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APPLICATION OF THE CITY OF CIBOLO §  
FOR SINGLE CERTIFICATION IN §  
INCORPORATED AREA AND TO §  
DECERTIFY PORTIONS OF GREEN §  
VALLEY SPECIAL UTILITY DISTRICT'S §  
SEWER CERTIFICATE OF CONVENIENCE §§  
AND NECESSITY IN GUADALUPE COUNTY §

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

GREEN VALLEY SPECIAL UTILITY DISTRICT'S  
INITIAL POST-HEARING BRIEF

February 10, 2017

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<b>APPLICATION OF THE CITY OF</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>CIBOLO FOR SINGLE</b>	<b>§</b>	
<b>CERTIFICATION IN INCORPORATED</b>	<b>§</b>	<b>OF</b>
<b>AREA AND TO DECERTIFY</b>	<b>§</b>	
<b>PORTIONS OF GREEN VALLEY</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>
<b>SPECIAL UTILITY DISTRICT'S</b>	<b>§</b>	
<b>SEWER CERTIFICATE OF</b>	<b>§</b>	
<b>CONVENIENCE AND NECESSITY IN</b>	<b>§</b>	
<b>GUADALUPE COUNTY</b>	<b>§</b>	

**GREEN VALLEY SPECIAL UTILITY DISTRICT'S  
INITIAL POST-HEARING BRIEF**

Green Valley Special Utility District ("Green Valley" or "GVSUD") files this Initial Post-Hearing Brief in this docket involving the City of Cibolo's ("Cibolo") Application for Single Certification in Incorporated Area and to Decertify Portions of Green Valley's Sewer Certificate of Convenience and Necessity in Guadalupe County, and in support would show as follows:

**I. INTRODUCTION AND SUMMARY**

Beginning September 1, 2014, the Legislature charged the Public Utility Commission of Texas ("PUC" or "Commission") with administering "a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers *and to the retail public utilities.*"<sup>1</sup> The Commission possesses broad regulatory powers to effect this mandate.<sup>2</sup> Those powers must be administered within constitutional constraints.<sup>3</sup>

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<sup>1</sup> TWC §13.001(3) (emphasis added).

<sup>2</sup> TWC §13.041(a) (stating, "The utility commission and the commission may do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction.")

<sup>3</sup> U.S. CONST. AMEND. V ("... nor shall private property be taken for public use, without just compensation."); TEX. CONST. Art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made ...").

Part of the reason this comprehensive regulatory system exists is that retail public utilities “are by definition monopolies in the areas they serve.”<sup>4</sup> Nevertheless, the Legislature has enacted a process that authorizes a municipality to decertify all or portions of a retail public utility’s CCN area, thereby threatening investments made by and, ultimately, the very viability of those retail public utilities through no fault of their own.<sup>5</sup> Certificated water and wastewater providers have a duty to serve their customers, and must plan and invest accordingly. That planning costs real monetary investment.

Green Valley has undertaken that planning and investment with regard to its wastewater CCN with the expectation that these capital expenditures would ultimately be reimbursed. Cibolo’s proposed decertification, if granted, will eliminate that opportunity and render Green Valley’s investments useless or valueless as to the decertificated property, requiring Green Valley and, ultimately, its customers, to absorb the loss. Thus, at the very least, Green Valley is now entitled to just and adequate compensation under the Federal and State constitutions.

The Commission has recognized that this is a first-of-its-kind proceeding.<sup>6</sup> Green Valley requests in this new, bifurcated process, that the Commission make it whole for its property losses which include: (1) project investments in planning and design to develop and implement a wastewater master plan; (2) project investments incurred to obtain a Texas Pollutant Discharge Elimination System (“TPDES”) permit; (3) investment in the purchase of real property to site a

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<sup>4</sup> TWC §13.001(1).

<sup>5</sup> TWC §13.255(c), (g), (l).

<sup>6</sup> Docket No. 45702, Supplemental Preliminary Order at 4 (“This is the first case of this type to be referred to SOAH.”) (July 20, 2016). The Commission is considering a pending proceeding under the similar provisions contained in TWC § 13.254. See PUC Docket No. 45848, SOAH Docket No. 473-16-5011, *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County* (pending). As the Commission pointed out in the Supplemental Preliminary Order in this docket, there are a number of similarities between TWC §§ 13.254 and 13.255, yet there are also some important differences. Supplemental Preliminary Order at 2.

wastewater treatment plant; (4) necessary legal and professional expenses incurred in this Docket; and (5) lost net revenues that would result from decertification. Green Valley also seeks compensation for projected increased costs to its constituents resulting directly from the “checkerboard” approach to decertification taken by Cibolo.

The manner in which the language in TWC § 13.255 was adopted and revised over the years is important to understanding Green Valley’s position regarding identification of property that would be rendered useless and valueless, and Green Valley has attempted to make this complex issue as simple as possible. Ideally, these issues would be clarified through legislative revisions to TWC § 13.255 or Commission changes to 16 TAC § 24.120. In the absence of same, some clarification may result from this hearing and related pending proceedings before the Commission. That said, the Commission must be cognizant that while the fact pattern here will not be identical in other retail public utility situations, other retail public utilities will almost certainly be affected by this decision.

Green Valley respectfully requests that the ALJ and Commission find that Green Valley has correctly identified property that will be rendered useless or valueless in its appraiser’s report as a result of the proposed decertification. Further, Green Valley respectfully requests that the Commission direct a second phase hearing to establish the value of compensation owed to Green Valley.

## **II. PROCEDURAL HISTORY**

Cibolo filed its Application on March 8, 2016. On April 12, 2016, the Commission ALJ issued Order No. 2, finding Cibolo’s application and notice to be deficient, establishing a deadline for further submissions by Cibolo, and establishing a deadline for Staff comments on administrative completeness of the application. On April 28, 2016, the Commission granted Green Valley’s Motion

to Intervene. On April 29, 2016, Green Valley filed its Motion to Dismiss and Plea to the Jurisdiction.

On May 11, 2016, Cibolo designated Mr. Jack Stowe as its “independent appraiser.” On May 12, 2016, Green Valley responded to Cibolo’s purported designation of an appraiser, asserting that the designation was premature because the Commission had not made a finding of administrative completeness and other Commission deadlines had not yet occurred.<sup>7</sup> Also on May 12, 2016, Green Valley, Cibolo and Staff submitted proposed lists of issues, as ordered. The Commission ALJ issued Order No. 4 on May 13, 2016, establishing a deadline of May 23, 2016 for agreement of the parties on an independent appraiser. On May 27, 2016, the Commission directed the parties to provide briefing on threshold issues regarding Green Valley’s plea to the jurisdiction and whether the City must establish minimum drinking water standards in this docket. Also on May 27, 2016, the parties submitted filings indicating lack of agreement regarding the appointment of an independent appraiser.

On June 2, 2016, Green Valley filed an emergency motion to abate, in which it opposed the City’s unilaterally proposed procedural schedule and notified the Commission of Green Valley’s pending federal lawsuit in Cause No. 1:16-cv-00627; *Green Valley Special Utility District v. City of Cibolo, Texas*; before the United States District Court Western District of Texas. That litigation, involving whether applicable federal law prohibits Cibolo’s proposed decertification, remains pending on appeal to the United States Court of Appeals for the 5<sup>th</sup> Circuit.<sup>8</sup>

The Commission ALJ issued Order No. 5 on June 3, 2016, denying Green Valley’s motion to abate and establishing a deadline for Green Valley to appoint an independent appraiser. On June

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<sup>7</sup> The Commission has yet to make a determination of administrative completeness regarding Cibolo’s application.

<sup>8</sup> *Green Valley Special Utility District v. City of Cibolo*, Cause No. 15-51282, in the United States Court of Appeals for the Fifth Circuit (pending).

6, 2016, Green Valley, Cibolo and Staff submitted briefing on threshold issues in compliance with Order No. 4. Green Valley submitted its selection of Mr. Joshua Korman as an independent appraiser on June 7, 2016. On June 14, 2016, the Commission ALJ issued Order No. 6, establishing deadlines regarding the statutorily-required meeting of the appraisers for the purpose of attempting to reach agreement on compensation under TWC § 13.255. On June 22, 2016, the Commission ALJ issued Order No. 7, correcting the deadlines set forth in Order No. 6.

On June 28, 2016, Green Valley and Cibolo submitted their respective appraisal reports to the Commission pursuant to Commission ALJ Order No. 7. The Commission issued its Preliminary Order on July 1, 2016, and its Supplemental Preliminary Order on July 20, 2016. The Commission issued its Order of Referral to SOAH for a contested case hearing on July 27, 2016. On September 2, 2016, the parties attended a prehearing conference before the SOAH ALJs and agreed to a proposed procedural schedule as set forth in SOAH Order No. 3, issued on September 9, 2016.

Cibolo submitted its direct testimony on October 19, 2016. Green Valley submitted its direct testimony on November 2, 2016. On November 8, 2016, Cibolo filed a Motion for Partial Summary Decision. On November 15, 2016, the ALJs Issued SOAH Order No. 4, establishing a prehearing conference date and a deadline for Green Valley to respond to Cibolo's Motion for Partial Summary Decision. On November 16, 2016, Staff informed the ALJ that it would not file testimony in this docket. On November 23, 2016, the ALJs issued SOAH Order No. 5, ruling on the parties' objections to and motions to strike direct testimony.

Cibolo submitted its rebuttal testimony on December 7, 2016. On December 9, 2016, the ALJs issued SOAH Order No. 7, granting in part Cibolo's Motion for Partial Summary Decision as to Preliminary Issue No. 10 regarding whether Cibolo was requesting any Green Valley property to be transferred upon decertification, which Green Valley agreed was an uncontested issue in this



proceeding. In all other respects, Cibolo's Motion for Partial Summary Decision was denied. On December 30, 2016, the ALJs issued SOAH Order No. 8, ruling on Green Valley's objections to and motion to strike Cibolo's rebuttal testimony.

The hearing on the merits on phase one of the proceeding was held on January 17, 2017. The SOAH ALJ issued Order No. 9 on January 19, 2017, establishing the parties' briefing deadlines and page limits and determining that the record will close on February 28, 2017.

### **III. GREEN VALLEY PROPERTY THAT WILL BE RENDERED USELESS AND VALUELESS IF DECERTIFICATION IS GRANTED. TWC §13.255(C).**

#### **A. GREEN VALLEY'S IDENTIFICATION OF PROPERTY.**

What property, if any, will be rendered useless or valueless to Green Valley if the decertification is granted is the central issue to be decided in this hearing. Green Valley and Cibolo were ordered to file appraisals per TWC §13.255(l) in this docket on or before June 28, 2016.<sup>9</sup> On that deadline, Green Valley filed an appraisal report prepared by KOR Group and licensed appraiser Mr. Joshua M. Korman ("Green Valley Appraisal Report") for its property to be rendered useless and valueless as the result of Cibolo's requested decertification area.<sup>10</sup> The City filed what it purported to be an "Appraisal of Green Valley Special utility District (GVSUD) in support of the City of Cibolo's Application under 13.255 for Single Certification" prepared by Jack Stowe of NewGen Strategies and Solutions, LLC. The filed reports could not be more different.

Green Valley identified the "property" it contends should be valued in this docket through the Green Valley Appraisal Report and its experts' testimonies.<sup>11</sup> Indeed, Green Valley is the only

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<sup>9</sup> Order No. 7 Establishing Deadlines (June 22, 2016).

<sup>10</sup> Ex. GVSUD-1.

<sup>11</sup> Ex. GVSUD-1, GVSUD-A, GVSUD-B, GVSUD-C, and GVSUD-D.

Party that filed a true “appraisal” report in this docket prepared by a licensed “appraiser.”<sup>12</sup> Cibolo’s “appraisal” was offered in its direct case by Rudy Klein, an engineer, who did not actually prepare the “appraisal,” but relied on a document prepared by another Cibolo witness, Jack Stowe. Neither Mr. Klein nor Mr. Stowe is an appraiser and Mr. Stowe is not an engineer.<sup>13</sup> While Green Valley agrees that non-appraiser consultants may be properly used to assist licensed appraisers, it disagrees that sole reliance on engineers is permitted given that TWC § 13.255(l) specifically uses the terms “qualified,” “appraiser” and “appraisals” when discussing compensation determinations.<sup>14</sup> TWC §13.255 does not mention “engineering appraisals” or other types of valuations.<sup>15</sup> Failure to engage licensed appraisers for this task could result in an incomplete property compensation determination and produce a regulatory taking.

Green Valley’s expert Joshua M. Korman is a licensed appraiser who prepared the Green Valley Appraisal Report in accordance with the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition (“USPAP”), the standards licensed appraisers typically use for appraisals, while also utilizing the TWC §13.255 compensation factors in place of USPAP where applicable.<sup>16</sup> Mr. Korman is the *only* licensed appraiser to testify in this proceeding.

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<sup>12</sup> Tr. at 123 (Korman Direct); Ex. GVSUD-A (Korman Direct) at 3; Ex. GVSUD-1 at GVSUD 100009; TWC § 13.255(l).

<sup>13</sup> Ex. Cibolo 1 (Klein Direct); Ex. Cibolo 3 (Stowe Rebuttal) at Exhibit Stowe R-A; Tr. at 24 (Klein Testimony); Tr. at 215 (Stowe Testimony).

<sup>14</sup> TWC §13.255(l); 16 TAC §24.120(m). Indeed, Mr. Korman relied on much information provided by Green Valley as discussed by Mr. Korman, Mr. Allen and Mr. Montgomery in their testimonies. Ex. GVSUD-A (Korman Direct) at 9-10; Ex. GVSUD-B (Allen Direct) at 6-7; Ex. GVSUD-C (Montgomery Direct) at 5-6, 18, 20-22; *see also* Ex. GVSUD-1 (Green Valley Appraisal Report).

<sup>15</sup> TWC §13.255(l).

<sup>16</sup> Ex. GVSUD-A (Korman Direct) at 9-10; Ex. GVSUD-1, at GVSUD 100001; Ex. GVSUD-2.

In sharp contrast, Cibolo's witnesses, Messrs. Rudy Klein and Jack Stowe, are unqualified to identify property in this proceeding. At hearing, Klein testified that he is not a licensed appraiser,<sup>17</sup> has no experience identifying or valuing intangible personal property,<sup>18</sup> has no familiarity or experience with USPAP,<sup>19</sup> and has no expertise and, importantly, could not provide *any opinion* on whether money constitutes property.<sup>20</sup> Thus, his opinions on the core issue of property identification in this proceeding, are of little if any value. Similarly, Jack Stowe conceded that he is neither a certified appraiser nor an attorney.<sup>21</sup> Mr. Stowe further acknowledged that there has never been a PUC final order in a case where one of Mr. Stowe's purported "appraisals" has been accepted in a decertification case.<sup>22</sup> Mr. Stowe acknowledged that his "appraisal" was not prepared using USPAP.<sup>23</sup>

Commission Staff has submitted no evidence on property at all for the record. Commission Staff only filed a Statement of Position containing legal argument and no evidence. The Green Valley Appraisal Report is uncontroverted by competent evidence, and is the *sole* source of proper property identification in the manner required by TWC §13.255(l), applicable Commission rules, and Commission Order No. 7.<sup>24</sup>

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<sup>17</sup> Tr. at 24 (Klein Testimony).

<sup>18</sup> *Id.* at 26.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> Tr. at 31 (Klein Testimony).

<sup>21</sup> Tr. at 215 (Stowe Testimony).

<sup>22</sup> *Id.* at 216.

<sup>23</sup> *Id.*

<sup>24</sup> TWC §13.255(l); current PUC SUBST. R. 24.120(m); Order No. 7 (June 22, 2016).

Green Valley has identified its property interests that are at risk of being rendered useless or valueless in this proceeding.<sup>1</sup> At hearing, the ALJ requested that Green Valley provide a list of these property interests,<sup>25</sup> which follows, and which will be explained in detail thereafter:

1. A portion of engineering and planning dollar investments expended to develop and implement the 2006 Wastewater Master Plan and allocable to the proposed decertification area.<sup>26</sup>
2. A portion of engineering and planning dollar investments expended to obtain a Texas Pollution Discharge Elimination System ("TPDES") permit from the Texas Commission on Environmental Quality and allocable to the proposed decertification area.<sup>27</sup>
3. A portion of investment dollars expended to purchase a 65-acre tract of real property for the siting and construction of a wastewater treatment plant allocable to the proposed decertification area.<sup>28</sup>
4. Necessary and reasonable legal and professional fees incurred by Green Valley to protect and defend its certificate of convenience and necessity and property interests in this proceeding.<sup>29</sup>
5. An allocable portion of expected lost net revenue resulting from the proposed decertification.<sup>30</sup>

Each of the above-listed property interests constitutes intangible personal property. While the Commission may find that it has the authority to treat CCNs and permits as "property," and there is authority to support such a finding,<sup>31</sup> Green Valley did not consider its CCN to be property itself

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<sup>25</sup> Tr. at 9-10.

<sup>26</sup> Ex. GVSUD-1 at GVSUD 100004-100005.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at GVSUD 100004.

<sup>29</sup> Ex. GVSUD-1 at GVSUD 100007.

<sup>30</sup> *Id.* at GVSUD 100003-100004.

<sup>31</sup> Staff took the position in briefing in Docket No. 45848 that a permit should be considered property for the purposes of the property identification analysis under TWC § 13.254, relying on the definition of intangible personal property set forth in the Texas Tax Code which states that intangible personal property "includes a stock, bond, note or account

for purposes of this proceeding. Green Valley does not waive its right to compensation should the Commission determine that Green Valley's CCN or its rights to a TPDES permit is a property interest for purposes of compensation.<sup>32</sup> Green Valley further submits that it should be compensated for increased costs to customers as measured by the effect of Cibolo's decertification approach on customer impact fees, which is discussed further in Section III.B., below.

Green Valley does not seek compensation for its purchased wastewater treatment plant real property itself (Property Item 3). Rather, Green Valley considers an allocable portion of the dollars expended to purchase the real property as intangible personal property that will be rendered useless or valueless upon decertification. Green Valley's identification of its at-risk property interests is supported by the record evidence.

**1. Expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question (Property Items 1, 2, and 3).**

Green Valley's appraiser, Joshua Korman, incorporated a substantial amount of information obtained from Green Valley and its consulting engineer into the Green Valley Appraisal Report addenda and his discussion of value recommendations.<sup>33</sup> Green Valley's general manager, Pat Allen, discussed the history of Green Valley's planning and development of a wastewater treatment system for Green Valley's CCN area and provided documentation reflecting those investments.<sup>34</sup> Green Valley's consulting engineer, Garry Montgomery, provided detailed testimony regarding steps that

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receivable, franchise, license or permit..." (emphasis added). Docket No. 45848, Staff Initial Brief at 6 (Oct. 28, 2016) (citing TEX. TAX CODE § 1.04(6)).

<sup>32</sup> Green Valley does not yet hold a TPDES permit, but the TCEQ Executive Director has made a preliminary decision to issue the TPDES permit to Green Valley. Ex. GVSUD-4 and Ex. GVSUD-5.

<sup>33</sup> Ex. GVSUD-1.

<sup>34</sup> Ex. GVSUD-B (Allen Direct) at 10-17; GVSUD-1 at GVSUD 100041-100139 (Wastewater Master Plan; GVSUD 100256-100342 (TPDES permit application); GVSUD 100343-100368 (TCEQ domestic wastewater permit application); GVSUD 100432-100454 (warranty deeds for 65-acre parcel); GVSUD-100459-100461 (invoices); (GVSUD-100455 (legal costs summary).

a retail public utility must take on the path toward providing wastewater service for its constituents, and provided documentation, in concert with Mr. Allen, to Mr. Korman that substantiated Green Valley's investments in this regard.<sup>35</sup> The detail concerning Green Valley's monetary investments, permitting, planning, and design activities is well documented in the record within Mr. Allen's testimony,<sup>36</sup> Mr. Montgomery's testimony,<sup>37</sup> and Mr. Korman's testimony.<sup>38</sup>

All of Green Valley's investments in planning and design for the entire wastewater CCN area, including its permitting activities, and its real property investment, constitute intangible property assets belonging to Green Valley, a portion of which will be stranded upon decertification.<sup>39</sup> Green Valley's fundamental position that money is property is undisputed in the record evidence.<sup>40</sup>

At hearing, Cibolo witness Klein acknowledged that Green Valley spent money on planning a wastewater system and purchasing land for the benefit of the decertified area.<sup>41</sup> Mr. Klein further agreed that a CCN holder has an obligation to serve *all* areas within its CCN area and that it was reasonable for Green Valley to have planned to serve the entirety of its CCN area.<sup>42</sup>

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<sup>35</sup> Ex. GVSUD-C (Montgomery Direct) at 6, 9-19.

<sup>36</sup> Ex. GVSUD-B (Allen Direct) at 6-7, 12-16; Tr. at 154-155 (Allen Testimony).

<sup>37</sup> Ex. GVSUD-C (Montgomery Direct) at 6, 9-19.

<sup>38</sup> Ex. GVSUD-A (Korman Direct) at 8, 12-13, 15-16.

<sup>39</sup> Ex. GVSUD-A (Korman Direct) at 12-13; Ex. GVSUD-1, at GVSUD 100004-100005; *see also* Tr. at 35 (Klein Testimony) (acknowledging that Green Valley will no longer be able to serve in the area where decertification is sought).

<sup>40</sup> Ex. GVSUD-A (Korman Direct) at 8 ("Monetary assets are a type of property interest that may be devalued by the decertification for reasons that have no use to GVSUD."). Staff offered no testimony and Cibolo witness Klein stated that he had no expertise or opinion regarding what is property, despite adopting and endorsing Mr. Stowe's "appraisal." Tr. at 31 (Klein Testimony). Mr. Stowe acknowledged that money can be property. Tr. at 233 (Stowe Testimony) (Q. Is money property? A. It can be, yes.).

<sup>41</sup> Tr. at 31-32 (Klein Testimony).

<sup>42</sup> *Id.* at 33-34 (Klein Testimony).

Directly contradicting Cibolo's position in its prefiled testimony,<sup>43</sup> Mr. Klein testified at hearing that it is *not speculative* for a CCN holder to plan for a CCN area.<sup>44</sup> Indeed, Mr. Klein testified that "it's good planning to prepare for that – those requests and come up with a concept of where the plant would go and potential capacities, which is what the master plan does."<sup>45</sup> Cibolo witness Jack Stowe agreed with Mr. Klein, testifying that Green Valley should not have anticipated that Cibolo would come into and seek to decertify Green Valley's service area, but rather that Green Valley "should go ahead and plan."<sup>46</sup> Given this record evidence, and for the legal reasons set forth in Sections III.C. and III.D below, the ALJ should find that Green Valley properly identified its property interests for Property Items 1, 2 and 3.

**2. Necessary and reasonable legal expenses and professional fees (Property Item 4).**

Green Valley has incurred legal expenses and professional fees in response to Cibolo's requested decertification in this docket which continue to increase as this proceeding moves forward.<sup>47</sup> As explained in detail in Section III.C., these expended funds constitute intangible personal property that is compensable under TWC § 13.255(g). Cibolo witness Rudy Klein acknowledged that it is reasonable for Green Valley to incur legal and professional fees to respond

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<sup>43</sup> Ex. Cibolo 1 (Klein Direct) at 28 ("these [planning and design] activities are highly speculative and it is uncertain whether the project is feasible or needed..."); 29 ("it is speculative at best for GVSUD to include this [real property investment] asset as property rendered useless or valueless, in whole or in part."); 29 ("GVSUD's decision to purchase the 65 acre tract may have been premature..."); and 32 ("GVSUD's Appraisal is entirely about compensation for GVSUD property and other speculative and/or future expenses...").

<sup>44</sup> Tr. at 45 (Klein Testimony).

<sup>45</sup> *Id.* at 55-56 (Klein Testimony).

<sup>46</sup> Tr. at 223 (Stowe Testimony).

<sup>47</sup> Ex. GVSUD-B (Allen Direct) at 16; Ex. GVSUD-A (Korman Direct) at 13; Ex. GVSUD-1 at GVSUD 100007, GVSUD 100455; *see also* Ex. GVSUD-D (Blackhurst Direct) at 13-14.

to Cibolo's application.<sup>48</sup> Green Valley's expert, on Staff cross-examination regarding whether he considered legal fees to be a property interest, stated that "in these high growth areas, if this is what is required for CCN holders like Green Valley to defend themselves, then I believe it could be."<sup>49</sup> Green Valley did not initiate this proceeding, but was compelled to defend itself against and it. Green Valley must be made whole for the requested decertification given the time and expense it has put into planning over the years for the entire CCN area.<sup>50</sup>

Legal expenses and professional fees are also being incurred as part of Green Valley's defense of Cibolo's opposition to its draft TPDES permit application and those fees continue to mount. Those expenditures are not included in the legal costs that Mr. Allen provided to Mr. Korman for his appraisal,<sup>51</sup> but would be properly included as a compensable portion of Green Valley's investments in a wastewater treatment system under TWC § 13.255(g), Factor 3.

### **3. Lost Economic Opportunity (Property Item 5).**

Upon decertification, Green Valley will have lost the economic opportunity to operate within the decertified area and utilize its investments allocable to that area to recoup its money expenditures through retail sewer utility service to customers.<sup>52</sup> That was the goal of Green Valley's

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<sup>48</sup> Tr. at 35-36.

<sup>49</sup> Tr. at 109 (Korman Testimony).

<sup>50</sup> *Id.*; GVSUD-C (Montgomery Direct) at 16-19.

<sup>51</sup> GVSUD-1 at GVSUD 100455 Summary of Legal Costs).

<sup>52</sup> Ex. GVSUD-A (Korman Direct) at 13-15; Ex. GVSUD-1 at 100003-100004.



investments consistent with its obligation to serve its entire CCN area.<sup>53</sup> Those investments created an intangible property right that will be eliminated by the sought decertification.<sup>54</sup>

The area that Cibolo seeks to decertify is particularly damaging to Green Valley because, as the parties agree, it is a high growth area directly in the path of development.<sup>55</sup> Thus, Green Valley presented a reasonable projection of net lost revenue that will be incurred as the result of decertification.<sup>56</sup> Mr. Montgomery, an expert in impact fee analysis,<sup>57</sup> provided Mr. Korman with a conservative data set to estimate net lost revenues.<sup>58</sup> This data set estimated the lost impact fees and lost monthly revenues allocable to the area that Cibolo seeks to decertify based on the historical customer growth rates experienced in Green Valley's certificated water service area.<sup>59</sup> Mr. Korman then incorporated the resulting calculation into the Green Valley Appraisal Report.<sup>60</sup> In that Appraisal and Mr. Korman's supporting testimony, he testified that these projected net lost revenues are compensable under Factors 1, 6, 8, and 9 of TWC § 13.255(g).<sup>61</sup>

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<sup>53</sup> Ex. GVSUD-B (Allen Direct) at 11-12; 16-17.

<sup>54</sup> Ex. GVSUD-A (Korman Direct) at 13; Ex. GVSUD-1 at 100003.

<sup>55</sup> Ex. GVSUD-A (Korman Direct) at 13; Tr. at 27 (Klein Testimony); Tr. at 109 (Korman Testimony).

<sup>56</sup> Ex. GVSUD-1 at 100003-100004.

<sup>57</sup> Tr. at 173-177 (Montgomery Testimony).

<sup>58</sup> Ex. GVSUD-C (Montgomery Direct) at 20-21.

<sup>59</sup> *Id.*

<sup>60</sup> Ex. GVSUD-1 at 100003-100004.

<sup>61</sup> Ex. GVSUD-A at 13 (Korman Direct); Ex. GVSUD-1 at GVSUD 100003-100004.

Mr. Korman is a recognized expert in eminent domain proceedings,<sup>62</sup> and has extensive experience with impact fees.<sup>63</sup> Drawing from this experience, Mr. Korman provided an analogy between the decertification process set forth in TWC § 13.255 and partial takings in eminent domain proceedings.<sup>64</sup> Mr. Korman testified that, as with eminent domain proceedings, where partial takings are common and are compensated based on the portion taken, GVSUD's property interests at stake in this proceeding are analogous to a bundle of sticks in which a number of those individual sticks will be wholly taken, or rendered "useless or valueless," by the decertification.<sup>65</sup> As such, it is appropriate that lost economic opportunity interests be treated similarly to partial takings in partial CCN decertification situations where only a portion of property allocable to Green Valley's CCN area will be rendered useless and valueless to Green Valley.<sup>66</sup> The legal basis for this treatment of lost economic opportunity as property rendered useless and valueless for this phase of the hearing is set forth below at Section III.D.

**B. INCREASED COSTS ON GREEN VALLEY'S FUTURE CUSTOMERS.**

Green Valley is a political subdivision and has an obligation for the benefit of its constituents to keep its fees reasonable consistent with the Commission's obligation to ensure just and reasonable rates.<sup>67</sup> Section 13.255(g) of the Texas Water Code identifies as a factor to ensure the justness and adequacy of rates "any demonstrated impairment of service or *increase of cost to consumers* of the

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<sup>62</sup> Ex. GVSUD-A (Korman Direct) at 1; Tr. at 96, 99, 123 (Korman Testimony).

<sup>63</sup> Tr. at 70 (Korman Testimony).

<sup>64</sup> Ex. GVSUD-A (Korman Direct) at 13-14.

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.*

<sup>67</sup> Ex. GVSUD-B (Allen Direct) at 10; TWC §13.001(3). Green Valley's retail rates are potentially appealable to the Commission under TWC § 13.043(b).

retail public utility remaining *after* the single certification.”<sup>68</sup> Given this explicit factor, Mr. Montgomery, an expert in impact fee analysis,<sup>69</sup> projected the increased cost to remaining customers stated as an increase to those remaining customers’ impact fees that would result after decertification.<sup>70</sup> Mr. Montgomery explained that the effect on impact fees will result from Cibolo’s unique cherry-picking approach to decertification that will “checkerboard” the service area.<sup>71</sup> Under this approach, Green Valley will retain its obligation to serve wastewater customers in certain parcels that will be interspersed with and even surrounded by areas where only Cibolo may provide wastewater service.

The practical result of this “checkerboarding” is that Green Valley will still be required to install the same infrastructure at the same cost in order to serve its remaining customers, but fewer customers will bear this cost.<sup>72</sup> In short, the method by which Cibolo is approaching decertification in its corporate limits is the direct cause of increased costs to remaining customers. Thus, Mr. Korman appropriately included this increased future cost to customers in the Green Valley Appraisal Report as consistent with Factor 5 of TWC § 13.255(g).<sup>73</sup>

At the time Mr. Korman submitted the Green Valley Report, the Commission had not announced this new bifurcated process. While future impact on customer costs is an explicitly enumerated compensable item, it is unclear whether the increased customer cost following

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<sup>68</sup> TWC § 13.255(g) (emphasis added).

<sup>69</sup> Tr. at 173-176.

<sup>70</sup> Ex. GVSUD-C (Montgomery Direct) at 20-22.

<sup>71</sup> *Id.* at 21.

<sup>72</sup> *Id.*

<sup>73</sup> Ex. GVSUD-1 at GVSUD 100005-100006.

decertification should be characterized as a *current* identifiable property interest in this first phase. Green Valley asserts that, consistent with the language of § 13.255(g), these increased costs become a property right intended to benefit future constituents after decertification and should thus be treated as a compensation item for purposes of the second phase of this proceeding.

**C. LEGAL DEFINITION OF “PROPERTY” FOR THE PURPOSE OF IDENTIFICATION.**

Conducting a hearing on this issue in the manner described in the Commission’s referral order is novel. However, applying a broad definition of “property” to the term where used without further elaboration in Texas statutes is required by well-established applicable law. Neither the Legislature nor the Commission has articulated precisely what “property” or other key terms, such as “useless” or “valueless,” mean in the context of TWC §13.255(c). Regardless, constitutional concerns are paramount.

Here, Green Valley will present what is the required view of “property” in order to ensure that the Commission fulfills the overriding purpose of the TWC § 13.255 compensation provisions: making sure that decertification of a portion of a retail public utility’s CCN, such as that portion of Green Valley’s CCN sought by Cibolo, will result in monetary compensation in an amount “adequate and just to compensate the retail public utility for such property.”<sup>74</sup> Compensation for lost property resulting from decertification must be adequate to prevent an unlawful regulatory taking, damaging, or destruction of property for public use.<sup>75</sup> Green Valley properly relied on its wastewater CCN No. 20973 rights in planning, designing and preparing to serve its entire certificated area, including the

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<sup>74</sup> TWC § 13.255(c); PUC SUBST. R. 24.120.

<sup>75</sup> E.g., *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.—Fort Worth 2014, no pet.) (discussing *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799, 799-806 (Tex. 1936) and its application in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996) and *Texas Building Owners and Managers Association, Inc. v. Public Utility Commission of Texas*, 110 S.W.3d 524 (Tex. App.—Austin 2003, pet. denied)).

approximately 1,694 acres that Cibolo seeks to decertify. Simply put, Green Valley has spent and continues to spend a great deal of money to obtain its sewer CCN, plan and design a wastewater system, and to obtain required permits. This money is property. Both Green Valley's expert and Cibolo's witness agreed on this fundamental premise.<sup>76</sup>

In turn, Green Valley has a reasonable expectation of being made whole for its investments, including an allocable portion of those costs commensurate with the portion of its sewer CCN area that Cibolo desires to appropriate.<sup>77</sup> Preventing a regulatory taking of these property rights is the only reason to have compensation provisions in the TWC. To fulfill this purpose, the statutory terms at issue must be applied in a manner that serves to make decertified retail public utilities whole.

The Texas Supreme Court has held that the term "property" must be applied in its broadest sense where no further definition is provided in the statute where used. The following is an excerpt from *State v. Public Utility Commission of Texas*:

In construing a statute, if the legislature does not define a term, its ordinary meaning will be applied. By its ordinary meaning, the term "property" extends to "every species of valuable right and interest." It is "commonly used to denote everything to which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal."<sup>78</sup>

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<sup>76</sup> Ex. GVSUD-A (Korman Direct) at 8 ("Monetary assets are a type of property interest that may be devalued by the decertification for reasons that have no use to GVSUD."); Tr. at 233 (Stowe Testimony) (Q. Is money property? A. It can be, yes.).

<sup>77</sup> Green Valley is not seeking compensation specifically on the ground that its CCN itself constitutes a compensable property right for the purpose of this proceeding. Rather, Green Valley seeks compensation for specific investments made in reliance on its CCN, including legal and professional fees incurred, and lost revenue rights as described in the Green Valley Appraisal Report.

<sup>78</sup> *State v. Public Util. Comm'n*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

The Texas Constitution requires just compensation when the government takes, damages, or destroys property of any variety for public use whether that property is real or personal and provides no limitation on the term “property.”<sup>79</sup>

Various sections of TWC Chapter 13 further demonstrate a broad view of “property” is required:

1. TWC Chapter 13 broadly defines “facilities” to mean “all the plant and equipment of a retail public utility, *including all tangible and intangible real and personal property without limitation*, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.”<sup>80</sup>
2. The language in TWC § 13.255 originated through H.B. 2035 in 1987<sup>81</sup>. Importantly, while some portions of the statute have been amended over the years, there have been *no* changes in the language of TWC § 13.255(c). The House Sponsor of H.B. 2035, Representative Hinojosa, specifically stated in a Senate Committee Meeting discussing H.B. 2035 that affected water supply corporations would be compensated for “any bonded indebtedness that it may have or *for any other property that it may lose because the City is going into the certified area and providing water.*”<sup>82</sup> Thus, no “property” limitation was contemplated.

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<sup>79</sup> TEX. CONST. Art. I, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .”); *see also Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980) (holding in pertinent part that destruction of personal property by police required compensation).

<sup>80</sup> TWC § 13.002(9); *see also* 16 TAC § 24.3(24). Plant may not be construed as only physical plant because “intangibles are ordinarily included in a utility’s rate base” and included in “plant in service.” *State v. Public Util. Comm’n*, 883 S.W.2d 190, 199-200 (Tex. 1994); *see also* TWC § 13.185(a) (“original cost of *property* used by and useful to the utility in providing service”) (emphasis added); PUC SUBST. R. 24.31(c)(2)(A)-(B) (referring to “plant, *property* and equipment” in original cost rules, indicating that plant schedules used for rate base may include all three interchangeably) (emphasis added); *Class A Water-Sewer Utility Rate Filing Package*, Instructions, at 13-14 (9/17/2015) (available at [www.puc.texas.gov/industry/water/Forms/Forms.aspx](http://www.puc.texas.gov/industry/water/Forms/Forms.aspx)); and *Class B Rate-Tariff Change Application Instructions*, at 10 (9/17/2015) (available at [www.puc.texas.gov/industry/water/Forms/Forms.aspx](http://www.puc.texas.gov/industry/water/Forms/Forms.aspx)).

<sup>81</sup> Tex. H.B. 2035, 70th Leg., R.S. (1987).

<sup>82</sup> *See* Audio of Senate Committee on Intergovernmental Relations hearing on May, 28, 1987, 70<sup>th</sup> Leg. R. S. at <https://www.tsl.texas.gov/ref/senaterecordings/70th-R.S./700795a/index.html>. A partial transcript is attached as **Exhibit A**. This Senate Committee Meeting discussion also reveals that the primary purpose for adding this process to TWC § 13.255 was to permit cities to extend service to colonia areas in South Texas where CCN holders could not serve them, not harm responsible retail public utilities.

3. Green Valley's expert witness on the legislative history and implementation of TWC § 13.255, Stephen Blackhurst, testified that he participated directly in the legislative and rules processes that implemented the updated compensation process and that the compensation factors are instructive of the broad array of both tangible and intangible property interests that must be compensated as the result of decertification if rendered useless or valueless.<sup>83</sup> No party cross-examined Mr. Blackhurst at hearing and his testimony regarding the legislative history of and day-to-day implementation of TWC § 13.255 is uncontroverted in the record evidence.
4. "Service" broadly "means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public . . ."<sup>84</sup> meaning that intangible assets may be used in furtherance of "service."
5. The TWC permits the sale of "a [CCN] or any right obtained under a certificate" with Commission approval after it determines "the purchaser, assignee, or lessee is capable of rendering adequate and continuous service."<sup>85</sup> While there may be conditions placed on such sale, there is no requirement that physical assets accompany such a sale, such as in a TWC § 13.301 sale, transfer, or merger transaction. Similarly, the TCEQ rules generally permit transfers of wastewater water quality permits with TCEQ approval.<sup>86</sup>

Moreover, Green Valley witness Joshua Korman's Exhibit GVSUD-2 consists of Standards 1-10 of the USPAP.<sup>87</sup> Those standards show that there are methods of valuing all types of property whether tangible, intangible, real, or personal.<sup>88</sup>

The non-exclusive list of compensation factors used to value personal property per TWC § 13.255(g) includes multiple items that are not necessarily tied to constructed or physical

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<sup>83</sup> Ex. GVSUD-D (Blackhurst Direct) at 6, 12, 15.

<sup>84</sup> TWC § 13.002(21); *see also* 16 TAC §24.3(62).

<sup>85</sup> TWC § 13.251.

<sup>86</sup> 30 TAC §305.64.

<sup>87</sup> Ex. GVSUD-2.

<sup>88</sup> *Id.*

infrastructure, such as planning and design expenditures, “necessary and reasonable legal expenses and professional fees,” and the broadly written “other relevant factors.”<sup>89</sup> While compensation is not an issue in this phase, the Commission’s procedural mechanism established to parse this proceeding into separate phases cannot serve as a basis for simply ignoring the factors enumerated in the same statutory scheme/provision: the factors would be rendered meaningless if they are, on the one hand, *required* to be considered in determining compensation for property rendered useless or valueless, yet on the other hand are somehow considered to have no connection to the *identification* of such property (e.g. planning and building, legal expenses incurred, other factors). This would be an absurd result of the Commission’s established *procedural* mechanism. As the Texas Supreme Court has stated:

Language *cannot be interpreted apart from context*. The meaning of a word that appears ambiguous when viewed in isolation may become clear when the word is analyzed in light of the terms that surround it. . . . [W]e look not only to the words themselves but *to the statute in its entirety* to determine the Legislature’s intent. It is a fundamental principle of statutory construction and indeed of language itself that words’ meanings cannot be determined in isolation but must be drawn from the context in which they are used.<sup>90</sup>

Taken as a whole, all this information shows that attempts to limit the term “property” to physical or tangible property interests without such a limitation in the TWC flies in the face of all applicable law. If “property” under TWC §13.255 is construed too narrowly, compensation to a decertified retail public utility under TWC § 13.255 could be improperly limited and result in a regulatory taking.

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<sup>89</sup> TWC §13.255(g).

<sup>90</sup> *TGS Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)(emphasis added).



The ALJs have already correctly determined that a broad definition of “property” is required in this context. In reaching their determination that Cibolo’s Motion for Partial Summary Decision as to its claim that Cibolo has no property that will be rendered useless or valueless upon decertification should be denied, the ALJs relied on Green Valley’s legal authority to conclude that, “for the Commission to fulfill its duties under TWC § 13.255, ‘property’ must be construed broadly enough to include items the statute lists as compensable if other requirements ... are met.”<sup>91</sup>

While Green Valley further addresses in Section IV, below, the unreasonableness of Cibolo’s contention that there is zero property that will be rendered useless or valueless on decertification, the statutory authority and principles of statutory interpretation set forth herein demonstrate that Cibolo’s attempts to limit the term “property” to physical “infrastructure” located “within” the area sought to be decertified have no legal or factual foundation. Thus, Cibolo cannot meet its burden of proof assigned by the Commission in this proceeding to support its bald assertions that Green Valley has no property that will be rendered useless or valueless by decertification.<sup>92</sup>

#### **D. LEGAL DEFINITION OF “USELESS OR VALUELESS.”**

Green Valley maintains that all the items identified or described in the Green Valley Appraisal Report are property that will be rendered useless or valueless to Green Valley as a result of the proposed decertification. As previously discussed, these items include: (1) an allocable portion of Green Valley’s planning, design, and permitting investments; (2) Green Valley’s money

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<sup>91</sup> SOAH Order No. 7 at 8-9 (Dec. 9, 2016). Notably, the SOAH ALJs in Docket No. 45848 have recommended that the Commission adopt a broad view of “property” for the purpose of interpreting and implementing the similar provision contained in TWC § 13.254. *See* Docket No. 45848, Proposal for Decision at 6-9 (finding, *inter alia*, that “in the interests of just compensation, the Water Code should be read as consistent as possible with a broad interpretation of property interests” and that “consistent with the principle that money and investments are personal property, the ALJs recommend that under Water Code § 13.254(g), Factor 3, Aqua has property interests in *any expenditure for the planning or design of service facilities allocable to the Tract.*”) (Jan. 27, 2017) (emphasis added).

<sup>92</sup> *See* SOAH Order No. 2 at 1 (assigning “the burden of proof in both stages of this case to the City, because it is the applicant in this proceeding.”) (Aug. 19, 2016).

spent on necessary and reasonable legal expenses and professional fees incurred in this docket; and (3) Green Valley's lost economic opportunity property interest that will result from decertification.<sup>93</sup>

As with the term "property," the Legislature has left the terms "useless" and "valueless" undefined and their plain meaning must be applied.<sup>94</sup> "Useless" means "having or being of no use."<sup>95</sup> "Value" in relevant context means "the monetary worth of something" and "valueless" would mean without same.<sup>96</sup> Importantly, however, this language as used in the context of TWC § 13.255 was derived from takings jurisprudence which allows *part* of a property to be rendered useless or valueless and taken.<sup>97</sup>

Indeed, partial takings in eminent domain cases are common where damages to the remainder are awarded.<sup>98</sup> But compensation is also required for personal property taken, damaged, or destroyed by the government for public use and these terms are often used synonymously.<sup>99</sup> While a "taking" has sometime been described as dependent on a transfer of property rights, the Texas Supreme Court has held that "one could recover damages by proof that [property] was inflicted with special injury such as will 'practically deprive him of the ordinary use and enjoyment of it'" and held that a damage

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<sup>93</sup> See Section III.A, *supra*. See also Section III.B., *supra*, discussing increased costs for customers.

<sup>94</sup> See *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994).

<sup>95</sup> "Useless." *Merriam-Webster.com*. Merriam-Webster, 2016. <http://www.merriam-webster.com/dictionary/useless> (October 28, 2016).

<sup>96</sup> "Valueless." *Merriam-Webster.com*. Merriam-Webster, 2016. <http://www.merriam-webster.com/dictionary/valueless> (October 28, 2016).

<sup>97</sup> *Chicago, R.I. & G.R. Co. v. Tarrant County Water Control & Improvement Dist.*, 123 Tex. 432; 73 S.W.2d 55, at 60-61 (Tex. 1934) (holding that submerged portion of property warranted compensation for damages).

<sup>98</sup> TEX. PROP. CODE §21.042(c)-(d) (addressing damage assessments in an eminent domain proceeding where a portion of a tract or parcel of real property is condemned); see also Ex. GVSUD-A, at 13-14 (Korman Direct); Tr. at 122-123 (Korman Testimony).

<sup>99</sup> *Steele v. Houston*, 603 S.W.2d 786, 788-793 (Tex. 1980); Ex. GVSUD-D (Blackhurst Direct) at 12-13.

means “every loss or diminution of what is a man’s own, occasioned by the fault of another.”<sup>100</sup> This is the proverbial “bundle of sticks” often used to describe property rights and referenced in Mr. Korman’s testimony.<sup>101</sup> As the “useless” or “valueless” terms are used in TWC § 13.255(c), they must be read in conjunction with TWC §13.255(g) and the single certification outlined in TWC §13.255.<sup>102</sup>

TWC §13.255 sets up a process whereby municipalities may decertify partial CCN areas from retail public utilities.<sup>103</sup> Consequently, corresponding property interests are damaged in varying degrees necessitating compensation under the constitution.<sup>104</sup> Partial CCN area transfers in single certification applications will be the general rule and not the exception as demonstrated by the allocable compensation factors in TWC §13.255(g).<sup>105</sup> Thus, the “useless” or “valueless” terms should not be interpreted in such a way as to preclude compensation for taking, damaging, or destruction of apportioned intangible personal property rights from CCN holders as required by the Federal and State constitutions.<sup>106</sup> This is a “relevant factor” to consider in determining compensation.<sup>107</sup>

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<sup>100</sup> *Steele v. Houston*, 603 S.W.2d 786, 789-790 (Tex. 1980).

<sup>101</sup> Ex. GVSUD-A (Korman Direct) at 12-14.

<sup>102</sup> TWC § 13.255.

<sup>103</sup> *See, e.g.*, TWC § 13.255 (b),(c),(g),(l).

<sup>104</sup> TWC § 13.255(g); Ex. GVSUD-D (Blackhurst Direct) at 12-16.

<sup>105</sup> *E.g.*, TWC § 13.255(g) (“the amount of any expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are *allocable* to service to the area in question.”) (emphasis added).

<sup>106</sup> U.S. CONST. AMEND. V (“ . . . nor shall private property be taken for public use, without just compensation.”); TEX. CONST. Art. I, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .”); *see also Steele v. Houston*, 603 S.W.2d 786, 788-93 (Tex. 1980).

<sup>107</sup> TWC § 13.255(g).

In sum, the application of these terms from a constitutional perspective is more important than their plain meaning for assessing what will actually happen in a partial CCN area decertification to the CCN holder's property interests. Thus, apportioned property rights may properly be viewed as rendered useless or valueless under TWC §13.255(c) and Green Valley's methodology for determining an allocable portion of its intangible personal property interests rendered useless or valueless was reasonable to address constitutional concerns.

#### **IV. CIBOLO AND STAFF'S CONTENTIONS REGARDING PROPERTY IDENTIFICATION AND "USELESS OR VALUELESS."**

Green Valley reiterates that the Green Valley Appraisal Report and supporting testimony is the only competent evidence on property identification offered by a qualified individual as required by TWC § 13.255(l).<sup>108</sup> In contrast, Cibolo relies exclusively on conclusory, unsubstantiated opinions.<sup>109</sup> For example, Cibolo witness Klein asserts, without explanation or other basis, that "personal property means, to me, wastewater infrastructure and other related facilities or assets."<sup>110</sup> Mr. Stowe merely echoes these opinions, testifying that GVSUD's property interests "are not for wastewater infrastructure, much less wastewater infrastructure located in the GVSUD sewer CCN."<sup>111</sup> There is no mention of "infrastructure" in TWC § 13.255, and Cibolo's attempts to limit property are unexplained and unsupported. Moreover, such a construct is undermined by Cibolo's

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<sup>108</sup> Tr. at 24, 26, 28, 31 (Klein Testimony); Tr. at 215-216 (Stowe Testimony); TWC § 13.255(l) (requiring a "qualified individual or firm to serve as an independent appraiser.").

<sup>109</sup> E.g., Ex. Cibolo-1 at 14 (Klein Direct) ("There is no real property or personal property of GVSUD that would be rendered useless or valueless, in whole or in part, by the Application"); 22 ("It is my opinion that there is no property of GVSUD that has been rendered useless or valueless by the Application."). Cibolo offers no basis for these statements.

<sup>110</sup> Ex. Cibolo-1 (Klein Direct) at 24.

<sup>111</sup> Ex. Cibolo-3 (Stowe Rebuttal) at 17.

witnesses' acknowledgment that money is property.<sup>112</sup> In short, Cibolo, as the applicant, has failed to meet its burden of proof in this proceeding to demonstrate its contention that Green Valley has zero property interests that will be rendered useless or valueless.<sup>113</sup>

Cibolo devotes an inordinate amount of testimony to a theory that only the Cibolo Creek Municipal Authority can be a wastewater treatment provider in the area that Cibolo seeks to decertify and that, thus, Green Valley's investments should not have been made.<sup>114</sup> This theory was undermined by Cibolo's own witness at hearing, who contended that *Cibolo* has the right and plans to provide retail service in its certificated area.<sup>115</sup> Mr. Klein further testified that even under Cibolo's regionalization theory, *Green Valley* could collect and transport wastewater inside the area to be decertificated.<sup>116</sup> The distinction acknowledged by Klein is that, even if Cibolo's regionalization theory was correct, it would have no effect on Green Valley's ability to provide *retail* sewer service in reliance on its sewer CCN, which is precisely what it has planned and expended funds to do. More important, the only record evidence is that this issue is before the Texas Commission on Environmental Quality which will decide the issue.

Staff appears to take the position, again unsupported by legal authority, that only a complete appropriation of property interests renders those interests useless or valueless, which, in turn, would

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<sup>112</sup> Tr. at 233 (Stowe Testimony).

<sup>113</sup> SOAH Order No. 2 at 1 (Aug. 19, 2016) ("Based on the argument of the parties...the Administrative Law Judge (ALJ) assigns the burden of proof in both stages of this case to the City, because it is the applicant in this proceeding.").

<sup>114</sup> *E.g.*, Ex. Cibolo-1 (Klein Direct) at 28 ("these [planning and design] activities are highly speculative and it is uncertain whether the project is feasible or needed..."); 29 ("GVSUD's decision to purchase the 65 acre tract may have been premature...").

<sup>115</sup> Tr. at 39 (Klein Testimony).

<sup>116</sup> *Id.* at 39-40.

trigger compensation, including attorneys' fees.<sup>117</sup> Staff's position is inconsistent with, and fails to address on the merits, Green Valley expert Korman's discussion regarding partial takings in the eminent domain context and how that applies in this context, where a partial decertification will be the norm rather than the exception.<sup>118</sup>

Moreover, Staff's assertion that the decertification is only a small percentage of Green Valley's CCN area is unpersuasive.<sup>119</sup> Other similar applications are likely to follow.<sup>120</sup> Further, Mr. Stowe testified that even if Cibolo were to take over Green Valley's entire sewer CCN area, it would only require compensation for the real property that Green Valley purchased.<sup>121</sup> That position is absurd. Green Valley addresses the legal basis for partial regulatory takings and the constitutional implications of failing to provide compensation for same in Section III.D., above.

**V. ARE THE EXISTING APPRAISALS LIMITED TO PROPERTY THAT HAS BEEN  
DETERMINED TO HAVE BEEN RENDERED USELESS OR VALUELESS  
BY DECERTIFICATION?**

The Green Valley Appraisal Report is the only filed report that contains a complete assessment by a licensed appraiser of all the property that will be rendered useless or valueless by the decertification in this docket.<sup>122</sup> The Green Valley Appraisal Report does not identify any non-property items.<sup>123</sup> Indeed, at hearing, Green Valley's general manager confirmed no fees that would

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<sup>117</sup> Staff Statement of Position at 2-4 (Jan. 10, 2017).

<sup>118</sup> See Ex. GVSUD-A (Korman Direct) at 13-14.

<sup>119</sup> Staff Statement of Position at 2 (Jan. 10, 2017).

<sup>120</sup> Tr. at 48 (Klein Testimony).

<sup>121</sup> Tr. at 248 (Stowe Testimony).

<sup>122</sup> Ex. GVSUD-1.

<sup>123</sup> *Id.*

otherwise be recoverable from customers have been included in the identified property.<sup>124</sup> The Cibolo “appraisal” was neither filed by a licensed appraiser nor was it prepared by an engineer or otherwise qualified person, and its purported finding of zero property is contrary to both the plain meaning and intent of TWC § 13.255.

#### **VI. OPERATIVE DATE FOR IDENTIFICATION OF PROPERTY TO BE RENDERED USELESS OR VALUELESS.**

In Order No. 7, the ALJs requested briefing on the date by which Green Valley must have property for consideration under Supplemental Preliminary Issue No. 9.<sup>125</sup> This is an issue of first impression given the Commission’s unique bifurcated approach to this matter. In a TWC § 13.254 proceeding, the decertification occurs prior to identification of property. Thus, the date of decertification is an appropriate time to identify the property rendered useless and valueless. The date of decertification could be the logical date of the taking here, but there is not even a determination of the application’s administrative completeness much less a decertification order.

Given the Commission’s unique process, Green Valley submits that a reasonable approach would be to identify Green Valley’s at-risk property on the date that the parties’ evidence was admitted at hearing. Such an approach would be consistent with that taken in eminent domain and inverse condemnation proceedings. For example, in the recent case of *Edwards Aquifer v. Bragg*, the 4<sup>th</sup> District Court of Appeals deliberated at length the appropriate date to quantify property taken.<sup>126</sup> The court noted that, in the context of a statutory condemnation proceeding under Chapter 21 of the Texas Property Code, “[t]he assessment of damages when a portion of or an entire tract or parcel of real property is condemned is made according to evidence presented at the condemnation

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<sup>124</sup> Tr. at 165-166 (Allen Testimony).

<sup>125</sup> SOAH Order No. 9 (January 18, 2017).

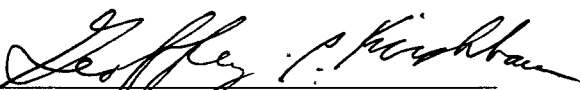
<sup>126</sup> *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118 (Tex. App. –San Antonio, 2013)(pet. denied).

hearing,” and that “the assessments are made *at the time of trial* because that is the time at which the government’s authority to condemn is determined.”<sup>127</sup> Here, however, a distinction is that valuations based on property identifications at trial in this phase must be determined in the second phase.

## VII. CONCLUSION

Green Valley respectfully requests the Honorable Administrative Law Judge finds and recommends that the Commission determine that: (1) all property items described in the Green Valley Appraisal Report are in fact property that will be rendered useless or valueless to Green Valley by the sought CCN decertification; (2) the City of Cibolo must provide just and adequate compensation to Green Valley for these property items if the Commission grants decertification; and (3) a second hearing must be held to determine the just and adequate compensation owed to Green Valley by Cibolo in the event that decertification is granted.

Respectfully submitted,

By: 

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<sup>127</sup> *Id.*, 421 S.W.3d at 147 (citing TEX. PROP. CODE § 21.042)(quotations omitted)(emphasis added).



### **CERTIFICATE OF SERVICE**

I hereby CERTIFY that on February 10, 2017, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

David Klein  
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#### **ATTORNEY FOR COMMISSION STAFF**

  
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Geoffrey P. Kirshbaum

**Senate Committee Meeting on HB 2035 (70<sup>th</sup> Leg., R.S. 1987)**

28:50

Parmer: Now I am going to go back to the start of the order of business, members, and lay out HB 2035 and recognize its House Sponsor, Representative Hinojosa.

Hinojosa: Thank you Mr. Chairman and Committee Members. HB 2035 deals with a problem that is not only unique to South Texas, but is probably in many municipalities throughout the State where they continue to grow they run into a problem of a water supply corporations have been given a certification over a certain area to provide water services. Unfortunately as the city grows, many times the water supply corporations are unable to provide the necessary services, necessary water to the new residents as the territory that is being annexed by the city. And many times they cannot work out their differences, and they end up in court. What this bill does, it allows for the city to provide water in those areas, and provides a procedure where the water supply corporation and the city can work out their differences and at the same time have the water supply corporation compensated for any bond indebtedness that it may have or for any other property that it may lose because the City going into the certified area and provided water.

That is basically what this bill does Mr. Chairman and Committee Members. And I have an amendment basically to exempt your retail public utilities. I would be glad to answer any questions that anyone might have.

Parmer: Are there any questions for Mr. Hinojosa? Senator Barrientos?

Barrientos: Um, I want to point out the amendment. I want to ask you to go over that again.

Hinojosa: Let me be more specific, Senator Barrientos. The City of McAllen, for example, is one of the fastest growing cities in the State of Texas, and as we continues to grow, we run into problems in that where a certain water supply corporation has been given a certification in large area to provide water services. However, they do not have the capability to

provide those water services. So that we have many people who have homes without water. And some of those homes, when they catch fire, there's no water to put out the fire. Because of the inability of the water supply corporation to provide that water. And the City of McAllen has the ability, has the capital to provide those water services, but because that area has been certified to the water supply corporation, City of McAllen cannot go in there and lay the water lines and provide the water services. Consequently, usually you have to file a lawsuit and end up with the Court through long proceedings that can take 3 or 4 or 5 years. I'll give you an example, it took me 5 years to get water in an area that was certified to the water, to Sharlett Water Supply Corporation.

Barrientos: Why?

Hinojosa: Because that area was certified to the Sharlett Water Supply Corporation.

Barrientos: And the City had the ability to provide that water?

Hinojosa: That is correct.

Barrientos: But did not do it.

Hinojosa: They couldn't. Because by law that area is certified to the water supply corporation and not the City of McAllen.

Barrientos: Only by law. . .

Hinojosa: And the water supply corporation refused to allow the City of McAllen to go in there and provide those services. So the City of McAllen had to file a lawsuit. And, what this bill does, it has been worked out, it is an agreement. It's an agreed bill between the municipalities and the water supply corporation association to put in place a procedures to work out this type of problem. And now in those areas where the City is certified to provide water to the same areas as the water supply corporation it provides for proper, proper compensation to the water supply corporation for any amount of indebtedness that they might have.

Barrientos: Do you foresee, in any way shape or form any more amendments coming to this bill?

Hinojosa: I hope not, but you know it is kind of hard to predict what is going to happen up here.

Barrientos: I understand things go bonkers in the last week, but in your considered opinion will there be any coming?

Hinojosa: No sir.

Barrientos: Alright, do you want to lay this out?

Hinojosa: Please.

Parmer: Senator, you have an amendment? Senator Barrientos sends up committee amendment number one. He will explain the amendment.

Barrientos: What he just said Mr. Chairman, you want to do it again?

Parmer: No

Barrientos: Section only applies in case where the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is not a public water supply.

Parmer: Is there objection to adoption of the amendment? The Chair hears none. The amendment is adopted. Members are there any other questions for Representative Hinojosa? Senator Armbrister?

Armbrister: Representative Hinojosa, isn't there now, or hasn't there recently been a 5<sup>th</sup> Circuit Federal Court Opinion on the cities' authority to annex rural water corporations as you are proposing to do, and they ruled against this?

Hinojosa: I am not aware of that, Senator Armbrister. I do know that most of the rural water supply corporations are non-profit and receive federal funds to expand their capabilities. So that may have been a factor. So what

happens is they have to be compensated for bond indebtedness to any debt that they might have to the federal government. I would imagine that if the cities could annex the water supply corporation it would be the main reason, and the federal monies that are involved in the investment of the water supply corporation.

Armbrister: As I understand, I am trying to get the whole gist of your bill. If you've got a rural water supply corporation out there, and the City annexes that area, what happens in effect to that rural water supply corporation?

Hinojosa: Well, the problem is that many times the area that is annexed even though it is certified to the water supply corporation, it's not being supplied with water because the water supply corporation does not have the capability of doing so. So that area that is annexed goes without water, and basically stops the growth of that particular city. And then the city goes to try and negotiate with the water supply corporation, and quite frankly, you have a lot of rural water supply corporations who do not wish to negotiate or cooperate with the municipality in trying to resolve this problem. And they end up in court. And what this bill does it tries to provide for an orderly, logical procedure for them to work out their differences and for the water supply corporation to get compensated for any of its debt or any of its property through a neutral party, and that is the Water Commission.

Parmer: Mr. Hinojosa, I think, as I understand it, this is a bill that you and Senator Uribe have been working on to try and deal with, in part, the Colonias problem down in your part of the State. Is that, is that correct?

Hinojosa: That's correct, Senator Parmer.

Parmer: These are the areas, I don't know how many of the Committee members have been to South Texas and have visited some of these developments where there is no water, there are no streets, there is no sewage, and people are trying to bring their kids up in probably the most abject conditions that exist in the State of Texas today, and I have had opportunity to, opportunity, if that is the right word, to make that trip, and I commend you for your effort in trying to deal with what is really a serious problem in the Texas.

?????? Senator, the Natural Resources Committee did have a hearing on this.  
We did not go down there, but we did go over, very thoroughly, and it  
is certainly a problem.

Parmer: Are there um, any other questions set for Representative Hinojosa?

End 37:00