WILMER CUTLER PICKERING
HALE AND DORR LLP

September 17, 2004

Mark C. Kalpin

60 STATE STREET
BOSTON, MA 02109
+1 617 526 6176
+1 617 526 5000 fax
mark.kalpin@wilmerhale.com

By Hand

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: D.T.E. 04-76 – Petition for Clarification as to the Extent of Applicability of Certain Provisions of M.G.L. c. 164 and 165

Dear Secretary Cottrell:

Enclosed for filing in the above-referenced matter is the response of Aquaria LLC to the Department's Information Request Sets # 1 and # 2, and Briefing Question Set # 1, as well as an entry of Appearance of Counsel by the undersigned.

Thank you for your attention to this matter.

Sincerely,

Mark C. Kalpin

Enclosure

cc: Caroline M. Bulger, Hearing Officer
A. John Sullivan, Analyst, Rates and Revenue Division
Service List
dte.efiling@state.ma.us

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Aquaria LLC Petition to the DTE for Clarification as to the Extent of Applicability of Certain Provisions of M.G.L. c. 164 and c. 165 September 17, 2004	)	**D.T.E. 04-76**

RESPONSE OF AQUARIA LLC TO DTE INFORMATION REQUEST SETS # 1 AND # 2, AND BRIEFING QUESTION SET # 1

DTE 1-1 ***Please explain the basis on which the Company has concluded that Aquaria constitutes a water company as defined by G.L. c. 165, § 1.***

Section 1 of Chapter 165 defines a water "corporation" or "company" as "every person, partnership, association or corporation, other than a municipal corporation, and other than a landlord supplying his tenant, engaged in the distribution and sale of water in the commonwealth through its pipes or mains."

Section 1 establishes a two-part test for being a "water company;" namely, (1) an entity must have one of the specified business forms, and (2) the entity must be engaged in the distribution and sale of water through pipes and mains in the Commonwealth. In this regard, it is important to note that the first part of this test – that the entity be a person, partnership, association or corporation – is different from the test established in Section 1 of Chapter 164 for establishing a "gas company" or an "electric company" (in that a gas company or electric company can only be a corporation). *See Dartmouth Power Associates Limited*, D.P.U. 90-142 (July 2, 1990). Aquaria believes that it is this difference that gives rise to the potential inapplicability of a number of the provisions of Chapter 164 in this matter.

Addressing the first prong of the two-part test established by Section 1 of Chapter 165, Aquaria is a limited liability company registered to conduct business in the Commonwealth in accordance with the provisions of M.G.L. c. 156C. As such, it is an "association" for the purpose of Section 1, and meets the first part of the standard.

In addition, as set forth in further detail in Exhibits A and B to its Petition, Aquaria intends to design, permit, construct and operate a water treatment/desalinization plant in North Dighton, Massachusetts to withdraw and treat water from the Taunton River, and to then distribute and sell at wholesale that water through pipes and mains to certain towns and cities within the Commonwealth, including the City of Brockton. Aquaria's proposed business activities clearly satisfy the second part of the standard set forth in Section 1.

As such, Aquaria believes that it is a water company as defined by Section 1 of Chapter 165, and must obtain authorization from the Department in accordance with Section 1A of Chapter 165 prior to commencing its operations in the Commonwealth.

DTE 1-2 ***Please explain the advantages and disadvantages, if any, to the Company if the Department finds that Aquaria is a water company as defined by G.L. c. 165, § 1.***

Aquaria believes that there are certain advantages and disadvantages that arise being classified as a water company under Chapter 165. Aquaria does not believe, however, that those advantages and disadvantages alter the fact that Aquaria constitutes a water company under Chapter 165.

As indicated in its Petition, Aquaria proposes to distribute and sell at wholesale water through pipes and mains to certain towns and cities within the Commonwealth, including the City of Brockton. There is a critical need for Aquaria's Water Treatment Facility in order to alleviate the water shortages that currently affect Brockton and other municipalities in southeastern Massachusetts. *See* Supplemental Petition, Affidavit of Juan Pablo Diaz Batanero, General Manager of Aquaria.

When the City of Brockton negotiated the Water Purchase Agreement with Aquaria (a copy of which previously was provided to the Department staff), the City declared Aquaria to be a "sole source" for the procurement of water pursuant to the provisions of M.G.L. c. 30B, § 7. *See* Agreement at para. K. By making this designation, the City was able to negotiate the Agreement in a manner and on a timetable that responded to the City's critical need for water. However, the City's designation was premised on the fact that Aquaria met the statutory definition of a water company, and accordingly would be so designated by the Department. *Id.* at para. J.

As such, the most critical "advantage" of Aquaria being designated as a water company is that Aquaria will be able to meet a fundamental requirement that is a condition precedent under the Agreement. *Id.* at section 2.2. If Aquaria cannot meet that condition, the end result is that the Agreement will fail, and the City of Brockton will not be able to secure an additional supply of needed water on a timely basis. Given the time and resources expended in the negotiation of the Agreement, the design of the Water Treatment Facility, and in obtaining financing commitments, Aquaria is not optimistic that an alternative agreement could be achieved between Brockton and Aquaria or any other entity on a timely basis due to the need for the City to utilize a competitive procurement process.

The primary disadvantage of being designated as a water company arises from the fact that Aquaria is a limited liability company, as opposed to a corporation. Section 2 of Chapter 165 makes numerous provisions of Chapter 164 applicable to a water company. As was noted above, however, those provisions apply (as does the bulk of Chapter 164) only to corporations. As such, many of the provisions of Chapter 164 – such as the requirement under Section 8 to hold a stockholder's meeting prior to increasing the capital stock of any class then authorized – are simply not applicable to a limited liability company. As such, Aquaria respectfully requests that any authorization issued by the Department to Aquaria make clear that those provisions are not applicable to Aquaria.

DTE 1-3 ***Refer to Supplement at 2. Please explain why the Company seeks exemptions from the requirements of G.L. c. 164, §§ 96, 99, 101, 102A, and 102B. Please discuss each statutory section separately, including a caption that contains the relevant statutory section and a brief description of the section.***

(a) Section 96: Sale, merger or consolidation

Section 96 of Chapter 164 authorizes a regulated water company to consolidate or merge with another water company, or to sell and convey its properties to another water company, or to purchase the properties of another water company, provided that the proposed purchase, sale, consolidation or merger, and the terms thereof, have been approved by a "vote of the holders of at least two thirds of each class of stock outstanding and entitled to vote on the question of each of the contracting companies." Following such an affirmative vote, the water company must obtain the approval of the Department. However, Department approval is not required for a proposed purchase or sale of properties by, or the consolidation or merger of, a wholesale generation company.

Aquaria is a limited liability company, and will have members (with a concomitant membership interest) as opposed to shareholders. As such, the voting requirements imposed by Section 96 are not directly applicable to Aquaria.

Aquaria will, of course, comply with all of the voting requirements for such a transaction that are set forth in the Aquaria's operating agreement, as well as all applicable requirements for such a transaction that are imposed on limited liability companies by the provisions of M.G.L. c. 156C. Thus, Aquaria hereby clarifies that it

does not seek an exemption from the provisions of Section 96; instead, it requests a determination from the Department that the provisions of Section 96 are not directly applicable to a limited liability company such as Aquaria.

Finally, Section 96 of Chapter 164 exempts "wholesale generation companies" from the requirement to obtain approval from the Department for certain purchases, sales, consolidations and mergers. As discussed in the Petition and Supplemental Petition, Aquaria's business is solely related to the production and supply of desalinized and purified water in bulk (that is, at wholesale) to cities and towns in the Commonwealth, and does not involve the production or sale of water at the retail level (such wholesale business, the "Wholesale Business Condition"). By limiting its business to the Wholesale Business Condition, Aquaria effectively is a "wholesale water company."

As a result, Aquaria herein clarifies its prior request regarding the applicability of Section 96 to specify that Aquaria seeks a determination from the Department that the exemption currently provided under Section 96 for wholesale generation companies is applicable to Aquaria for as long as Aquaria maintains the Wholesale Business Condition.

(b) Section 99: Increase of capital stock to affect acquisition

Section 99 of Chapter 164 authorizes a purchasing or consolidated company, in connection with the purchase or merger and subject to certain limitations, to increase its capital stock and issue bonds, and to exchange its securities for those of the selling or

merged company, upon such terms as the Department approves, provided that the aggregate amount of the capital stock and the aggregate amount of the debt, respectively, of the consolidated companies are not, by reason of such consolidation, increased.

Because Aquaria is a limited liability company and not a corporation, it will not issue capital stock or bonds as would a gas company or electric company. In addition, the primary purposes of this provision – to prevent a company from "watering" its stock or acquiring too much debt (both of which ultimately could lead to a request for an increase in any cost-of-service rates authorized by the Department) – are not raised in this case as Aquaria does not and cannot (for so long as it maintains the Wholesale Business Condition) charge cost-of-service rates. As a result, the provisions of Section 99 are not applicable to Aquaria, and Aquaria respectfully requests that the Department confirm such non-applicability in any authorization granted to Aquaria.

(c) Section 101: Applications for approval of sales or consolidations

Section 101 requires that all applications for the approval by the Department of purchases and sales or consolidations under sections twenty-six, ninety-six, ninety-seven and one hundred shall be filed with the Department within four months after the passage by the contracting companies of votes authorizing such purchase and sale or consolidation. As an initial matter, Section 26 was repealed in 1973, and Sections 97 and 100 contemplate activities that will not be undertaken by the Company.

In addition, and as was discussed in greater detail in the response to item (a), because Aquaria is a "wholesale" water company, the exemption for obtaining the approval of the Department that is applicable to wholesale generation companies under section 96 also should be available to Aquaria so long as Aquaria maintains the Wholesale Business Condition.

(d) Section 102A: Consolidation or merger

Section 102A imposes obligations upon "corporations desiring to consolidate or merge ...." Because Aquaria is a limited liability company and not a corporation, these obligations are not applicable to Aquaria (and Aquaria respectfully requests that the Department make such a determination in the authorization issued to Aquaria under Chapter 165 in response to Aquaria's Petition). Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to the consolidation or merger of a limited liability company such as Aquaria.

(e) Section 102B: Certificate of consolidation or merger

Section 102B requires the Secretary of the Commonwealth, upon the payment of a prescribed fee, to issue a certificate evidencing the filing and approval of any articles of consolidation or merger pursuant to section one hundred and two A. Because the provisions of Section 102A are not applicable to Aquaria, the provisions of Section 102B also are not applicable. Aquaria will, of course, comply with all applicable provisions

(including the payment of prescribed fees) of Chapter 156C as they relate to the consolidation or merger of a limited liability company such as Aquaria, and assumes that the Secretary of the Commonwealth will issue any certificates required under that chapter.

DTE 1-4 ***Please refer to Supplement at 3.***

> ***(a) Confirm, or amend as appropriate, whether Aquaria registered on June 11, 2002 with the Secretary of the Commonwealth as a foreign limited liability company, under certificate number 043566882.***

Aquaria hereby confirms that Aquaria registered on June 11, 2002 with the Secretary of the Commonwealth as a foreign limited liability company under certificate number 043566882.

> ***(b) Explain, notwithstanding possession of such certificate from the Secretary of the Commonwealth, how the requirements of G.L. c. 164, §§ 4 through 8D are "inapplicable and unworkable" as they relate to Aquaria. As part of this response, discuss how the corporate governance requirements described in these statutes would affect the ability of Aquaria to operate.***

The provisions of Sections 4 through 8D of Chapter 164 establish, directly and by reference to the provisions of M.G.L. c. 156B (which govern the operation of corporations within the Commonwealth), certain requirements on the operations of corporations that are subject to the requirements of Chapter 164 (that is, electric companies and gas companies). Because Aquaria is a limited liability company, and not a corporation, the provisions of M.G.L. c. 156B do not apply to its operations. As a result, the provisions of Sections 4 through 8D of Chapter 164 also are not applicable to Aquaria. Aquaria is subject to the requirements of M.G.L. c. 156C, which govern the operation of limited liability companies within the Commonwealth. Aquaria fully intends

to comply with those requirements, including the submission of all required documents and the payment of all required fees.

Accordingly, Aquaria respectfully requests that any authorization issued to Aquaria acknowledge that the provisions of Sections 4 through 8D of Chapter 164 are not applicable to Aquaria.

DTE 1-5 ***Refer to Supplement at 3. Please explain how the requirements of G.L. c. 164, §§ 10, 11, 12A, 13, 16, 16A, 17, 17A, 18, 19, 21, 22, 23, 24, 25, and 33 are "inapplicable and unworkable," as they relate to Aquaria. Please discuss each statutory section separately, including a caption that contains the relevant statutory section and a brief description of the section.***

(a) Section 10: Issuance of capital stock; notification of department

Section 10 requires that a corporation notify the Department within a specified time period after the issuance of (and receipt of payment for) capital stock. As discussed above, Aquaria is a limited liability company that (by virtue of its business form) will not issue capital stock. As such, by its own terms this provision is not applicable to Aquaria. In addition, there is no need in the case of a limited liability company for the Department to protect against the "harm" that is envisioned by this provisions – namely, the issuance of capital stock by a corporation without receipt of sufficient payment.

Aquaria understands that its request for an exemption from this provision (and other provisions) of Chapter 164 may in some circumstances be better characterized as a request for a determination of non-applicability. Accordingly, Aquaria herein clarifies that it seeks a determination from the Department that because it is a limited liability company, many of the provisions of Chapter 164 (which by their own terms apply only to corporations) are not applicable to Aquaria. Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

(b) Section 11: Payment of price of share

Section 11 prohibits the issuance by a gas or electric company of stock or scrip dividend to, or the division of the proceeds of the sale of stock or scrip among, the company's stockholders unless the Department approves. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 11 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165).

(c) Section 12A: Convertible debentures

Section 12A establishes limitations on a corporation that proposes to issue debentures to be convertible into stock of the corporation. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 12A do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). Furthermore, Aquaria notes that the Pledge Agreement forming part of the Loan Documentation enables the Project Lenders, in the event of a Loan default, to foreclose and succeed to the member interests in Aquaria; the exercise of such remedies are not subject to Section 12A and Aquaria requests that the Department also so determine.

(d) Section 13: Mortgage of property

Section 13 imposes requirements on corporations that are subject to the requirements of Chapter 164 with respect to any decision by the corporation to mortgage all or substantially all of its property, including its franchise. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 13 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). As Aquaria's Petition makes clear, Aquaria is mortgaging its property to the Project Lenders.

(e) Section 16: Making good impairment of capital stock

Section 16 states that if the Department, when it approves an issue of new stock, bonds or other securities by a gas or electric company (that is, a corporation), determines that the fair structural value of the plant and of the land and the fair value of the nuclear fuel, gas inventories or fossil fuel inventories owned by such company is less than its outstanding stock and debt, then the Department may prescribe such conditions and requirements as it deems best adapted to make good within a reasonable time the impairment of the capital stock. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 16 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165).

In addition, Aquaria notes that the provisions of this Section act to ensure that any impairment of the capital stock of a corporation ultimately does not result in an inappropriate increase in the corporation's cost-of-service. Because Aquaria will provide only wholesale service at an arms-length negotiated rate, and not seek cost-of-service rate treatment, the concerns that Section 16 seeks to address are not applicable to this matter.

(f) Section 16A: Inadequate depreciation allowances

Section 16A states that if the Department, when it approves an issue of stock, bonds, coupon notes or other evidences of indebtedness of a corporation, or passes upon the price, rates, charges or service of a corporation, determines that the provision made by the corporation for the depreciation of its property has been inadequate, then the Department shall order the corporation to set aside out of earnings such allowances for depreciation and for such period or periods as the Department may from time to time prescribe.

Because Aquaria is a limited liability company and not a corporation, the provisions of Section 16A do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). In addition, the concerns that Section 16A seeks to address – the inappropriate attempt by a regulated corporation to inflate its physical plant in order to

increase its rate base – are not present in this matter as Aquaria's wholesale rates are determined through arms-length negotiation (as opposed to cost-of service ratemaking).

(g) Section 17: Improper issue of stock, bonds or other securities; penalty

Section 17 imposes penalties on any director, treasurer or other officer or agent of a gas or electric company who knowingly votes to authorize the issue of stock, bonds or other securities contrary to specified provisions of Chapter 164, or who knowingly votes to authorize the application of, or knowingly applies, the proceeds of such stock, bonds or other securities contrary to those provisions, or who knowingly votes to assume or incur, or knowingly assumes or incurs in the name or behalf of such corporation, any debt or liability except for the legitimate purposes of the corporation.

Because Aquaria is a limited liability company and not a corporation, the provisions of Section 17 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

(h) Section 17A: Approval of investments by the Department

Section 17A states that no gas or electric company, except in accordance with such rules and regulations as the Department shall from time to time prescribe, may loan its funds to, guarantee or endorse the indebtedness of, or invest its funds in the stock,

bonds, certificates of participation or other securities of, any corporation, association or trust unless the said loan, guaranty or endorsement, or investment is approved in writing by the Department. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 17A do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

(i) Section 18: Disposition of shares

Section 18 addresses the price at which shares of the capital stock of a gas or electric company shall be offered. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 18 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

(j) Section 19: Sale of unissued capital stock; terms; auction sale

Section 19 addresses the terms under which a gas or electric company may issue any unissued shares of its capital stock that are authorized under its articles of incorporation. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 19 do not apply to Aquaria (and Aquaria respectfully requests that

the Department make such a determination in any authorization issued to Aquaria under Chapter 165).

(k) Section 21: Authorization necessary to transfer franchise

Section 21 prohibits a corporation that is subject of Chapter 164 from transferring its franchise, leasing its works or contracting with any person, association or corporation to carry on its works, without the authority of the general court. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 21 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165).

Aquaria further notes that it has not requested the Department or the General Court to grant Aquaria a franchise with respect to the cities and towns to which Aquaria intends to provide wholesale service under arms-length negotiated agreements. Each of the municipalities has other water sources, and Aquaria is not an exclusive provider. Finally, pursuant to the terms of Section 15.5 of the Water Purchase Agreement, the City of Brockton is provided numerous safeguards, including but not limited an option to purchase, in the event that Aquaria seeks to sell or lease the project, and the right to take over the Loan in the event of any Aquaria Loan default that would allow the Project Lenders to exercise foreclosure remedies.

(l) Section 22: Deposits

Section 22 requires that all deposits of funds of corporations subject to Chapter 164 shall be made in national banks, duly chartered trust companies, savings banks, co-operative banks or federal savings and loan associations. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 22 do not apply to Aquaria. Notwithstanding that non-applicability, Aquaria intends to comply with the provisions of this Section, and withdraws its prior requests with respect to this Section.

(m) Section 23: Voting by stockholders

Section 23 addresses the manner in which the stockholders of a corporation subject to the provisions of Chapter 164 may vote, and authorizes voting by proxy under certain circumstances. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 23 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

(n) Section 24: Voting by stockholders

Section 24 addresses circumstances under which the voting requirements established (in terms of the necessary amount of affirmative votes) for a corporation under Chapter 164 differ from those set forth in the corporation's articles of organization or by-laws, and specifies that the articles of organization or by-laws shall control when

they require the vote or concurrence of a greater proportion of the shares than required by Chapter 164. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 24 do not apply to Aquaria (and Aquaria respectfully requests that the Department make such a determination in any authorization issued to Aquaria under Chapter 165). Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

(o) Section 25: Stockholders of public service corporation

Section 25 prohibits any person owning, holding or controlling shares of stock of any public service corporation from using the name or title or other words that, in the opinion of the Department, might lead the public to believe that such person is a public service corporation or that its business is that of a public service corporation.

Because Aquaria is a limited liability company and not a corporation, the provisions of Section 25 do not apply to Aquaria. Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria. Notwithstanding that non-applicability, Aquaria intends to comply with the provisions of this Section, and withdraws its prior requests with respect to this Section.

(p) Section 33: Fees for filing certificates, articles and copies of votes

Section 33 addresses the manner in which filing fees that are required to be made by corporations subject to the provisions of Chapter 164 shall be determined by the

Commissioner of Administration. Because Aquaria is a limited liability company and not a corporation, the provisions of Section 33 do not apply to Aquaria. Aquaria will, of course, comply with all applicable provisions of Chapter 156C as they relate to a limited liability company such as Aquaria.

DTE 1-6 ***Refer to Supplement at 4-5. Please explain why the right of user requirements of G.L. c. 164, § 92 are "inapplicable" as they relate to Aquaria.***

Section 92 of Chapter 164 provides, in part, that upon

> written petition of any person, having a residence or place of business in a town where a corporation is engaged in the manufacture, transmission or sale of gas or the distribution of electricity, aggrieved by its refusal or neglect to supply him with gas or electricity, the department may, after notice to the corporation to appear at a time and place therein named to show cause why the prayer of such petition should not be granted, issue an order directing and requiring it to supply the petitioner with gas or electricity, upon such terms and conditions as are legal and reasonable; provided, however, that if such corporation is engaged in such town solely in the transmission of gas such order shall not be made where it appears that compliance therewith would result in permanent financial loss to the corporation.

Because Aquaria is a limited liability company and not a corporation, the provisions of Section 92 do not apply to Aquaria. Aquaria also notes that the granting of any such petition by the Department would cause Aquaria to cease to satisfy the Wholesale Business Condition – a result that could cause substantial financial harm to Aquaria as it might then be subject to cost-of-service ratemaking by the Department (a process that would be inconsistent with the terms of the Aquaria Loan from the Project Lenders and with the fact that Aquaria and the City of Brockton negotiated arms-length rates in the Water Purchase Agreement). Finally, Aquaria submits there should be no reasonable basis for any person to file (or for the Department to grant) such a petition, as that person will have the right to purchase water on a retail level directly from the

municipality in which the person resides, and no right (other than through successful recourse to Section 92) to purchase water directly from Aquaria.

DTE 1-7 ***Refer to Supplement at 5. Please explain why the office location requirements of G.L. c. 164, § 80 are "inapplicable" as they relate to Aquaria. As part of this response, explain whether the space in the desalinization plant devoted to administrative matters associated with the facility would fairly be considered to constitute an "office" for purposes of compliance with that statute.***

Section 80 requires that a water company have an office in a town where their works are located and, unless otherwise authorized by the Department, keep in that office all of the books and papers required by law to be kept within the Commonwealth, and also such books as may be required to show their receipts, expenditures, indebtedness and financial condition.

As set forth in the Petition, a portion of Aquaria's "works" will be located with the City of Brockton. Aquaria currently maintains a business office in the City of Brockton. Accordingly, Aquaria withdraws its prior requests with respect to this provision.

DTE 1-8 ***Refer to Supplement at 5-6. Please explain why the requirements of G.L. c. 164, §§ 81, 82, and 128 are "inapplicable" as they relate to Aquaria. Please discuss each statutory section separately, including a caption that contains the relevant statutory section and a brief description of the section.***

(a) Section 81: Form of books and accounts

Section 81 requires that gas and electric companies or persons engaged in the manufacture and sale or distribution of gas or electricity shall keep their books and accounts in a form to be prescribed by the Department, and the accounts shall be closed annually, so that a balance sheet can be taken therefrom. The purpose behind this requirement is to allow the Department to properly determine, on a regular basis, the company's cost-of-service for the purpose of establishing rates.

Aquaria intends to keep detailed financial information in accordance with generally accepted accounting principles ("GAAP"). Aquaria proposes to file its audited financial statements with the Department for informational purposes on an annual basis, and is willing to accept a condition in any authorization granted to it under Chapter 165 to that effect. Inclusion of such a condition in that authorization by the Department would satisfy the requirements of Section 81. Because Aquaria intends to sell and distribute water at "wholesale" only to municipalities and to charge only arms-length negotiated rates, Aquaria respectfully submits that its submission of audited financial statements on an annual basis would satisfy the requirements of this section.

(b) Section 82: Form of records of work at manufacturing station

Section 82 requires a water company to keep records pertaining to its manufacture of water at the manufacturing station, and in such form as the Department may require.

In accordance with the terms of permits for Aquaria's operations that will be issued by federal and state agencies, such as the U.S. Environmental Protection Agency and the Massachusetts Department of Environmental Protection, Aquaria will be required to maintain detailed records pertaining to, among other items, its withdrawal and treatment of water from the Taunton River, the discharge of any unusable water to the Taunton River, and the quantity and quality of the water that it distributes and sells at wholesale. Those records will be kept at the Water Treatment Facility in North Dighton.

Because the type of information that is collected, and the form in which that information is recorded, by Aquaria with respect to its operations will be dictated by those permits, Aquaria respectfully requests that the Department confirm in any authorization granted to Aquaria under Chapter 164 that the maintenance of its records in compliance with the requirements of those permits will comply with the requirements of Section 81. Inclusion of such authorization by the Department would satisfy the requirements of Section 81.

(c) Section 128: Guaranty fund; payment of interest

Section 128 applies to any corporation which has a franchise in and the use of the public streets of a town for the supply and distribution or only distribution, of gas, water, electric light or power, and requires that corporation to pay interest on a security deposit that it collects from a customer for a period of more than six months.

Because Aquaria is a limited liability company and not a corporation, the provisions of Section 92 do not apply to Aquaria. In addition, Aquaria notes that the provisions of Section 92 do not apply to Aquaria as it has not applied for, and will not be granted, the requisite "franchise" in the use of public streets. Finally, Aquaria notes that the Water Purchase Agreement does not allow Aquaria to collect any security deposit from the City of Brockton.

DTE 1-9 ***Refer to Supplement at 6-7. Please explain why the Company is seeking an exemption from 220 C.M.R. § 31.00, a regulation whose application is optional to a water utility.***

Aquaria agrees that the provisions of 220 C.M.R § 31.00 allows a water company to request that the Department utilize optional methodology for establishing the company's allowed return on equity at the time the company makes a rate filing with the Department. Because Aquaria does not intend to make (and the requirements of Aquaria's Loan financing will not allow Aquaria to accept an authorization that requires it to make) a rate filing with the Department, and because the provisions of Section 31.00 are optional in any such filing, Aquaria accordingly withdraws its prior requests with respect to this section.

DTE 1-10 ***Refer to Supplement at 6-7. Please explain why the Department's regulations in 220 C.M.R. § 52.00 are "inapplicable" as they relate to Aquaria. As part of this response, explain how the Company intends to satisfy the requirements of G.L. c. 164, § 83 in the absence of a system of accounts as set forth in 220 C.M.R. § 52.00.***

The provisions of 220 C.M.R. § 52.00 require water companies to keep detailed records pertaining to their operations according to a system of uniform accounts prescribed by the Department. A primary purpose of this requirement is to allow the Department to obtain sufficient information necessary to support cost-of-service ratemaking treatment.

Aquaria does not intend to sell and distribute water at retail. Instead, much like a wholesale generation company, Aquaria will distribute and sell water only at wholesale, and at arms-length negotiated rates. As such, there is no reason that Aquaria should be required (much like an exempt wholesale generator that sells (without market power) electric power on a wholesale basis at market-based rates is not required) to maintain detailed information in the same format as traditional cost-of-service regulated utilities.

As discussed above, Aquaria intends to keep detailed financial information in accordance with generally accepted accounting principles ("GAAP"). Aquaria proposes to file its audited financial statements with the Department for informational purposes on an annual basis, and is willing to accept a condition in any authorization granted to it under Chapter 165 to that effect. Inclusion of such a condition in that authorization by the Department would satisfy the requirements of Section 83. Because Aquaria intends

to sell and distribute water at "wholesale" and to charge only arms-length negotiated rates, Aquaria respectfully submits that its submission of audited financial statements on an annual basis would satisfy the requirements of this section.

DTE 2-1 ***Refer to Petition at 3. Please explain the Company's reasoning that the proposed financing does not require Department approval because the financing is "a project-financing arrangement of a sort typically utilized in significant capital projects."***

Aquaria proposes to provide service to cities and towns within the Commonwealth, including but not limited to the City of Brockton, at arms-length negotiated rates. For the City of Brockton, that rate is set by the Water Purchase Agreement, and is not related to the method in which Aquaria finances its proposed project. Thus, Aquaria submits that Department approval of Aquaria's proposed financing arrangement is not required for the foregoing reasons, and because the interest rate on Aquaria's Project Finance Loan can have no impact on the water rates charged under Bulk Contracts with municipalities in the Commonwealth.

To the extent that the Department disagrees with this conclusion, Aquaria clarifies that it provided a copy of the Loan Documentation to establish that it was of the sort typically used for the construction of significant capital projects, and that it was reasonably necessary to finance the Water Treatment Facility.

DTE 2-2 ***Refer to Exhibit C, Affidavit of Antonio Lopez Cerdan, at 1. Please provide the names of the banks, in addition to Banco Santander Central Hispano, SA, that will be participating in the project financing arrangement. As part of this response, provide the anticipated percentage of financing that would be provided by each bank.***

Ambac Assurance Corporation will be the guarantor of the Loan made by Banco Santander Central Hispano, SA to Aquaria. Aquaria has no control over the subsequent participation of any banks in the project financing, and as such cannot speculate as to the percentage of financing that would be provided by any one bank. Aquaria notes, however, that any subsequent participation would have no effect of the terms of the project financing.

DTE 2-3 ***Refer to Exhibit C, Affidavit of Antonio Lopez Cerdan, at 2. Please explain how the Company determined that the total loan would be between $32 million and $36 million.***

As an initial matter, the Water Purchase Agreement requires that Aquaria contribute to the project as equity at least 15% of the total cost of the project. Aquaria also notes that the lenders participating in the Loan financing for the project have reviewed the current cost estimates for the project, and preliminarily determined the amount that they would lend (again based on estimates of market-based interest rates at the anticipated time of financial closing). Based on these factors, Aquaria, after consultations with the Project Lenders, has determined that the total loan amount should be between $32 million and $36 million.

DTE 2-4 ***Refer to Exhibit C, Affidavit of Antonio Lopez Cerdan, at 2. Please explain how the Company determined that the interest rate associated with the loan would range between 4.6 percent and 8.6 percent.***

Aquaria has been informed by its lenders that, based on current and expected market conditions and interest rates, Aquaria should anticipate that the interest rate associated with the Loan would range between 4.6 percent and 8.6 percent. The exact interest rate that will be charged will be determined by the Project Lenders at the financial closing based on market conditions.

DTE 2-5 ***Refer to Exhibits D-1, at 1; D-3. Please explain whether the referenced Construction Loans will be on a demand basis or will have a fixed term. If the Construction Loans are expected to have a fixed term, provide the anticipated date of maturity.***

The Construction Loans will be issued for a fixed term that will be aligned with the outside date for the completion of construction that is established under the Water Purchase Agreement. As such, Aquaria cannot at this time provide an anticipated date of maturity. Upon the completion of construction of the Project, however, the Construction Loans will be converted to a term note with a fixed term of approximately 15 years. Aquaria notes that the terms of these loans are typical for significant capital projects.

DTE 2-6 ***Refer to Exhibit D-1, at 3. Please provide the anticipated Fixed Rate associated with the Construction Loans, and the basis by which the Fixed Rate will be determined.***

The Fixed Rate for the Construction Loans will be determined at, and be based on market conditions that exist at the time of, the financial closing for the project. Accordingly, Aquaria cannot at this time identify with any certainty the exact amount of the Fixed Rate; it will be within the ranges specified in the Petition and the Affidavits accompanying the Petition. Aquaria notes, however, that the exact amount of that rate will have no effect on the negotiated rate that is charged to the City of Brockton under the Water Purchase Agreement.

DTE 2-7 Refer to Exhibits D-1, at 1; D-5. Please identify the "Pledgor" associated with the pledge and security agreement.

The pledgors will be the two members of Aquaria (Inima, Servicios Europeos de Medio Ambiente, S.A., and Bluestone Energy Services, Inc.), each of who will subordinate their interest in the project to the Project Lenders.

BQ 1-1 ***Please discuss the legal basis for the proposition that state agencies have the authority to waive or exempt companies they may regulate from provisions of Massachusetts general law.***

As discussed above, Aquaria respectfully clarifies that it does not seek in its Petition or Supplemental Petition broad-scale waivers or exemptions from the requirements of Massachusetts general law. Rather, Aquaria seeks confirmation from the Department in any authorization issued to Aquaria under Chapter 165 that either (a) the provision in question is not applicable to Aquaria, or (b) the provision in question grants the Department discretion in determining the method for compliance, and that the method proposed by Aquaria is acceptable to the Department.

BQ 1-2 ***Refer to Supplement at 3. Please discuss the corporate obligations of a limited liability company, as distinct from a corporation. As part of this response, explain a limited liability company's filing requirements with the Secretary of the Commonwealth of Massachusetts.***

A Massachusetts limited liability company ("LLC") is an unincorporated organizations that has been formed under Chapter 156C of the Massachusetts General Laws. An LLC must have at least one member.

Chapter 156C of the Massachusetts General Laws imposes a number of obligations on a limited liability company that seeks to do business in the Commonwealth. Those obligations are distinct from the corporate obligations imposed by Chapter 156B on corporations conducting business in the Commonwealth. Much like Chapter 156B, Chapter 156C requires limited liability companies to make numerous filings (such as certificates of organization (and amendments, restatements, or cancellations thereto), applications to do business, and designations of resident agents) with the Secretary of the Commonwealth.

Chapter 156C regulates many of same issues that are regulated for corporations under Chapter 156B. For example, Chapter 156C addresses the name that a limited liability company may use, requires that a resident office be established, and dictates the types of records that must be kept by the company in that office. The rights and obligations of company members (and any different classes of members), such as voting rights, also are addressed. Limitations are established for certain financial matters – such as the power of a member or manager to loan money to or transact business with the

company – and for the consolidation or merger, or the winding up and distribution of assets, of the limited liability company.

BQ 1-3 ***If the Department finds that the Company is exempted from the requirements of G.L. c. 164, § 96, under what authority would the Department regulate the Company should the Company decide to sell, transfer, or close its planned desalinization plant in Dighton?***

Section 96 of Chapter 164 authorizes a regulated water company to consolidate or merge with another water company, or to sell and convey its properties to another water company, or to purchase the properties of another water company, provided that the proposed purchase, sale, consolidation or merger, and the terms thereof, have been approved by a "vote of the holders of at least two thirds of each class of stock outstanding and entitled to vote on the question of each of the contracting companies." Following such an affirmative vote, the water company must obtain the approval of the Department. However, Department approval is not required for a proposed purchase or sale of properties by, or the consolidation or merger of, a wholesale generation company.

Aquaria is a limited liability company, and will have members (with a concomitant membership interest) as opposed to shareholders. As such, the voting requirements imposed by Section 96 are not directly applicable to Aquaria. Aquaria will, of course, comply with all of the voting requirements for such a transaction that are set forth in the Aquaria's operating agreement, as well as all applicable requirements for such a transaction that are imposed on limited liability companies by the provisions of M.G.L. c. 156C.

Thus, Aquaria hereby clarifies that it does not seek an exemption from the provisions of Section 96; instead, it requests an acknowledgment from the Department

that the provisions of Section 96 are not directly applicable to a limited liability company such as Aquaria.

Finally, Section 96 of Chapter 164 exempts "wholesale generation companies" from the requirement to obtain approval from the Department for certain purchases, sales, consolidations and mergers. As discussed in the Petition and Supplemental Petition, Aquaria's business is solely related to the production and supply of desalinized and purified water in bulk (that is, at wholesale) to cities and towns in the Commonwealth, and does not involve the production or sale of water at the retail level (such wholesale business, the "Wholesale Business Condition"). By limiting its business to the Wholesale Business Condition, Aquaria effectively is a "wholesale water company;" fully analogous to a wholesale generation company.

As a result, Aquaria herein clarifies its prior request regarding the applicability of Section 96 to specify that Aquaria seeks confirmation from the Department that the exemption currently provided under Section 96 for wholesale generation companies is applicable to Aquaria for as long as Aquaria maintains the Wholesale Business Condition.

While this exemption is in effect, the Department would not regulate Aquaria (so long as Aquaria's business continued at all times to satisfy the Wholesale Business Condition) should Aquaria decide to sell, transfer, or close its proposed project, much like the Department would not regulate a wholesale generation company under similar

circumstances. As a practical matter, however, any concerns that the Department might have that Aquaria could undertake one of the specified actions to the detriment of the City of Brockton are unfounded, as the Water Purchase Agreement provides numerous safeguards (such as the option to purchase set forth in Section 15) to the City of Brockton should Aquaria decide to sell, transfer or close the project.

BQ 1-4 ***Please discuss the attributes of an "aqueduct company" as used in G.L. c. 165, 12 through 27 and whether they apply to Aquaria. Include in your discussion whether the Company constitutes an "aqueduct company" as the term is used in G.L. c. 165 and explain the advantages and disadvantages, if any, to the Company if the Department finds that Aquaria is an "aqueduct company" as the term is used in G.L. c. 165.***

Section 12 through 27 of Chapter 165 impose certain obligations on "aqueduct companies." Unfortunately, none of those sections define the term "aqueduct company." As such, it is difficult for Aquaria to respond to this information request in detail.

As discussed elsewhere herein, Aquaria is a water company as defined in Section 1 of Chapter 165. Assuming that an "aqueduct company" is a company that engages in the transmission and distribution of water (and thus constitutes a specific type of water company), then Aquaria also could be considered to be an aqueduct company in addition to being a water company. However, to the extent that the term aqueduct company was intended to have a definition distinct from that of a water company – in that a water company distributes and sells water through pipes and mains while an aqueduct company only distributes water – then Aquaria would not be an aqueduct company.

Aquaria does not believe that it is necessary for the Department to determine (and believes that no advantage springs from a Department determination) that Aquaria is an aqueduct company, provided, of course, that the Department determines that Aquaria also is a water company. In the event that the Department were to determine that Aquaria is an aqueduct company, then a number of the statutory provisions would not be applicable to Aquaria, on the grounds that those provisions apply only to corporations, and not to

limited liability companies such as Aquaria. Those provisions include M.G.L. c. 165, §§ 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, M.G.L. c. 158, and M.G.L. c. 166, §§ 4 - 10. Aquaria would, of course, comply with the provisions of M.G.L. c. 165C, which do apply to limited liability companies.

BQ 1-5 ***Please discuss whether the classification as a water company with exemption from most of the attendant obligations found in G.L. c. 164 would be met by a Department determination that Aquaria constitutes an "aqueduct company" as the term is used in G.L. c. 165.***

Aquaria respectfully clarifies that it does not seek in its Petition or Supplemental Petition broad-scale waivers or exemptions from the requirements of Chapter 164. Rather, Aquaria seeks confirmation from the Department in any authorization issued to Aquaria under Chapter 165 that either (a) a specific provision of Chapter 165 or 164 is not applicable to Aquaria, or (b) the specific provision in question grants the Department discretion in determining the method for compliance, and that the method proposed by Aquaria is acceptable to the Department.

In light of this clarification, and the fact (as discussed in the response to BQ 1-4) that many of the provisions applicable to aqueduct companies also would not be applicable to Aquaria, Aquaria does not believe that a determination by the Department that Aquaria is an aqueduct company would provide any added benefit in the case of the Petition.

BQ 1-6 ***Please discuss whether the classification as a water company with exemption from most of the attendant obligations found in G.L. c. 164 would be met by a Department determination that Aquaria is a "water company" as defined by G.L. c. 165, 1, yet constitutes a class of water company known as an "aqueduct company"***

Aquaria respectfully clarifies that it does not seek in its Petition or Supplemental Petition broad-scale waivers or exemptions from the requirements of Chapter 164. Rather, Aquaria seeks confirmation from the Department in any authorization issued to Aquaria under Chapter 165 that either (a) a specific provision of Chapter 165 or 164 is not applicable to Aquaria, or (b) the specific provision in question grants the Department discretion in determining the method for compliance, and that the method proposed by Aquaria is acceptable to the Department.

In light of this clarification, and the fact (as discussed in the response to BQ 1-4) that many of the provisions applicable to aqueduct companies also would not be applicable to Aquaria, Aquaria does not believe that a determination that by the Department that Aquaria is an aqueduct company would provide any added benefit in the case of this Petition.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Aquaria LLC Petition to the DTE for Clarification as to the Extent of Applicability of Certain Provisions of M.G.L. c. 164 and c. 165 September 17, 2004	)	**D.T.E. 04-76**

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused the Response of Aquaria LLC to the Department's Information Request Sets # 1 and # 2, and Briefing Question Set # 1, to be sent via first class mail to the service list in this matter in accordance with the requirements of 220 C.M.R. 1.05 of the Department's Rules of Practice and Procedure.

Dated at Boston on this 17th day of September 2004.

Mark C. Kalpin, Esq.

For: Aquaria LLC, Petitioner

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Aquaria LLC Petition to the DTE for Clarification as to the Extent of Applicability of Certain Provisions of M.G.L. c. 164 and c. 165 September 17, 2004	)	**D.T.E. 04-76**

APPEARANCE OF COUNSEL

In the above-entitled proceeding, the following attorney hereby appears, in addition to other counsel of record, for and on behalf of Petitioner Aquaria LLC.

Mark C. Kalpin, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109

Dated at Boston this 17th day of September 2004.

Mark C. Kalpin, Esq.

For: Aquaria LLC, Petitioner