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APPLICATION OF CITY OF HEATH TO
AMEND A CERTIFICATE OF
CONVENIENCE AND NECESSITY AND
TO DECERTIFY A PORTION OF
FORNEY LAKE WATER SUPPLY
CORPORATION'S SERVICE AREA IN
ROCKWALL COUNTY

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PUBLIC UTILITY COMMISSION
OF TEXAS

**CITY OF HEATH'S
MOTION FOR PARTIAL SUMMARY DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Heath ("Heath") files this Motion for Partial Summary Decision on the issue of whether the single certification requested by Heath would result in property of Forney Lake Water Supply Corporation ("Forney Lake") being rendered useless or valueless to Forney Lake. With regard to this issue, there is no genuine issue as to any material fact, and Heath is entitled as a matter of law to a finding that single certification as requested by Heath will not result in any property of Forney Lake being rendered useless or valueless. In support of this motion, Heath would respectfully show the following:

I. Background and Facts

1. On March 16, 2015, Heath filed an application¹ for single certification under Texas Water Code §13.255 relating to an area inside Heath's corporate boundaries but currently in Forney Lake's certificated service area. The application sought single certification solely to serve new customers in specified tracts identified for development that were not receiving retail water service. The application stated that Heath was not aware of Forney Lake providing service to any customers in the area.
2. On April 10, 2015, Heath served requests for information on Forney Lake. On April 30, 2015, Forney Lake responded to Heath's RFIs. In response to HEATH 1-5, Forney Lake identified 8 service addresses corresponding to current Forney Lake customers within the area

¹ *City of Heath's Application to Obtain or Amend a CCN under Water Code Section 13.255*, PUC Docket 44541 (March 16, 2015).

² *City of Heath's Response to Order No. 2 and Amendment to Clarify Application*, PUC Docket 44541 (May 4, 2015).

³ *Forney Lake Water Supply Corporation's First Supplemental Response to City of Heath's First Request for*

identified in Heath's application. In response to HEATH 1-8, Forney Lake admitted that all of Forney Lake's water utility facilities currently used to provide retail water service to its customers before the grant of single certification as requested by Heath will continue to be used for that purpose after the single certification requested is granted.

3. On May 4, 2015, Heath filed its Response to Order No. 2 and Amendment to Clarify Application.² In the filing, Heath amended the area requested for single certification to exclude the customers identified by Forney Lake in response to HEATH 1-5. Additionally, Heath stated that it did not expect that any of Forney Lake's facilities would be rendered useless or valueless based on Forney Lake's response to HEATH 1-8.

4. On May 8, 2015, Forney Lake filed a supplemental response to Heath's RFI, in which Forney Lake changed its response to HEATH 1-8. In the supplemental response, Forney Lake admitted that it will continue to use all of its property after single certification is granted "except for specific water distribution lines located in the single certification area."³

5. On September 18, 2015, Forney Lake filed a second supplemental response to Heath's RFI, in which Forney Lake again changed its response to HEATH 1-8. Forney Lake's current response to HEATH 1-8 is:

HEATH 1-8. (Revised as Agreed) Please admit that all of Forney Lake's water utility facilities currently used to provide retail water service to its customers before the grant of single certification as requested by Heath will continue to be used for that purpose provided the single certification requested is granted.

All of FLWSC's water utility facilities currently used to provide retail service to its customers before the grant of single certification as requested by Heath will continue to be used for that purpose provided the single certification is granted as requested. If single certification is granted as requested then there will be stranded capacity from facilities that have been constructed to provide water service in the future to the unserved areas.⁴

² City of Heath's Response to Order No. 2 and Amendment to Clarify Application, PUC Docket 44541 (May 4, 2015).

³ Forney Lake Water Supply Corporation's First Supplemental Response to City of Heath's First Request for Information at 3, PUC Docket 44541 (May 8, 2015).

⁴ Forney Lake Water Supply Corporation's Second Supplemental Response to City of Heath's First Request for Information at 6, PUC Docket 44541 (September 18, 2015) (Exhibit 1).

II. Summary of Motion

Texas Water Code §13.255(c) and P.U.C. Subst. R. 24.120(c) require that the Commission determine whether single certification as requested by Heath will result in any of Forney Lake's property being rendered useless or valueless. Forney Lake has admitted that all of its property **will continue to be used** if single certification is granted. As a matter of law, because all of Forney Lake's property will continue to be used, none of Forney Lake's property will be rendered useless or valueless as a result of single certification. Heath is entitled to a summary decision on this issue.

III. Argument

A. Legal Standard for Summary Decision

The rules of the Commission allow for summary decision on any or all issues in contested cases before SOAH when there is no genuine issue as to any material fact. Commission rules provide:

The presiding officer may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters official noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issue expressly set forth in the motion.⁵

Additionally, a motion for summary decision must describe the facts upon which the movant bases its request, the information and materials that demonstrate those facts, and the laws or legal theories that entitled the movant to summary decision.⁶

B. Issue for Summary Decision

As part of its consideration of an application for single certification filed under Texas Water Code §13.255(c), the Commission must "determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered

⁵ P.U.C. Proc. R. 22.182(a).

⁶ P.U.C. Proc. R. 22.182(b); *see also* Tex. R. Civ. P. 166a(c).

useless or valueless to the retail public utility.”⁷ Heath’s position is that the pleadings, materials obtained by discovery, and admissions show that there is no genuine issue as to the fact that none of Forney Lake’s property will be rendered useless or valueless to Forney Lake as a result of single certification as requested by Heath, and that Heath is entitled, as a matter of law, to such a determination.

C. Straight-Forward Argument

Heath’s view is that the statute⁸ means what it says – for property not requested to be transferred, compensation is owed only for property identified by the Commission as being rendered useless or valueless. If Forney Lake will continue to use all of its property (even if such use changes as a result of granting single certification), as Forney Lake freely admits, then none of its property will be rendered useless or valueless. Forney Lake can continue to use its property to provide service to its existing customers, all of whom will still remain Forney Lake customers. Thus, the evidence in the record shows that there is no genuine issue of material fact with regard to this issue, and Heath is entitled to ruling in its favor on this issue as a matter of law.

D. Response to Forney Lake’s Position

Based on the response to HEATH 1-8, Heath anticipates that Forney Lake will argue that portions of its property (“capacity”) will be rendered useless or valueless (“stranded”) as a result of single certification. Such a construction, that stranded capacity equals useless or valueless, is contrary to the language of the statute.

Heath contends that “property,” as used in §13.255, means separate, distinct, and identifiable components of the existing utility’s system, such as specific distribution pipes, storage tanks, pumps, *etc.* Heath further contends that “useless or valueless” means no use or no value to the retail public utility. Thus, the issue is whether any of Forney Lake’s separate, distinct, and identifiable pipes or tanks will have no use or no value to Forney Lake if single certification is granted. Because Forney Lake has admitted that it will continue to use all of its

⁷ Tex. Water Code §13.255(c).

⁸ Relevant excerpts of Texas Water Code §13.255 are set out in Attachment A.

property after the granting of single certification, Heath's position is that none of Forney Lake's property will be rendered useless or valueless.

Heath's interpretation that property means separate, distinct, and identifiable components is based on the use of the term in the context of Water Code §13.255. The statute refers to two types of property belonging to the existing utility that must be evaluated by the Commission in ruling on an application for single certification. The **first type of property** is the "specified property" the municipality requests to be transferred from the existing utility to the municipality.⁹ This property is transferred to the municipality, which has to pay for such property and an amount determined by the Commission as an "award for damages to property remaining in the ownership" of the existing utility.¹⁰ The **second type of property** is property that is rendered useless or valueless, for which the municipality must also compensate the existing utility, but the compensation for property rendered useless or valueless *does not include an award for damages to property remaining in the ownership of the existing utility.*

This statutory language suggests that the term "property" when referring to the two types of property (transfer/useless or valueless) means separate, distinct, and identifiable components of the system, such as discrete pipes or tanks that can be specifically located on the ground, and that this "property" is different than the property that remains in the ownership of the existing utility for which damages are paid. "Stranded capacity" is not a separate, distinct, and identifiable component of the system; it is damage to the property remaining in the ownership of the existing utility. If Heath had requested transfer of some of Forney Lake's property, Heath would be liable for damages to property remaining in the ownership of Forney Lake, which might include stranded capacity, but Heath has not made such a request.

One clear indication that the statutory language means separate, distinct, and identifiable property is revealed in the part of the statute dealing with the transfer of title to the property. The §13.255 process ends with a "judgment" by the district court that comes after the administrative proceeding.¹¹ This judgment "transfers to the [municipality] title to property to be transferred to the [municipality] as delineated by the utility commission's final order *and property determined*

⁹ Tex. Water Code §13.255(c); P.U.C. Subst. R. 24.120(c).

¹⁰ *Id.*

¹¹ Tex. Water Code §13.255(d) & (e).

by the utility commission to be rendered useless or valueless by the granting of single certification.”¹² The district court cannot transfer “title” to stranded capacity; the district court can only transfer title to discrete and specifically identifiable components of the system.¹³ Even if a district court could identify stranded capacity with sufficient specificity to transfer title (which it could not do based on Forney Lake’s discovery responses), the result would be that the municipality and the existing utility would share title to portions of the existing utility’s system. Such a result would be untenable and not the result intended by the Legislature.¹⁴

The untenable nature of joint ownership of portions of discrete parts of a system is also illustrated by Forney Lake’s response to RFIs. In response to HEATH 2-7, Forney Lake states that it should be compensated \$4.5 million dollars for its property, which it contends will be rendered useless or valueless only in part.¹⁵ Forney Lake’s position is that it must “replace” all of the property for which Forney Lake contends will be partially “stranded.” Forney Lake asserts that it has to replace these assets because title to these assets will transfer to Heath. In making this argument, Forney Lake is acknowledging that co-ownership of portions of these discrete assets would be impractical.¹⁶

Finally, Heath provided Forney Lake with the opportunity during discovery to explain why “stranded capacity” in facilities that Forney Lake would continue to use should be determined to be “useless or valueless.”¹⁷ Forney Lake failed to explain what it meant by the use of the term “stranded,” failed to explain how any parts of its system were in fact “stranded,” and failed to explain the basis for its contention that “stranded capacity” equates to “useless or

¹² Tex. Water Code §13.255(d)(1) & (e)(1).

¹³ See *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 645 (Tex. 2008) (“To be valid, a conveyance of . . . property must contain a sufficient description of the property to be conveyed. . . . property description must be sufficiently particular to allow a party to locate the specific land being identified.”)

¹⁴ If the municipality owns part of the system, could the municipality control the other utility’s use of the system? Could the municipality force the existing utility to pay to use the municipality’s share of the capacity in the system? Could the municipality sell its share of the capacity to another utility to use?

¹⁵ Forney Lake Response HEATH 2-7, *Forney Lake Water Supply Corporation’s First Supplemental Response to City of Heath’s Second Request for Information* at 6, PUC Docket 44541 (December 1, 2015) (Exhibit 2).

¹⁶ Interestingly, Forney Lake claims that it needs to replace the affected facilities with facilities of exactly the same capacity. If, in fact, the granting of Heath’s application will “strand” portions of these facilities, then the replacement facilities should be correspondingly smaller.

¹⁷ HEATH 2-2 and 2-13.

valueless.”¹⁸ Forney Lake should not be allowed in response to this motion to finally articulate its position on these issues.

E. Additional Statutory Construction

When interpreting statutes, courts rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results.¹⁹ The term “useless or valueless” is not defined in Chapter 13 of the Texas Water Code. The term was added to the Water Code in 1987, and at the time the Legislature did not provide any guidance on the meaning of “useless or valueless.”²⁰ The term is used in only one other instance in Texas statutes, and that is in Texas Water Code §13.254(d) relating to the compensation owed to a decertified retail public utility. There is no case interpreting the use in the Texas Water Code, and no administrative decision shining any meaning on the term. The term has no trade or other specialized meaning. Therefore, the term must be construed according to its plain meaning. Useless means “having or being of no use.”²¹ Valueless means without “worth, utility, or importance.”²²

The only area of law that might provide some assistance in interpreting the term is inverse condemnation/regulatory takings law, which makes sense given that decertification is an exercise of police power that might have an affect on a party. Texas law recognizes that while all property is held subject to the valid exercise of the police power, a regulation may constitute a taking requiring compensation.²³ In 1987, regulatory takings law generally held that a regulation might constitute a taking requiring compensation if the regulation went too far, such as whether the regulation rendered property “wholly useless” or caused a “total destruction” of a tract’s economic value.²⁴

¹⁸ See *Heath Supplemental Motion for Sanctions* (Dec. 15, 2015).

¹⁹ *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010)

²⁰ Acts 1987, 70th Leg., ch. 583, §1, eff. Aug. 31, 1987 (HB 2035).

²¹ *Webster’s Ninth New Collegiate Dictionary* at 1299 (1990).

²² *Id.* at 1303.

²³ *Sheffield Devel. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).

²⁴ *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 806 (Tex. 1984), quoting *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978).

One part of the test to determine whether a regulatory taking has occurred is whether the regulatory action injures a property's value or usefulness.²⁵ The Texas Supreme Court has identified two bright-line tests to determine whether a regulatory taking has occurred: (1) when the regulatory action "compels the property owner to suffer a physical invasion of his property," and (2) when regulation "denies *all economically beneficial or productive use* of the land."²⁶ In these regulatory takings cases, the courts have generally insisted "all" means "all."²⁷ As the Texas Supreme Court recently stated, "The actions of the State do not constitute a taking simply because [the plaintiff] cannot earn as much money on its investment as it originally hoped."²⁸

In enacting the "useless or valueless" language in §13.255(c), the Legislature may have been indicating to TCEQ and the courts that it viewed the involuntary amendment of a CCN to be similar to a regulatory taking. Consequently, the Legislature directed TCEQ and the courts to provide for compensation to the incumbent utility for property specifically requested to transfer (similar to a physical invasion) and for other property for which all use or all value would be lost (similar to the denial of all economically beneficial or productive use). To ensure that there would be no dispute about the level of lost value for property not requested to be transferred, the Legislature also directed the courts to transfer title to all of the "useless" property to the municipality seeking single certification.

F. Conclusion

None of Forney Lake's property will be rendered useless or valueless if Heath's application for single certification is granted. All of its property will continue to be used to provide service to its customers. The fact that some portion of the capacity of the system may not be used as quickly as it might otherwise be used does not mean that the property (or portion of the property) will be rendered useless or valueless. If Heath requested the transfer of specified

²⁵ *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587, 591 (Tex. App. – Dallas 2007, no pet.)

²⁶ *Sheffield Devel.*, 140 S.W.3d at 671, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (emphasis added).

²⁷ In *Sheffield*, the Texas Supreme Court held that a municipal down-zoning that diminished the value of the plaintiff's property by more than 50% was not a taking because the property could still be used and still had value. *Sheffield Devel.*, 140 S.W.3d at 677-679

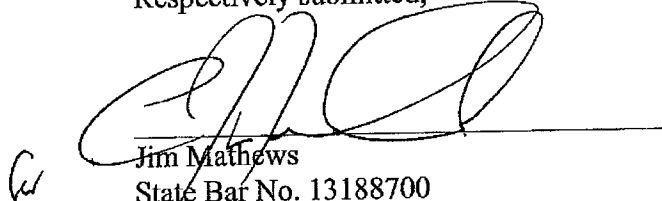
²⁸ *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 490 (Tex. 2012) ("Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . . the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.")

property from Forney Lake's, Heath might be liable to compensate Forney Lake for damage to its remaining property, but Heath did not so request and the Legislature did not extend such protection to property that is determined to be rendered useless or valueless.

IV. PRAYER

Based on the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters official noticed, and evidence of record, which show that there is no genuine issue as to any material fact, Heath respectfully requests that the ALJ enter an order finding, as a matter of law, that the granting of single certification as requested by Heath will not result in any of Forney Lake's property being rendered useless or valueless to Forney Lake.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Mathews", is written over a horizontal line. To the left of the signature is a small, handwritten mark that looks like "G".

Jim Mathews
State Bar No. 13188700
Mathews & Freeland, LLP
8140 N. Mopac Expy, Ste 2-260
Austin, Texas 78759
Telephone (512) 404-7800
Facsimile (512) 703-2785

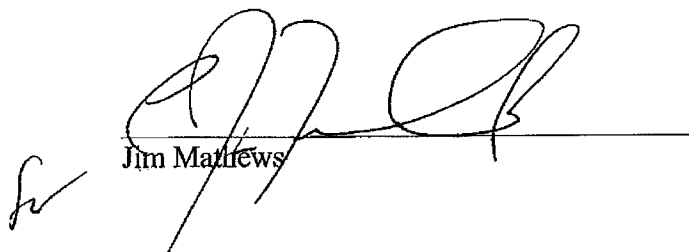
Attorneys for the City of Heath

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the City of Heath's Motion for Partial Summary Decision was served on all parties of record in this proceeding on this 15th day of December, 2015, by hand-delivery, facsimile, electronic mail, and/or First Class Mail.

Arturo Rodriguez, Jr.
Attorney for FLWSC
Russell & Rodriguez LLP
1633 Williams Dr., Building 2, Suite 200
Georgetown, Texas 78632
866-929-1641 (fax)

A.J. Smullen
Attorney, Legal Division Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326
512-936-7268 (fax)


Jim Matthews

ATTACHMENT A
Excerpts from Texas Water Code §13.255

Sec. 13.255. SINGLE CERTIFICATION IN INCORPORATED OR ANNEXED AREAS.

(c) The utility commission shall grant single certification to the municipality. The utility commission shall also determine whether single certification as requested by the municipality **would result in property of a retail public utility being rendered useless or valueless** to the retail public utility, and shall determine in its order **the monetary amount that is adequate and just to compensate** the retail public utility **for such property**. If the municipality in its application has **requested the transfer of specified property** of the retail public utility to the municipality or to a franchised utility, the utility commission shall also determine in its order the adequate and just compensation to be paid for such property pursuant to the provisions of this section, **including an award for damages to property remaining in the ownership of the retail public utility after single certification**. The order of the utility commission shall not be effective to transfer property. A transfer of property may only be obtained under this section by a court judgment rendered pursuant to Subsection (d) or (e). . . .

(d) In the event the final order of the utility commission is not appealed within 30 days, the municipality may request the district court of Travis County to enter a judgment consistent with the order of the utility commission. In such event, **the court shall render a judgment that:**

(1) **transfers to the municipally owned utility** or franchised utility title to property to be transferred to the municipally owned utility or franchised utility as delineated by the utility commission's final order and **property determined by the utility commission to be rendered useless or valueless by the granting of single certification**; and

(2) orders payment to the retail public utility of adequate and just compensation for the property as determined by the utility commission in its final order.

(e) Any party that is aggrieved by a final order of the utility commission under this section may file an appeal with the district court of Travis County within 30 days after the order becomes final. The hearing in such an appeal before the district court shall be by trial de novo on all issues. After the hearing, if the court determines that the municipally owned utility or franchised utility is entitled to single certification under the provisions of this section, **the court shall enter a judgment that:**

(1) **transfers to the municipally owned utility** or franchised utility title to property requested by the municipality to be transferred to the municipally owned utility or franchised utility and located within the singly certificated area and **property determined by the court or jury to be rendered useless or valueless by the granting of single certification**; and

(2) orders payment in accordance with Subsection (g) to the retail public utility of adequate and just compensation for the property transferred and for the property damaged as determined by the court or jury.

EXHIBIT 1

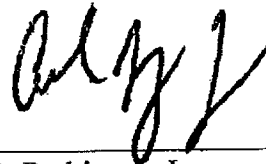
FORNEY LAKE'S RESPONSE TO HEATH 1-8

HEATH 1-8. **(Revised as Agreed)** Please admit that all of Forney Lake's water utility facilities currently used to provide retail water service to its customers before the grant of single certification as requested by Heath will continue to be used for that purpose provided the single certification requested is granted.

All of FLWSC's water utility facilities currently used to provide retail service to its customers before the grant of single certification as requested by Heath will continue to be used for that purpose provided the single certification is granted as requested. If single certification is granted as requested then there will be stranded capacity from facilities that have been constructed to provide water service in the future to the unserved areas.

Prepared by Eddy Daniel; sponsoring witness Eddy Daniel

Respectfully submitted,



Arturo D. Rodriguez, Jr.
State Bar No. 00791551
Russell & Rodriguez, L.L.P.
1633 Williams Drive, Building 2, Suite 200
Georgetown, Texas 78628
T: (512) 930 1317
F: (866) 929-1641

ATTORNEY FOR FORNEY LAKE WATER
SUPPLY CORPORATION

EXHIBIT 2

FORNEY LAKE'S RESPONSE TO HEATH 2-7

HEATH 2-5 Please explain the basis for Forney Lake's response to Heath 2-4.

RESPONSE:

See Response to Heath RFI 2-2.

Response prepared by Eddy Daniel; sponsoring witness Eddy Daniel

HEATH 2-7 Please identify the monetary amount that Forney Lake contends is just and adequate to be paid to Forney Lake for the portions of the in the following classes of facilities that Forney Lake contends will be rendered useless or valueless in Forney Lake's response to Heath 1-2.

- a. 1.5" waterline _____
- b. 2" waterline _____
- c. 2.5" waterline _____
- d. 4" waterline _____
- e. 6" waterline _____
- f. 8" waterline _____
- g. 10" waterline _____
- h. 12" waterline _____
- i. 100,000 gallon ground storage tank _____
- j. 150,000 gallon ground storage tank _____
- k. 200,000 gallon ground storage tank _____
- l. 500,000 gallon ground storage tank _____
- m. 500,000 gallon elevated tank _____
- n. 3,000 GPM booster pump station _____
- o. 1,500 GPM booster pumps and building _____
- p. 1,500 GPM booster pumps and building _____

- p. 1,500 GPM booster pumps and building ____
- q. 1,500 GPM booster pumps and building ____
- r. 1,500 GPM booster pumps and building ____
- s. 1,500 GPM booster pumps and building ____
- t. 230 KW genset ____
- u. 275 KW genset ____
- v. Electrical/SCADA ____
- w. Valves and fittings ____
- x. Appurtenances ____
- y. Easements/Other Real Estate ____

RESPONSE:

Heath has taken the position that since it will be compensating FLWSC for assets that are rendered useless and valueless in this docket, it should then be entitled to own the assets. As such, FLWSC will need to replace the assets taken by Heath, if Heath's position is upheld by the PUC. As such, replacement cost of the assets are contained in Exhibit Heath RFI 2-7.

Response prepared by Eddy Daniel; sponsoring witness Eddy Daniel

HEATH 2-8 Please explain the basis for Forney Lake's response to HEATH 2-7.

RESPONSE:

See Response to Heath 2-7.

Response prepared by Eddy Daniel; sponsoring witness Eddy Daniel

