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SOAH DOCKET NO. 473-16-5296.WS
PUC DOCKET NO. 45702

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**

INITIAL BRIEF OF CITY OF CIBOLO

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FEBRUARY 10, 2017

INITIAL BRIEF OF CITY OF CIBOLO

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TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Cibolo (the "City") files this, its Initial Brief, in accordance with the Administrative Law Judge's ("ALJ") Order No. 9 in this matter. This Initial Brief is timely filed.

I. INTRODUCTION

On March 8, 2016, more than 180 days after the City provided GVSUD with notice of its intent to provide retail wastewater service, the City filed its application to for single sewer certificate of convenience and necessity ("CCN") certification under Texas Water Code ("TWC") § 13.255 and 16 Tex. Admin. Code ("TAC") § 24.120 (the "Application") at the Public Utility Commission ("Commission"), decertifying portions of Green Valley Special Utility District's ("GVSUD") sewer CCN No. 20973 (the "Decertified Area") that are within the City's corporate limits.

In accordance with Order No. 6- Establishing a Timeline and Requiring Filings, in this matter, the City and the District filed their respective appraisals on June 28, 2016. At an open meeting on June 29, 2016, the Commission adopted a preliminary order identifying a list of issues to be addressed in a hearing at the State Office of Administrative Hearings ("SOAH")

regarding the Application. On July 20, 2016, the Commission filed a Supplemental Preliminary Order providing three additional issues to be addressed in this hearing.

A prehearing conference was held for this matter at SOAH on August 17, 2017, and in light of the Commission's July 20, 2016 Supplemental Preliminary Order and the ALJ's Order No. 2 in this matter, the purpose of this first phase of the contested case hearing is to address the three issues listed below, identified in that Supplemental Order as Issue Nos. 9-11:

9. What property, if any, will be rendered useless or valueless to GVSUD by the decertification sought by Cibolo in this proceeding?

10. What property of GVSUD, if any, has Cibolo requested to be transferred to it?

11. Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification and the property that Cibolo has requested be transferred?

On November 8, 2016, the City filed a Motion for Partial Summary Decision and on December 9, 2016, the ALJ issued Order No. 7 Granting in Part and Denying in Part the City's Motion for Partial Summary Decision, finding that Cibolo has not requested GVSUD to transfer any GVSUD property to Cibolo. Specifically, the ALJ's Order memorializes that the following two issues are to be addressed in the hearing on the merits in the first phase of this matter.

9. What property, if any, will be rendered useless or valueless to GVSUD by the decertification sought by the City in this proceeding? TWC § 13.255(c).

11. Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification?

Issues 9 and 11, as memorialized in the ALJ's Order No. 7 in this matter, are collectively referred to herein as the "Referred Issues."

On February 9, 2017, the parties filed Agreed Stipulations (the "Stipulations") to partially address what is disputed in this matter. As discussed in more detail, herein, the City has met its

burden of proof that no property of GVSUD will be rendered useless or valueless to GVSUD by the decertification sought by Cibolo in this proceeding, and that while the City's appraisal is limited to valuing the property that has been determined to have been rendered useless or valueless by decertification, of which there is none, GVSUD's appraisal goes beyond valuing the property that has been determined to have been rendered useless or valueless by decertification.

II. PARTIES

Party	Representatives
City of Cibolo	David J. Klein, Christie Dickenson, and Ashleigh Acevedo
Green Valley SUD	Geoffrey Kirshbaum and Shan Rutherford
Commission Staff	Landon Lill and Doug Brown

III. REQUESTED RECOMMENDATION

The City requests that the ALJ issue a Proposal for Decision recommending that no property of GVSUD is rendered useless or valueless to GVSUD, in whole or in part, by the decertification sought by the City in this proceeding. The City further requests that the ALJ's Proposal for Decision recommend that the City's appraisal is limited to valuing the property that has been determined to have been rendered useless or valueless by decertification, of which there is none, and that GVSUD's appraisal includes items that have not been rendered useless or valueless by decertification.

IV. PROCEDURAL HISTORY

A detailed list of the relevant milestones/deadlines in this matter was agreed to by the parties in the Stipulations, filed on February 9, 2017.

V. ARGUMENT

A. Referred Issue No. 9: There is no property that will be rendered useless or valueless to GVSUD in whole or in part by the decertification sought by the City in this proceeding.

In light of all of the evidence in the record in this matter, the City has clearly met its burden of proof that no property of GVSUD will be rendered useless or valueless to GVSUD, in whole or in part, by the decertification sought by the City in this proceeding. As noted in the City's opening statement, this case is about taking an inventory of property – but to make this inventory list, the property must be a valid GVSUD property interest, and that property that must be rendered useless and valueless to GVSUD by the Application.[1] As noted in Stipulation Nos. 2 and 3, while the City contends that there is no property rendered useless or valueless to GVSUD by the decertification sought by the City, GVSUD contends that the following property is rendered useless or valueless to Green Valley by the proposed decertification sought by the City in this proceeding:

(a) Dollars expended by GVSUD for engineering and planning to implement GVSUD's 2006 Wastewater Master Plan allocable to the proposed decertification area;

(b) Dollars expended by GVSUD to obtain a Texas Pollutant Discharge Elimination System ("TPDES") permit from the Texas Commission on Environmental Quality allocable to the proposed decertification area;

(c) Dollars expended by GVSUD to purchase an approximate 65 acre tract of land allocable to the proposed decertification area;

(d) Dollars expended by GVSUD for legal fees and appraiser expenses in this docket; and

(e) Lost expected net revenues allocable to the proposed decertification area. (collectively, "the Alleged Property Interests")

Here, as will be discussed in more detail, below, the Alleged Property Interests are not only not valid property interests, but they are also not rendered useless or valueless to GVSUD

[1] Tr. at 14:13-21 (Allen Cross) (Jan. 17, 2017).

by the Application. In short, GVSUD does not have a wastewater system or the authority from the Texas Commission on Environmental Quality ("TCEQ") to transport, treat, and discharge of wastewater generated within the Decertified Area. Plus, the Decertified Area is located in a highly unique area of the state of Texas- the Cibolo Creek Watershed in the vicinity of the City of Cibolo- meaning that GVSUD is prohibited under TCEQ's regionalization regulations, 30 TAC Chapter 351, Subchapter F, from developing a sewerage system to transport, treat, and discharge wastewater. Fatal to GVSUD's contentions, the evidence in the record and applicable laws and regulations demonstrate that GVSUD's five Alleged Property Interests (i) are not property under Referred Issue No. 9, (ii) are based upon legal impossibilities, (iii) are based upon unsupported allegations from impeached witnesses, and (iv) in some instances, have even been admitted by GVSUD witnesses as not being rendered useless or valueless to GVSUD. In other words, GVSUD's Alleged Property Interests are factual and legal fiction.

As the evidence in the record is evaluated for each of the Alleged Property Interests, the City urges that the following critical, uncontroverted fatal facts be considered:

- GVSUD does not have any wastewater infrastructure within the Decertified Area;[2]
- GVSUD does not have any wastewater customers within the Decertified Area;[3]
- GVSUD does not have any wastewater customers outside the Decertified Area;[4]
- GVSUD does not have any wastewater infrastructure outside the Decertified Area that could be used to serve within the Decertified Area;[5]

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[2] Direct Testimony of Rudolph "Rudy" F. Klein, IV, P.E., Cibolo Ex. 1, Ex. G at 558 (Response to Cibolo Request For Information ("RFI") 1-4); Tr. at 140:1-3 (Allen Cross) (Jan. 17, 2017).

[3] Tr. at 140:14-16 (Allen Cross).

[4] *Id.*

[5] Cibolo Ex. 1, Ex. G at 558 (RFA 1-2).

- GVSUD does not have a Texas Pollutant Discharge Elimination System Permit to treat and discharge wastewater or a Texas Land Application Permit to treat and dispose of wastewater;[6]

- GVSUD does not have authorization to construct a wastewater system;[7]

- GVSUD has not adopted retail wastewater rates;[8]

- GVSUD has not adopted a wastewater impact fee;[9] and

- GVSUD has not obtained a loan to pay for the costs to construct a wastewater system.[10]

The City will refute each of the Alleged Property Interests, in turn:

1. Dollars expended by GVSUD for engineering and planning to implement GVSUD's 2006 Wastewater Master Plan allocable to the proposed decertification area is not property rendered useless or valueless to GVSUD by the City's Application.

The alleged money spent by GVSUD for engineering and planning to implement GVSUD's 2006 Wastewater Master Plan allocable to the proposed decertification area does not amount to property rendered useless or valueless to GVSUD by the Application under TWC § 13.255(c). First, such alleged money itself is not "property" rendered useless or valueless by the Application.[11] Second, the alleged engineering and planning efforts to implement GVSUD's 2006 Wastewater Master Plan, are also not "property" rendered useless or valueless by the Application.

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[6] Tr. at 140:7-13 (Allen Cross).

[7] *Id.* at 140:1-3.

[8] *Id.* at 139:13-16.

[9] *Id.* at 139:17-25.

[10] Cibolo Ex. 1, Ex. G at 567; Cibolo Exs. 4 and 5 (*see* Responses to RFI 4-16).

[11] This issue is discussed in more detail in Section V.A.5., infra (regarding attorney's fees).

(a) Regionalization precludes consideration of engineering and planning costs for a wastewater system to serve the Decertified Area.

First and foremost, the engineering and planning investments made by GVSUD allegedly relate to money spent by GVSUD to implement the 2006 Wastewater Master Plan are not valid property interests under TWC § 13.255(c), as GVSUD is prohibited from transporting, treating, and discharging wastewater generated in the Decertified Area under the TCEQ's regionalization rules in 30 TAC, Chapter 351, Subchapter F. The 2006 Wastewater Master Plan – a document that GVSUD admits is out-of-date[12] and is merely a high level planning document[13]- only contemplates the design and construction of a wastewater plant and central wastewater lines to transport wastewater to the proposed plant. However, any expenses related to the engineering and design of such infrastructure is not rendered useless or valueless by the Application because the TCEQ's rules in 30 TAC Chapter 351, Subchapter F, expressly prohibit entities like GVSUD from performing such acts to serve the Decertified Area. Said another way, since GVSUD is prohibited from obtaining a TPDES Permit to treat wastewater from the Decertified Area or constructing wastewater collection pipelines to transport wastewater from the Decertified Area to a wastewater treatment plant, any engineering or planning related to obtaining a TPDES Permit or such other wastewater infrastructure can never be rendered useless or valueless by the decertification because it was never useful and valuable to GVSUD to serve the Decertified Area to begin with.

Specifically, the TCEQ's regionalization regulations in 30 TAC, Chapter 351, Subchapter F expressly provide that the Cibolo Creek Municipal Authority ("CCMA") is the only entity in the State of Texas that can collect, transport, treat, and discharge wastewater generated within the Decertified Area. Specifically, 30 TAC § 351.62 provides the following:

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[12] Direct Testimony of Garry Montgomery, GVSUD Ex. C at 22:3-4; Cibolo Ex. 4 at 8 (Response to Cibolo RFI 4-21).

[13] GVSUD Ex. C at 10:18-21.

> The Cibolo Creek Municipal Authority is designated **the** governmental entity to develop a regional sewerage system in that area of Cibolo Creek Watershed, in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base.[14]

This regulation does not state that CCMA is "an entity" or "one of many governmental entities" to develop a sewerage system; rather, this rule states that CCMA is "the" entity. Consequently, any alleged property interest of GVSUD that is or pertains to a regional sewerage system to transport, treat, or discharge wastewater from the portion of the Cibolo Creek Watershed, in the vicinity of the City (the "CCMA Regional Area"), like this Alleged Property Interest, cannot be rendered useless or valueless in this matter because it cannot be used for such purposes in the CCMA Regional Area. As testified to by Mr. Rudolph Klein, IV, P.E., an expert in the field of designing, planning, and construction of wastewater treatment plants and wastewater systems for over 30 years,[15] a sewerage system is the wastewater treatment plant and collection system.[16]

Further, Mr. Klein testified that the Decertified Area is within the Cibolo Creek Watershed,[17] and this testimony was not controverted by GVSUD. These two critical facts are fatal to this Alleged Property Interest.

(b) Alleged engineering and planning costs for a wastewater system to serve the Decertified Area are unsubstantiated and there is no evidence that they are rendered useless or valueless

In addition to the fact that GVSUD's alleged expenditures for planning and engineering are not rendered useless or valueless by the Application due to regionalization under 30 TAC Chapter 351, Subchapter F, such expenditures are also not rendered useless or valueless to GVSUD because (i) GVSUD's evidence fails to show what engineering or planning activities

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[14] 30 Tex. Admin. Code § 351.62 (2016) (TAC) (emphasis added).

[15] Cibolo Ex. 1 at 9:6-13.

[16] Tr. at 60:24-61:12 (Klein Redirect) (Jan. 17, 2017).

[17] Cibolo Ex. 1 at 21:16-19; Tr. at 58:15-59:14 (Klein Cross).

have occurred, and/or (ii) to the extent such activities have occurred, how such activities have been rendered useless or valueless by the Application. In an attempt to refute the City's evidence that there is no property of GVSUD rendered useless or valueless by the proposed decertification, GVSUD merely offers into evidence a list of alleged invoices.[18] However, again fatal to GVSUD, GVSUD neglected to offer the invoices into evidence, failed to provide any testimony explaining what planning or engineering activities have been done, and failed to provide any evidence explaining how these alleged expenditures were rendered useless or valueless, in whole or in part. The record is void, and providing a list amounts to hiding the ball. What was revealed through cross examination, however, is contradicting sworn direct testimony from GVSUD's primary witness, Mr. Korman, that the invoice list contains alleged the planning and engineering expenditures of GVSUD for wastewater service, and sworn, cross examination testimony from him that the list actually contains items that are unrelated to planning and engineering expenditures of GVSUD for wastewater service.[19] While Mr. Korman is presented as a witness testifying, in part, as to what property is rendered useless or valueless by decertification,[20] he performed no independent analysis of whether the planning or the land would actually be rendered useless or valueless, and instead relied on the assertions of his client or his client's other consultants.[21] Further, one of GVSUD's consultants that he relied upon, Mr. Montgomery, independently admitted that he did not provide true and correct copies of certain documents for Mr. Korman to consider, after first testifying under oath that he had done just

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[18] GVSUD-1 at GVSUD 100459-100461

[19] GVSUD-1 at GVSUD 100004-100005; GVSUD-1 at GVSUD 100459-100461; Tr. at 73:17-81:7 (Korman Cross).

[20] Josh Korman Direct Testimony, GVSUD Ex. A at 7:10-21; Direct Testimony of Pat Allen, GVSUD Ex. B at 8:13-19 and 10:1-3.

[21] Tr. at 72:9-73:16; 76:12-77:3; 78:21-79:4 (Korman Cross).

that.[22] When pressed on cross-examination, Mr. Montgomery admitted that he had made contradicting statements,[23] which renders him, at best, unreliable.

(c) Alleged engineering and planning expenditures implementing the 2006 Wastewater Master Plan are high level, fungible activities that are not rendered useless or valueless in whole or in part, by the proposed decertification.

As memorialized in the Agreement Stipulations, GVSUD merely concludes that its expenditures for engineering and planning are to implement the 2006 Wastewater Master Plan. Despite failing to explain what the alleged expenditures were, how they were used to implement the 2006 Wastewater Master Plan, or how they were rendered useless or valueless, GVSUD cannot persuasively argue that such expenditures, even if were true, are property rendered useless or valueless by the Application because the 2006 Wastewater Master Plan is not specific to planning or designing the wastewater distribution system to serve the Decertified Area. Rather, as testified by Mr. Klein, the 2006 Wastewater Master Plan is a "high-level, 'living' document that must be reviewed and updated continually."[24] As such, it is used as a general planning tool to develop long-range goals.[25] As a high-level document, it changes over time because systems must continually review and update land use assumptions to determine the level of service need for an area.[26] Mr. Klein testified that the City, as an example, has a master plan that is reviewed annually by high-level city staff and every five years by an outside consultant.[27] Then, every ten years, a more thorough plan update is performed.[28] Even GVSUD's witness, Mr.

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[22] GVSUD Ex. C at 7:16-18; Tr. at 189:16-18 (Montgomery Cross). The missing pages pertained to regionalization, a key issue in this case.

[23] Tr. at 193:3-10 (Montgomery Cross).

[24] Tr. at 9:13-15 (Klein Rebuttal).

[25] *Id.* at 10:18-20.

[26] *Id.* at 10:5-8.

[27] *Id.* at 9:16-22.

[28] *Id.*at 9:23.

Montgomery describes a master plan as a general planning tool,[29] and testifies that it is an "aging document."[30] It does not go into detail of planning for specific tracts of land, and the 2006 Wastewater Master Plan certainly does not go into detail about collection lines to serve the Decertified Area.[31] In other words, these activities, to the extent they occurred, are not specific to the Decertified Area and would be done anyway to design a wastewater system. It is disingenuous for GVSUD to assert that any alleged high-level engineering or planning activities could be rendered useless or valueless by decertification. And, in fact, when given the opportunity to explain which parts of its Wastewater Master Plan will be rendered useless or valueless, GVSUD has failed to provide any evidence.[32] Instead, in putting on its case, GVSUD has blindly concluded from witnesses that have contradicting sworn testimony, without adequate explanation or supporting evidence, that an allocable amount of dollars spent will be rendered useless or valueless.[33]

The City, however, has explained how engineering and planning activities to implement the 2006 Wastewater Master Plan cannot be directly attributable to the area to be decertified. A careful review of this Alleged Property Interest reveals that it is not a property interest under TWC § 13.255(c), and if the alleged money spent on these alleged activities are a valid property interest, there is no evidence in the record as to what the activities are, much less how they could be rendered useless or valueless to GVSUD by the decertification.

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[29] GVSUD Ex. C at 10:18-21.

[30] *Id.* at 22:3-4.

[31] Tr. at 11:4-6 (Klein Rebuttal); GVSUD Ex. C at 11:9-15.

[32] GVSUD's Supplemental Response to Cibolo's Fourth Request for Information, Cibolo Ex. 5 at 3.

[33] *Id.*

2. Dollars expended by GVSUD to obtain a TPDES permit from the TCEQ is not property rendered useless to GVSUD by the City's Application.

The alleged money spent by GVSUD to obtain a TPDES permit from the TCEQ does not amount to property rendered useless or valueless to GVSUD by the Application under TWC § 13.255(c). A TPDES permit authorizes the permittee to treat and dispose of wastewater into waters of the state of Texas.[34] Here, GVSUD does not have a TPDES Permit, and it is uncertain whether it will ever obtain one, as its application has been referred to SOAH for a contested case hearing on several issues, including whether the draft permit violates the TCEQ's regionalization rules.[35] The City's requested decertification has absolutely no impact on the money spent on GVSUD's speculative, TPDES permit application, and it is ridiculous to assert that removing the Decertified Area somehow renders that application, or any part of it, useless or valueless. There is a wealth of legal reasons and evidence in the record supporting the City's position that this Alleged Property Interest is not rendered useless or valueless by the Application, as follows:

- According to the TCEQ's regionalization rules in 30 TAC § 351.65, entities like GVSUD are precluded from obtaining a TPDES permit to discharge into the Cibolo Creek Watershed, in the vicinity of the City CCMA's Regional Area.[36]

- According to the TCEQ's regionalization rules in 30 TAC § 351.62, GVSUD is precluded from developing a sewerage system to serve in the Cibolo Creek Watershed, in the vicinity of the City, which includes the Decertified Area;[37] so even if GVSUD can legally obtain a TPDES permit, it cannot use it to serve the Decertified Area (the City hereby incorporates its regionalization arguments in Section V.A.1.(a) to this Alleged Property Interest);

- There is no evidence in the record, other than a mere list of alleged invoices, identifying what activities have been completed by GVSUD regarding the TPDES application, which is also suspect due to inaccuracies and contradicting sworn testimony from GVSUD's witnesses (the City hereby incorporates its arguments in Section V.A.1.(b) to this Alleged Property Interest);

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[34] GVSUD-1 at 100332.

[35] Cibolo Ex. 2 at 6:11-20; Tr. at 161:9-162:2 (Allen Cross).

[36] 30 TAC § 351.65 (2017).

[37] *Id.* at § 351.62.

- **GVSUD did not identify how this Alleged Property Interest is rendered useless or valueless, in whole or in part in discovery,[38] and there is no other evidence in the record as to how these alleged costs are rendered useless or valueless by the decertification, in whole or in part;**

- There is evidence in the record that GVSUD does not have to obtain a TPDES permit to provide retail wastewater service- it can obtain wastewater service from a wholesale wastewater provider, like CCMA;[39]

- There is evidence in the record that for GVSUD to treat and discharge wastewater to any customer, inside or outside the Decertified Area, it must obtain a TPDES permit;[40]

- There is evidence in the record that GVSUD's proposed TPDES application is phased, and GVSUD will not build the final phase in the event it obtains a TPDES permit; and[41]

- GVSUD contends that the full build-out of GVSUD's wastewater service area, not including the Decertified Area, would necessitate the final phase of the proposed TPDES permit, if it is approved.[42]

For these simple, clear reasons, GVSUD's money spent in an attempt to obtain a TPDES permit cannot be rendered useless or valueless to GVSUD by the decertification, in whole or in part.

3. Dollars expended by GVSUD to purchase an approximate 65 acre tract of land is not property rendered useless to GVSUD by the City's Application.

Next, there is ample, uncontroverted evidence that the 65-acre tract of land (the "Land") will not be rendered useless and valueless to GVSUD by the decertification of the areas requested in the Application.[43] Similar to the prior two Alleged Property Interests, the record is

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[38] Cibolo Ex. 5 at 3-4 and 6. (Responses to Cibolo RFIs 4-1, 4-3 and 4-11).

[39] Tr. at 53:17-22 (Klein ReDirect); Tr. at 39:3-6 (Klein Cross); Tr. at 40:6-13 (Klein Cross); and Tr. at 162:11-164:1 (Montgomery Cross).

[40] Rebuttal Testimony of Rudolph "Rudy" Klein, Cibolo Ex. 2 at 6:2-10; Tr. at 155: 20-25 (Allen Cross); and Tr. at 164:19-165:2 (Allen Redirect)

[41] Cibolo Ex. 1 at 27: 7-11; GVSUD Ex. 1 at 100382.

[42] Tr. at 158:12-159:18 (Allen Cross).

[43] Cibolo Ex. 2 at 28:9-29:17; Cibolo Ex. 2 at 5:14-8:21 and at Ex. Klein R-A at 34 (Response to Cibolo RFA 2-10).

clear that the Land cannot be rendered useless or valueless to GVSUD, in whole or in part, by the decertification, for each the following reasons:

- There is no evidence in the record as to how the Land is rendered useless or valueless by the decertification, in whole or in part;
- **To the contrary, GVSUD admits in City RFA 2-10 that the Land will not be rendered useless or valueless in whole or in part;**[44]
- According to the TCEQ's regionalization rules in 30 TAC § 351.65, entities like GVSUD are precluded from obtaining a TPDES permit to discharge into the Cibolo Creek Watershed, in the vicinity of the City CCMA's Regional Area, so it is unlikely that the Land could be used to hold a wastewater treatment plant to serve the Decertified Area.[45]
- According to the TCEQ's regionalization rules in 30 TAC § 351.62, GVSUD is precluded from developing a sewerage system to serve in the Cibolo Creek Watershed, in the vicinity of the City, which includes the Decertified Area;[46] so even if GVSUD can legally obtain a TPDES permit and put a wastewater treatment plant on the Land, such plant and Land cannot be used to serve the Decertified Area (the City hereby incorporates its regionalization arguments in Section V.A.1.(a) to this Alleged Property Interest);
- There is evidence in the record that GVSUD does not have to obtain a TPDES permit to provide retail wastewater service- it can obtain wastewater service from a wholesale wastewater provider, like CCMA;[47] thus, it does not need the Land;
- GVSUD contends that the full build-out of GVSUD's wastewater service area, not including the Decertified Area, would necessitate the final phase of the proposed TPDES permit, if it is approved;[48]
- Despite GVSUD's assertion that the Land will be used in part to hold a wastewater treatment plant, in actuality, Mr. Klein testified that the Land is

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[44] Cibolo Ex. 2 at Ex. Klein R-A at 34 (Response to Cibolo Request for Admission ("RFA") 2-10).

[45] 30 TAC § 351.65 (2017).

[46] *Id.* at § 351.62.

[47] Tr. at 53:17-22 (Klein Redirect); Tr. at 39:3-6; Tr. at 40:6-13 (Klein Cross); Tr. at 162:11-164:1 (Allen Cross).

[48] Tr. at 158:12-159:18 (Allen Cross).

merely an undeveloped piece of land[49] that has no permits attached to it (and it is uncertain whether GVSUD will ever obtain a TPDES permit);[50]

- GVSUD has admitted that it has not constructed a wastewater treatment plant or wastewater infrastructure;[51] and

- There is evidence in the record that the Land is likely more valuable now than when GVSUD purchased it- assuming GVSUD paid fair market value for the Land.[52]

4. Lost expected net revenues allocable to the Decertified Area is not property of GVSUD that will be rendered useless or valueless to GVSUD by this decertification.

GVSUD's alleged economic opportunity interest for lost expected net revenues from future customers allocable to the Decertified Area is not property under Texas Water Code § 13.255(c), and this far-reaching, speculative Alleged Property Interest is certainly not rendered useless or valueless by the decertification Application.

(a) Lost expected net revenues allocable to the Decertified Area is not a property interest contemplated by TWC § 13.255.

As admitted by GVSUD's witness, Mr. Korman, the alleged lost expected net revenues are lost profits from future customers.[53] These alleged lost profits are not real property interests; they are not tangible personal property interests; and they are not intangible property interests, as alleged by GVSUD, because GVSUD does not have an economic opportunity interest that attaches to the future lost profits from the Decertified Area.

The City's extensive testimony makes it clear that GVSUD has no economic opportunity interest related to the Decertified Area. These alleged lost net revenues from future customers allocable to the Decertified Area ("Lost Future Profits") are not an investment made by GVSUD

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[49] Cibolo Ex. 1 at 28:19-21.

[50] *Id.* at 28:18-29:6.

[51] Tr. at 140:1-3, 169:17-170:4 (Allen Cross); Tr. at 179:12-14 (Montgomery Cross); Cibolo Ex. 1, at Ex. G (Response to Cibolo RFAs 1-2, 1-4, 1-10, 2-4, 2-5, 2-6, 2-7, 2-8, and 2-9).

[52] Cibolo Ex. 1 at 28:23-29:1.

[53] Tr. at 89:19-90:3 (Korman Cross).

or a resource that it has otherwise supplied in furtherance of providing service to the Decertified Area; rather, it is merely a speculative benefit that GVSUD hopes to eventually receive. To accept GVSUD's assertions that it has an economic opportunity interest in the form of Lost Future Profits is contrary to basic principles of statutory construction.

(i) Lost net revenues from future customers are not property under TWC § 13.255(g).

GVSUD does not have an economic opportunity interest in Lost Future Profits because such a property interest simply does not exist under TWC § 13.255(g). An economic opportunity interest is an intangible personal property right arising from the ownership of some vested interest, and that ownership gives the economic opportunity interest value.[54] GVSUD relies on Factors 6[55] and 9 of the TWC § 13.255(g) compensation factors to support its theory that GVSUD has an economic opportunity interest in future net revenues from future wastewater customers.[56] TWC § 13.255 provides, in relevant part:

> [T]he value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate, shall, at a minimum include . . . [Factor 6] the impact on future revenues lost from *existing* customers . . . [Factor 9] other relevant factors.[57]

TWC § 13.255 does not support a vested interest in future net revenues because the rules of statutory construction, when applied to both Factor 6 and Factor 9, preclude such an interpretation.[58]

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[54] Rebuttal Testimony of Jack Stowe, Cibolo Ex. 3, at 18:11-18.

[55] The City is assuming that GVSUD is applying Factor 6 in describing what property is rendered useless and valueless. The assumption is based on the fact that GVSUD alleges Factor 6 applies to the portion of GVSUD's Appraisal at bates range GVSUD 100002-100004, but then states at bates number GVSUD 100007 that Factor 6 is not applicable. Mr. Korman's later testimony supports that GVSUD is alleging Factor 6 is applicable, so the City will address the property interest allegedly supported therein. Tr. at 87:1-92:6 (Korman Cross-Examination).

[56] Tr. at 87:1-88:20 (Korman Cross).

[57] TWC § 13.255(g) (emphasis added). The corresponding compensation factors in 16 TAC § 24.120(g) likewise specify that on the impact on future revenues from existing customers may be considered.

[58] *See* TWC § 13.255(g).

(A) Factor 6 does not contemplate Lost Future Profits from future customers.

The Texas Legislature clearly and unambiguously addressed whether the future revenues or profits from future customers is a contemplated property interest in Factor 6 of TWC § 13.255(g). They are not. Rather, compensation for future revenues is specifically limited to only include future revenues from existing customers, *i.e.* the customer that the utility actually has, by limiting the scope of the factor to revenues from *existing* customers.[59] The Texas Code Construction Act, Tex. Gov't Code, Chapter 311, requires that all words and phrases be read in context and construed according to common usage unless such word or phrase has acquired a technical or particular meaning.[60] In this context, the word "existing" is given its plain meaning as there is no specialized meaning of that phrase for purposes of determining what property is rendered useless and valueless.[61] It is ridiculous to even consider that the words "existing" and "future"[62] could be synonyms.

Because the Legislature has made clear that net revenues from future customers are not compensable under TWC § 13.255, GVSUD's allegation that Factor 6 contemplates that a utility has an economic opportunity interest in and could recoup lost revenues from currently nonexistent customers is unsupported under the plain language of TWC § 13.255(g). GVSUD produced no testimony or evidence to the contrary other than the unsupported assertions by Mr. Korman that GVSUD has an economic opportunity interest in such revenues and such interest would be rendered useless and valueless by decertification.[63] Given such clear direction from the Texas Legislature as it relates to lost future revenues and profits from future customers,

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[59] *Id.*

[60] Tex. Gov't Code § 311.011.

[61] "Exist" means "to have a real being" or "to have being in a specified place or with respect to understood limitations or conditions. MERRIAM-WEBSTER DICTIONARY COLLEGIATE DICTIONARY (11th ed. 2003).

[62] By contrast, "future," when given its plain meaning, is something "that is to be", or, more specifically, "existing or occurring at a later time". *Id.*

[63] Tr. at 87:8-11, 87:25-88:20 (Korman Cross)

GVSUD's insistence that such revenues are lost economic opportunity interest, seem to, in the alternative, be premised on the applicability of Factor 9 to lost future revenues in general.

(B) Reading Factor 9 to include Lost Future Profits from future customers is contrary to the basic principles of statutory construction.

As a matter of law, Lost Future Profits is not an economic opportunity interest.[64] GVSUD's reliance on Factor 9's broad "other relevant factors" language to treat future lost revenues from future, currently nonexistent customers is, like with Factor 6, a thinly-veiled attempt to ignore basic statutory construction.

The primary goal in statutory construction is to ascertain the drafter's intent and effectuate that intent in the application of the statute.[65] Such construction necessitates that the Legislature, in enacting the statute, intended the entire statute to be effective.[66] Thus, every word in a statute is presumed to have a purpose.[67] As such, a provision of a statute cannot be read in such a way that would render another provision a nullity or mere surplusage.[68]

Correspondingly, every word not included in a statute must be presumed to have been excluded for a purpose.[69] According to the statutory construction doctrine of *inclusio unius est exclusion alterius*, it must be presumed that the purposeful inclusion of a specific term implies the purposeful exclusion of terms that were not included.[70] In other words, when the Legislature

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[64] *See* TWC § 13.255(g).

[65] *Tex. Dep't of Protective & Reg. Svcs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176-77 (Tex. 2004).

[66] Tex. Gov't. Code § 311.021(2).

[67] *Id.* "[A] cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible." *Tex. Worker's Comp. Ins. Fund. v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000).

[68] Tex. Gov't. Code § 311.021(2); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442-43 (Tex. 2002).

[69] *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).

[70] *City of Hous. v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011).

has specifically excluded a term in a statutory provision, that term should not be implied elsewhere in the statute.[71] Relatedly, the express mention or enumeration of one person, thing, consequence, or class is the equivalent to an express exclusion of all others.[72]

Finally, the language of a particular provision cannot be determined in isolation, but must be drawn from the context in which such language is used.[73] In this way, a statute is considered as a whole, not as individual provisions.[74] A party thus cannot pick and choose individual provisions that, when read in isolation, suit their needs, but when read in context of the statute as a whole, clearly support an alternative conclusion.

GVSUD's assertions that it has an economic opportunity interest in Lost Future Profits is an overly broad interpretation of "other relevant factors" in Factor 9 and contrary to the application of these basis rules of statutory construction, consistent with Mr. Stowe's testimony.[75] Factor 6 is limited to future revenues from *existing* customers.[76] Thus, presuming every word of a statute was used for a purpose and to give effect to the Legislature's intent by using such words, Factor 9 cannot be read to allow compensation from *nonexistent* customers. Otherwise, the word "existing" in Factor 6 would have no meaning and be rendered a nullity. Additionally, the inclusion of the word "existing" without reference to future customers is an intentional omission by the Legislature that indicates such customers were expressly not to be considered in determining compensation for Lost Future Profits.

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[71] *Laidlaw Waste Sys., Inc.*, 904 S.W.2d at 659.

[72] *Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108-09 (Tex. 1985).

[73] *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011).

[74] *Id.* at 439.

[75] Tr. at 238:20-239:5 (Stowe Cross).

[76] TWC § 13.255(g).

To GVSUD's detriment, Mr. Blackhurst's testimony is instructive as to this intent.[77] As he explained, in 2005, the Texas Legislature amended TWC § 13.255.[78] Among those changes was the transition from a broad compensation scheme for future revenues to the narrow language that is limited to only future revenues from existing customers.[79] Specifically, Mr. Blackhurst testifies that "the impact on future revenues and expenses of the retail public utility" was replaced with "the impact on future revenues lost from existing customers."[80] Because Factor 6 cannot be read separate and apart from Factor 9, this explicit limitation by the Legislature in the scope of lost revenues that may be considered under TWC § 13.255(g) in Factor 6 precludes any entity, GVSUD included, from reading compensation for other types of future revenues into Factor 9. The Legislature clearly and unambiguously removed any possibility that compensation can be provided under TWC § 13.255 in the way GVSUD alleges. Had the Legislature intended that future revenues from future customers be a compensable economic opportunity interest for the decertified utility under a broad reading of Factor 9, it would not have amended Factor 6 specifically for the purpose of narrowing the scope of recoverable lost future revenues to existing customers only.

GVSUD has offered no precedent or alternative statutory construction canon to support its overly broad reading of Factor 9. Therefore, TWC § 13.255(g) does not support a lost economic opportunity interest in future lost revenues from future customers in a CCN decertification, and GVSUD cannot circumvent the intent of the Legislature in choosing to limit the type of future revenues that are compensable thereunder by categorizing such revenues as an "other relevant factor".[81]

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[77] Steve Blackhurst Direct Testimony, GVSUD Ex. D at 14:14-16.

[78] *Id.* at 14:9-21.

[79] *Id.* at 14:14-16.

[80] GVSUD Ex. D at 14:14-16.

[81] *See* TWC § 13.255(g).

(ii) GVSUD has no economic opportunity interest because it does not have any existing customers from whom revenues will be lost upon decertification, and it cannot legally collect, treat, or discharge wastewater.

Irrespective of the legal prohibition on treating Lost Future Profits as an economic opportunity interest, the City demonstrated that GVSUD has no actual economic opportunity interest in revenues from such nonexistent wastewater customers. First, the City has proven–and GVSUD has conceded–that GVSUD has no existing wastewater customers, despite the numerous references to "customers" throughout GVSUD's prefiled direct testimony and the calculations included by Mr. Korman in the GVSUD Appraisal that would suggest otherwise.[82]

GVSUD's lack of any economic opportunity interest is not only reflected by the fact that GVSUD currently has no wastewater customers and no customer prospects, but also that GVSUD does not have a TPDES Permit. In other words, GVSUD does not have the legal ability to collect, treat, and discharge wastewater from the future customers in the Decertified Area (or anywhere else). Common sense requires that in order to have wastewater customers, GVSUD must first have the legal ability to provide wastewater service, meaning some governmental authorization to treat and dispose of wastewater as well as some sewer system to serve those customers. As Mr. Allen has testified and responded through discovery in this matter, TCEQ has not issued GVSUD a TPDES permit, the TCEQ has not authorized GVSUD to construct a wastewater treatment plant, and GVSUD has not even submitted plans to the TCEQ to construct a wastewater treatment plant or wastewater system.[83] In fact, Mr. Allen testified that GVSUD has not hired any employees with licenses from the TCEQ to operate a wastewater system.[84] As testified by Mr. Stowe, without the legal ability to provide these wastewater services, the alleged

[82] Tr. at 154:25-157:19 (Allen Cross); GVSUD-1 at 10003; Tr. at 154:6-157:19 (Allen Cross).

[83] Cibolo Ex. 1, Ex. G at 573-574 (RFAs 2-3 through 2-9).

[84] Tr. at 140:1-13 (Allen Cross).

economic opportunity interest does not attach to the Decertified Area, and this property interest does not exist.[85]

(b) GVSUD's alleged lost net revenues from future customers is not rendered useless or valueless by the Application.

Regardless of the fact that GVSUD's alleged Lost Future Profits are not property under TWC § 13.255, this far-reaching Alleged Property Interest is absolutely not rendered useless or valueless by the Application because (i) GVSUD's alleged lost revenues and projected expenses that comprise the Lost Future Profits do not exist and are highly speculative; and (ii) GVSUD, as a political subdivision of the state of Texas, cannot make a profit, so GVSUD should not have any net revenues in the first place.

As testified by Mr. Allen, GVSUD has not yet established retail sewer rates or sewer impact fees, or obtained debt to construct a wastewater system in this matter.[86] These are uncontroverted facts. Accordingly, it is impossible and premature to determine what sewer revenues could be lost from future customers, if any. In short, GVSUD has not perfected any of the steps necessary in order to provide wastewater service and collect revenues from potential, future customers. Additionally, not even Mr. Allen, GVSUD's General Manager, is of the opinion that GVSUD currently has the ability to go into the wastewater business and thus collect revenues. To that end, Mr. Allen testified:

> I didn't feel it was right for us to change our website until we has the permit and *the ability to go into that business.* Rather, that's something that we will probably do in the future *once we know we had the established authority or the ability to build facilities and prepare ourselves for that business.*[87]

This acknowledged inability to even enter the wastewater business further reinforces just how speculative any claim for lost future revenues is at this time.

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[85] Cibolo Ex. 3 at 17:19-18:10.

[86] Tr. at 139:14-25 (Allen Cross); GVSUD-1 at 100004.

[87] Tr. at 164:22-165:2 (Allen Re-Direct) (emphasis added).

Plus, even if GVSUD could enter the wastewater business, there is no guarantee that GVSUD would have customers. As Mr. Klein testified, landowners within GVSUD's CCN have the option to use a septic system, and nothing requires those landowners to use GVSUD's wastewater system instead, if and when it is constructed.[88] This testimony is reinforced with similar testimony from Mr. Allen, where GVSUD has 33,000 retail water customers, but no retail wastewater customers.[89]

Because GVSUD has not effectuated any of the necessary steps in order to collect revenues, the only plausible explanation for GVSUD's insistence that it has an economic opportunity interest in Future Lost Profits must be that GVSUD treats its CCN as conferring some sort of property interest related to future revenues. However, it is expressly established in the Commission's rules that a CCN is not a vested interest nor does it create a property interest therein.[90] In fact, a CCN holder has no right to or reasonable expectation of deriving a profit from that CCN.[91] Rather, as Mr. Stowe testifies, a CCN gives the holder a right to provide service, but also an obligation to provide service.[92] He succinctly explains: "The CCN is an obligation to provide service. That's all. You are dealing with a nonprofit entity . . . . So you are only looking at cost recovery for a dollar spent and a dollar recovered."[93] In short, a CCN holder is never assured an opportunity to receive any economic benefit and has no legal claim to such right. Therefore, because a CCN is not itself a vested property interest, the GVSUD cannot derive an economic opportunity from the CCN alone. To the extent GVSUD is relying on its

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[88] Tr. at 53:23-54:7, 54:25-55:17 (Klein Re-Direct).

[89] Tr. at 154:6-157:19 (Allen Direct).

[90] 16 TAC §§ 24.113(a), 24.116; *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 145 (Tex. App.—Austin 2014, pet. denied); *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 525-56 (Tex. App.—Austin, pet. denied).

[91] *See Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 525-26.

[92] Tr. at 222:22-223:11 (Stowe Cross); *see also* TWC § 13.241.

[93] Tr. at 249: 4-18 (Stowe Cross).

CCN to establish it has existing wastewater customers from whom GVSUD can derive an economic opportunity interest, such reliance is misplaced and not supported by law.

Again, GVSUD's assertion that it has an economic opportunity interest in future net revenues from future customers is a claim for lost profits. However, GVSUD, as a special utility district, is a political subdivision of the state of Texas.[94] As such, GVSUD is a nonprofit, tax-exempt entity that is not authorized legally to make a profit, a fact acknowledged by Mr. Allen at the hearing on the merits.[95] Thus, as noted by Mr. Allen, the district should not be making any profits on this system, much less claiming it as lost property in this matter.

5. Dollars expended by GVSUD for attorney's fees and the appraisal fee are not property rendered useless or valueless by this decertification.

The City correctly asserts that this Alleged Property Interest does not amount to property under TWC § 13.255, and there is no evidence in the record indicating that it is property rendered useless or valueless to GVSUD by the Application. Pursuant to TWC § 13.255(g) Factor 7, "necessary and reasonable legal expenses and professional fees" are potentially recoverable as part of compensation to a decertified utility, to the extent that property is rendered useless in valueless under this law.[96] Here, GVSUD mistakenly alleges that its legal expenses and appraisal expenses (or the money spent thereto) in "defending the decertification" are property interests.[97] However, recovery of those fees and expenses is contingent upon reaching the compensation phase of this proceeding, which is premised on a prior determination that property will be rendered useless or valueless by decertification because such fees and expenses, without capitalization, are not in and of themselves property. Regardless, such fees and expenses are not rendered useless and valueless to GVSUD by this decertification.

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[94] TWC, Chapters 49 and 65.

[95] Tr. at 145:14-20 (Allen Cross).

[96] TWC § 13.255(g).

[97] GVSUD Ex.1 at GVSUD 100007; Tr. at 109:2-13 (Korman Cross).

(a) Attorney's fees and the appraisal fee are not a property interest and not considered at this phase of the hearing.

GVSUD asserts, without providing any legal support thereof, that attorney's fees and the appraisal fee are property that may be considered at this phase on determining what property GVSUD has and what property is rendered useless and valueless. In the GVSUD Appraisal, both fees are included as a component of Factor 7, although the Appraisal lacks any accompanying explanation of how such fees are property.[98] When asked whether attorney's fees were a property interest, Mr. Korman testified that "they have become that."[99] Although, when asked about appraisal fees, Mr. Korman did not directly address whether such a fee was a property interest.[100] This unsubstantiated assertion that such fees are property is typical throughout GVSUD's case, and fails to adequately rebut that GVSUD does not have a property interest in such fees.

There are no express laws or regulations that contemplate attorney's fees or the appraisal fee as anything other than a mere compensation factor in the event that property is rendered useless or valueless. Mr. Korman suggested that the property interest is derived from the TWC § 13.255(g) compensation factors and a comparison to eminent domain proceedings. However, neither TWC § 13.255(g) nor eminent domain statutes state that attorney's fees are property. In fact, no such authority exists. The compensation valuation factors in TWC § 13.255(g) does not render attorney's fees and the appraisal fee a property interest. As the City has maintained throughout this hearing, the compensation factors in TWC § 13.255(g), while instructive of what the Commission will consider at the second phase, are not a menu of property interests from which GVSUD can pick and choose what it owns. TWC § 13.255 only indicates that the "value of personal property shall be determined according to the factors" listed therein. But what it does

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[98] GVSUD-1 at 100007.

[99] Tr. at 109:2-5 (Korman Cross).

[100] *Id.* at 110:11-13.

not say is just as important; TWC § 13.255(g) does not state that the factors listed therein are, themselves, personal property interests.[101] Mr. Korman's testimony supports this reading of TWC § 13.255(g) that a characterization as property is independent of TWC § 13.255.[102]

The eminent domain statute also does not support the proposition that attorney's fees and the appraisal fee are property interests. In the Texas eminent domain statute, Texas Property Code, Chapter 21, attorney's fees are a cost independent of the assessment of damages to property.[103] In fact, the assessment of the value of the property is a process entirely distinct from the consideration of other costs and expenses, specifically attorney's fees.[104] As such, GVSUD's reliance on the eminent domain process to support the assertion that attorney's fees is property is a disingenuous reading of that statute.

Attorney's fees and the appraisal fee (as well as any other Alleged Property Interest) are not personal property simply by virtue of GVSUD expending money to pay for the services that correspond to such fees. Such logic is inherently flawed. Once money is spent on legal expenses and professional fees, GVSUD has released any right it had in that money in exchange for the services rendered. GVSUD is paying for those legal and appraisal services, but does not retain any ownership interest in those services. An simple example of how this logic is flawed is when money is used to buy real property. Is that real property somehow actually personal property? Absolutely not. Paying for legal and appraisal services is just a cost or expense related to doing

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[101] TWC § 13.255(g).

[102] Tr. at 134:2-6; 134:24-135:5 (Korman Cross).

[103] Tex. Prop. Code §§ 21.042 (Assessment of Damages, relating to the valuation of the condemned property), 21.047 (Assessment of Costs and Fees, relating to additional expenses that may be assessed upon the condemnor, including attorney's fees and other professional fees).

[104] *Id.*

business and protecting actual investments, but paying those costs does not maintain a property interest simply because personal property in the form of money was given in exchange.

(b) Even if attorney's fees and the appraisal fee are a property interest that may be considered now, those fees are still not rendered useless and valueless by decertification.

Regardless of whether attorney's fees and the appraisal fee are a personal property interest under TWC § 13.255, those fees are simply not rendered useless and valueless by the decertification. GVSUD's alleged "significant" costs on legal fees and the appraisal fee in, according to Mr. Allen, "(1) defending its pending TCEQ permit application against Cibolo and others and (2) responding to Cibolo's Application at issue here, including costs associated with RCE, KOR Group, and legal counsel,"[105] are not rendered useless or valueless to GVSUD by the decertification. Such mere allegations are void of an explanation of how such fees will be rendered useless or valueless as a result of decertification, which is a crucial half of the scope of this proceeding.

The decertification itself has no impact whatsoever on the use and value of GVSUD's those legal services. To put the fees in context, the City filed the Application to decertify a portion of GVSUD's property under TWC § 13.255. TWC § 13.255 states that the Commission "shall grant single certification to the municipality" when this type of decertification is requested. GVSUD thus made the business decision to hire attorneys to represent its position in this proceeding. In so doing, GVSUD's attorneys have been doing exactly what they were hired to do.

[105] GVSUD Ex. B at 16:8-11.

The outcome of this proceeding is decertification. That much is mandated by law.[106] The removal of less than 3% of GVSUD's sewer CCN boundaries from its sewer CCN does not, in some way that is still unexplained by GVSUD, diminish or negate the legal services provided to GVSUD. In this way, attorney's fees are unaffected by the result of decertification, and are certainly not rendered useless or valueless by the Application.

Although GVSUD has not substantiated exactly the purpose of the attorney's fees cited in the GVSUD Appraisal, Mr. Allen's testimony suggests that GVSUD is also considering GVSUD's defense of the TPDES permit.[107] Even if we are considering the attorney's fees accrued in defense of GVSUD's TPDES permit, those fees are not applicable to this Application under Factor 7, and are not rendered useless and valueless. Besides the fact that GVSUD has failed to identify which portions of those fees are related specifically to the Decertified Area, all of those fees would still have to be expended to defend the TPDES permit regardless of what happens here- regardless of whether this Application was filed or not.[108] Attorney's fees simply do not work that way. Therefore, none of the fees expended by GVSUD, regardless of whether they are property, could be rendered useless and valueless in whole or in part (of which there is no testimony in the record as to how they could be partially impacted) as a result of decertification.

Similarly, the appraisal fee will not be impacted at all by decertification. Again, in the context of a TWC § 13.255 proceeding, the Appraisal is a necessary component and an expense that must be incurred. Just as with the attorneys, the appraiser, Mr. Korman, did exactly what he was hired to do: develop an appraisal to address property rendered useless and valueless by

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[106] TWC § 13.255(c).

[107] GVSUD Ex. B at 16:8-11.

[108] *See* Cibolo Ex. 2 at 19:11-15, 20:19-20:10.

decertification knowing that decertification is imminent. To claim then that the money spent on the Appraisal itself is rendered useless and valueless by decertification, *i.e.* the very thing it was developed to assess, is circular and unsupported at law. The frivolousness of this claim is only reinforced by the fact that GVSUD does not, and quite frankly cannot, identify which portions of that Appraisal will be impacted and how it will be impacted by decertification to rebut the City's position to the contrary.

B. Referred Issue No. 11: Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification?

As discussed at length in Section V.A., above, the City has demonstrated that there is no property of GVSUD rendered useless or valueless to GVSUD, in whole or in part, by the decertification. Accordingly, the City's appraisal, which indicates that there is no property of GVSUD rendered useless or valueless to GVSUD, in whole or in part, by the decertification, accurately limits valuing the property that has been determined to have been rendered useless or valueless by decertification.[109] GVSUD's appraisal, on the other hand, mistakenly includes the flawed, Alleged Property Interests[110], and, thus, it does not accurately value the property that has been determined to have been rendered useless or valueless by decertification.

C. Timing for Property that may be considered in this hearing.

In response to the ALJ's request, the relevant date on which property must have been owned is the date the City sent GVSUD its notice of the Application. In this case, that date is August 18, 2015.

Neither TWC § 13.255 nor the Commission's Substantive Rules definitively state the cutoff for property to be considered in a TWC § 13.255 proceeding.[111] However, both TWC §

[109] Cibolo Ex. 1 at Ex. C.

[110] GVSUD-1 at 100000-100012.

[111] TWC § 13.255; 16 T AC § 24.120.

13.255(b) and 16 TAC § 24.120(b) required the City to notify GVSUD of its intent to provide service in the portions of its annexed area within GVSUD's sewer CCN boundaries. The purpose of this is to put GVSUD on notice of the imminent decertification and trigger a 180-day negotiation period, upon the conclusion of which the Commission shall grant single certification to the City and determine whether any property is rendered useless or valueless.[112] Thus, on the date the notice of intent was served to GVSUD, GVSUD was certain that that property referenced therein would be decertified pursuant to the mandate in TWC § 13.255(c). As such, the date of that notice is the relevant date for purposes of determining what property is within the scope of this proceeding.

VI. CONCLUSION AND PRAYER

The City has met its burden of proof in this matter for the Referred Issues, demonstrating that no property of GVSUD is rendered useless or valueless to GVSUD, in whole or in part, by the decertification, and that the City's appraisal is limited to the property of GVSUD that is rendered useless or valueless to GVSUD by the decertification, of which there is none. The City respectfully requests that the Administrative Law Judge issue a proposal for decision consistent with the City's request in Section III of this Initial Brief and grant any other relief to the City of Cibolo to which it may be entitled.

[112] *See* TWC §§ 13.255(b)-(c); 16 TAC §§ 24.120(b)-(c).

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF CIBOLO

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, hand-delivery and/or regular, first class mail on this 10th day of February, 2017 to the parties of record.

David J. Klein