of water shortage the Board of Directors of Deepwater shall have full authority to declare a water emergency, and to ration or otherwise regulate the distribution and use of water from Deepwater's system. Such action by the Board of Directors may include a moratorium on new water connections until the emergency has been alleviated.

#### 14. SAVINGS CLAUSE.

If any section, subsection, sentence, clause or phrase of these By-Laws is for any reason held to be invalid by a court of law, such determination shall not affect the validity of the remaining portions of these By-Laws, which shall remain binding and enforceable against the shareholders of Deepwater.

#### 15. EFFECTIVE DATE.

These By-Laws shall be in full force and effect from and after the date of passage and adoption by the Board of Directors of Deepwater.

#### 16. CONTRACTS, LOANS, CHECKS AND DEPOSITS.

Contracts. The Board of Directors may authorize any officer or officers, agent or agents, to enter into any contract or execute and deliver any instrument in the name of an on behalf of Deepwater, and such authority may be general or confined to specific instances.

Loans. The Board of Directors shall, upon resolution duly adopted, have the authority to incur indebtedness on behalf of Deepwater, not to exceed \$10,000.00. Any loans or indebtedness in excess of that amount shall be incurred by Deepwater only upon the two-thirds majority vote of all the shareholders present, in person or by proxy, at an annual or special meeting called for that purpose.

Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of Deepwater, shall be signed by such officer or officers, agent or agents of Deepwater and in such manner as shall from time to time be determined by resolution of the Board of Directors.

Deposits. All funds of Deepwater not otherwise employed shall be deposited from time to time to the credit of Deepwater in such banks, trust companies, or other depositories as the Board of Directors may select.

#### 17. FISCAL YEAR.

The fiscal year of Deepwater shall begin on the 1<sup>st</sup> day of January in each year and end on December 31<sup>st</sup> each year.

#### 18. SEAL.

The Board of Directors shall provide a corporate seal which shall be circular in form and shall have inscribed thereon the name of Deepwater and the words, "Corporate Seal."

19. WAIVER OF NOTICE

Unless otherwise provided by law, whenever any notice is required to be given to any stockholder or a director of Deepwater under the provisions of these By-Laws or under the provisions of the Articles of Incorporation, a waiver thereof in writing, signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

20. AMENDMENTS.


The power to adopt, amend or repeal By-Laws shall be vested in the governing board. No By-Laws pertaining to the ability of Deepwater to assume debt, issue bonds, mortgage its property, sell or transfer any major asset or modify the allocation of Deepwater source or source capacity, shall be adopted, repealed, or amended, without having first received the unanimous consent of all of the directors, and, in no event shall any By-Law so adopted be inconsistent with the Articles of Incorporation of Deepwater; notwithstanding the foregoing, no by-law which requires approval of shareholders shall be amended or changed without receiving the approval of such number of shareholders.

These Second Amendments to By-Laws are duly adopted by the unanimous vote of the Board of Directors this 9th day of September, 2009.

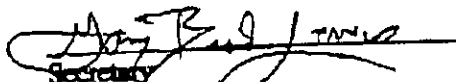
DEEPWATER DISTRIBUTION COMPANY

  
Sean Brown

  
Gary Brad Lewis

  
Robert Powell

ATTEST:

  
Secretary