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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  
PUBLIC UTILITY COMMISSION  
FILING CLERK

OF

ADMINISTRATIVE HEARINGS

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

February 28, 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>AREA AND TO DECERTIFY</b>	<b>§</b>	
<b>PORTIONS OF GREEN VALLEY</b>	<b>§</b>	<b>OF</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>	<b>ADMINISTRATIVE HEARINGS</b>

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

Green Valley Special Utility District ("Green Valley" or "GVSUD") files this Post-Hearing Reply Brief in the above-styled Application, and in support would show as follows:

**I. INTRODUCTION AND SUMMARY**

Green Valley completely disagrees with the position taken by the City of Cibolo ("Cibolo") and Commission Staff ("Staff") that no property items will be rendered useless or valueless if decertification is ultimately granted as to a significant portion of Green Valley's Certificate of Convenience and Necessity ("CCN") No. 20973. If the Commission were to adopt either party position, Green Valley will be deprived of adequate and just compensation as mandated by TWC § 13.255(c) and the Federal and State constitutions, which place no limits on the type of "property" that may be lost. Nor does the statute, constitutional provisions or applicable precedent prohibit allocated partial property losses, which losses will constitute the overwhelming majority of takings requiring compensation under the statutory decertification scheme. Green Valley has properly and conservatively identified its at-risk property interests resulting from the proposed decertification in the Green Valley Appraisal Report and has factually and legally supported these property interests. Cibolo, which bears the burden of proof for all matters in this proceeding, has offered bald assertions

from unqualified witnesses and/or unduly narrow statutory interpretations to support its position. Green Valley respectfully requests that the Commission direct a second phase hearing to establish the value of compensation that will reasonably and adequately make Green Valley whole.

## II. PROCEDURAL HISTORY

Green Valley laid out the procedural history in its Initial Brief and entered into a stipulation with Cibolo regarding relevant procedural milestones.<sup>1</sup> Beyond the stipulated occurrences in this docket, the following are crucial for the ALJ to recognize in considering Cibolo's application and Green Valley's reply to the often disingenuous arguments posited in Cibolo's initial brief.

On June 28, 2016, Green Valley and Cibolo submitted their respective appraisal reports to the Commission as required by Commission ALJ Order No. 7, *prior to* the Commission's establishment of this bifurcated process and *following* the negotiation process mandated by TWC § 13.255(l) and Commission ALJ Order No. 7. As Green Valley addresses below, this is but one of several requirements that would be undermined were the Commission to adopt Cibolo's absurd position that Green Valley's property interests should be identified or measured when Cibolo allegedly started that process on August 18, 2015.<sup>2</sup>

On August 22, 2016, the ALJs issued SOAH Order No. 2, determining, *inter alia*, that Cibolo has the burden of proof for all purposes in this proceeding.<sup>3</sup>

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<sup>1</sup> Agreed Stipulations (Feb. 9, 2017) at 2.

<sup>2</sup> Whether Cibolo's notice was proper and whether its application has met all administrative requirements are second hearing issues. *See* Supplemental Preliminary Order (July 20, 2016) at 3 (directing that administrative completeness not be addressed in the first phase hearing).

<sup>3</sup> SOAH Order No. 2 (Aug. 19, 2016) at 1.

On November 16, 2016, Staff informed the ALJ that it would not file testimony in this docket and has thus offered no record evidence to support its circular position that money is not property and that, if money is property, it loses such status once it has been spent.

On December 9, 2016, the ALJs issued SOAH Order No. 7, in which they determined that a broad definition of “property” is required to effect the purpose of the TWC § 13.255 statutory framework.<sup>4</sup>

Finally, the Commission has never made a finding of administrative completeness on Cibolo’s application, including either a determination regarding the sufficiency of notice or whether Cibolo meets the minimum standards under TWC § 13.255(m). If Cibolo fails to meet these standards, the Commission “shall deny [the] application for single certification.”<sup>5</sup> The absence of these requirements discredits Cibolo’s extreme position regarding the date for property identification.

### **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.**

Green Valley identified the “property” it contends should be valued in this docket through the Green Valley Appraisal Report and its experts’ testimonies,<sup>6</sup> and is the only party to submit a true appraisal by a licensed appraiser.<sup>7</sup> Cibolo’s “appraisal” did not conform with applicable standards governing appraisals,<sup>8</sup> and therefore failed to meet the plain wording of TWC § 13.255(l) requiring

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<sup>4</sup> SOAH Order No. 7 (Dec. 9, 2016) at 9 (“[F]or 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>5</sup> TWC § 13.255(m). This is a second phase issue.

<sup>6</sup> Ex. GVSUD-1, GVSUD-A, GVSUD-B, GVSUD-C, and GVSUD-D.

<sup>7</sup> Tr. at 123 (Korman Direct); Ex. GVSUD-A (Korman Direct) at 3; Ex. GVSUD-1 at GVSUD 100009; TWC § 13.255(l).

<sup>8</sup> Ex. GVSUD-A (Korman Direct) at 9-10; Ex. GVSUD-1, at GVSUD 100001; Ex. GVSUD-2 (referencing Mr. Korman’s use of the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition (“USPAP”), the

an “appraiser” who is “qualified.”<sup>9</sup> Beyond the absence of a competent Cibolo appraisal, its witnesses are unqualified to identify property that is rendered useless or valueless. Mr. Klein directly acknowledged both: (a) that he has zero experience identifying or valuing intangible property;<sup>10</sup> and (b) that he could not provide *any opinion* on whether money constitutes property.<sup>11</sup> Mr. Stowe’s “appraisals” have to date never been accepted in a case that proceeded to a final order before a settlement agreement was reached between the parties.<sup>12</sup> Mr. Stowe further acknowledged that his “appraisal” was not prepared using USPAP.<sup>13</sup> The ALJ and Commission are thus faced with a contested case proceeding in which the applicant, with the burden of proof, has not offered competent evidence on property that will be rendered useless or valueless.<sup>14</sup>

Even if Cibolo’s witnesses were qualified to identify property interests rendered useless or valueless, which they are not, the arguments Cibolo offered to support its position that zero Green Valley property will be rendered useless or valueless upon decertification are insufficient as a matter of law to meet Cibolo’s burden. At their essence, Cibolo’s arguments and testimony regarding property identification can be boiled down to two theories: (1) Cibolo is prohibited from having a wastewater system either inside or outside of the area to be decertificated; and (2) Green Valley does

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standards licensed appraisers typically use for appraisals along with the TWC §13.255 compensation factors in place of USPAP where applicable.).

<sup>9</sup> TWC §13.255(l); 16 TAC §24.120(m). Mr. Korman relied on extensive information provided by Green Valley, as evidenced by the testimonies of Mr. Korman, Mr. Allen and Mr. Montgomery. 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>10</sup> Tr. at 26 (Klein Testimony).

<sup>11</sup> Tr. at 31 (Klein Testimony).

<sup>12</sup> Tr. at 216 (Stowe Testimony).

<sup>13</sup> *Id.*

<sup>14</sup> Commission Staff has offered no evidence in this proceeding.

not have a physical wastewater system and therefore has no property inside or outside of the proposed decertification area.

Cibolo's first argument (its "regionalization" theory) would require the ALJ to divine the outcome of pending litigation before the Texas Commission on Environmental Quality ("TCEQ") in which a hearing on the merits has been scheduled to take place in mid-September 2017.<sup>15</sup> Even were that not the case, the record evidence, discussed in detail below, demonstrates that Cibolo's own witnesses contradict its "regionalization" theory.

Cibolo's second argument would require the ALJ to read "infrastructure" into the statutory scheme. Regardless of how many times Cibolo utilizes the word in its testimony and briefing,<sup>16</sup> the term is nowhere to be found in TWC § 13.255. Reading such a word into the statutory scheme also flies in the face of the ALJs' determination that a broad reading of "property" is required to give meaning to the statute.<sup>17</sup>

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 supported its monetary investments in permitting, planning, and design activities through extensive testimony and documentary support as evidenced in the testimony of Mr. Allen, Mr. Montgomery, and Mr. Korman, as well as the Green Valley Appraisal Report and its

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<sup>15</sup> See *In re Green Valley Special Utility District*, TCEQ Docket No. 2016-1876-MWD, SOAH Docket No. 582-17-1850. The SOAH ALJ in that docket determined at a February 14, 2017 prehearing conference that the hearing on the merits would take place from September 12-14, 2017.

<sup>16</sup> E.g., Cibolo Initial Brief at 9; Ex. Cibolo-1 (Klein Direct) at 16, 23, 24, 25, 30; Ex. Cibolo-2 (Klein Rebuttal) at 21, 22; Ex. Cibolo-3 (Stowe Rebuttal) at 17, 28.

<sup>17</sup> SOAH Order No. 7 at 9.



addenda.<sup>18</sup> An allocable portion of these dollar investments will be stranded upon decertification.<sup>19</sup> Cibolo conceded at hearing that money is property,<sup>20</sup> that Green Valley made planning and design investments for its entire CCN area,<sup>21</sup> that it was prudent for Green Valley to do so,<sup>22</sup> and that such planning was *not* speculative,<sup>23</sup> but instead constitutes “good planning” in anticipation of future service requests.<sup>24</sup> Cibolo witness Stowe agreed that Green Valley “should go ahead and plan” to serve its CCN area without anticipation that Cibolo would seek to decertify the area.<sup>25</sup> That actually makes sense, given that Cibolo both agreed to and approved Green Valley’s sewer CCN boundary at the time it was obtained.<sup>26</sup>

In briefing, Cibolo elects to ignore this extensive record evidence, including *testimony of its own witnesses*, and continues to assert without any evidentiary or legal support that “money itself

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<sup>18</sup> Ex. GVSUD-B (Allen Direct) at 6-7, 10-17; Tr. at 154-155 (Allen Testimony); Ex. GVSUD-C (Montgomery Direct) at 6, 9-19; Exhibit GVSUD-A (Korman Direct) at 8 12-13, 15-16; 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).

<sup>19</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.”), 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>20</sup> Tr. at 233 (Stowe Testimony) (Q. Is money property? A. It can be, yes.).

<sup>21</sup> Tr. at 31-32 (Klein Testimony).

<sup>22</sup> Tr. at 33-34 (Klein Testimony).

<sup>23</sup> Tr. at 45 (Klein Testimony).

<sup>24</sup> Tr. at 55-56 (Klein Testimony).

<sup>25</sup> Tr. at 223 (Stowe Testimony).

<sup>26</sup> Tr. at 46-47 (Klein Testimony) (Q. Do you know whether City of Cibolo consented to the sewer CCN boundary Green Valley has today when Green Valley’s sewer CCN was first issued in 2005? A. Yes sir. Q. Did Cibolo oppose it? A. We had several meetings with the City—with Green Valley to modify their original application boundaries, yes, sir, and then we did *approve* the final boundary. Q. And that’s where it is today? A. Yes, sir.) (emphasis added).

is not property.”<sup>27</sup> That view was not shared by Cibolo’s witness at hearing.<sup>28</sup> Nor was that view shared by the ALJs in SOAH Order No. 7 when they determined that “‘property’ must be construed broadly enough to include items the statute lists as compensable...”<sup>29</sup> Among those compensable items is “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.”<sup>30</sup>

In its initial brief, Cibolo again launches into a lengthy rehashing of its “regionalization” theory in yet another attempt to convince the ALJ and Commission that its hypothesis precludes Green Valley from developing a wastewater system.<sup>31</sup> As with its theory that money is not property, Cibolo’s regionalization theory (in which it insists *ad nauseam* that only the Cibolo Creek Municipal Authority (“CCMA”) may provide wastewater treatment service in the regional area) was undermined by Cibolo’s own witness at hearing, who contended that *Cibolo* has the right and plans to provide retail sewer service in its certificated area.<sup>32</sup> Cibolo witness Klein also conceded at hearing that *Green Valley* could collect and transport wastewater inside the area to be decertificated.<sup>33</sup>

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<sup>27</sup> Cibolo Initial Brief at 9-10, 14-16.

<sup>28</sup> Tr. at 233 (Stowe Testimony).

<sup>29</sup> SOAH Order No. 7 at 9 (finding that “property” must include the items listed by the statute as compensable).

<sup>30</sup> TWC § 13.255(g) (emphasis added). The ALJs in Docket No. 45848 have recommended that the Commission take this broad approach to property identification. See *City of Celina’s Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, PUC Docket No. 45848, Proposal for Decision (Jan. 27, 2017) at 16.

<sup>31</sup> Cibolo Initial Brief at 9-10.

<sup>32</sup> Tr. at 39 (Klein Testimony).

<sup>33</sup> *Id.* at 39-40.

While Cibolo's brief misconstrues as "uncontroverted" the evidence regarding into which watershed Green Valley's proposed treatment plant would discharge,<sup>34</sup> the TCEQ will decide this issue sometime following the scheduled September 2017 hearing on the merits on that issue. Here, the only relevance of the pending TCEQ proceeding is to Green Valley's expenditures in that proceeding which have increased significantly as the result of Cibolo's opposition to a final TPDES permit in that case, the amounts of which are second hearing issues.

Cibolo's second argument consists of rehashing its conclusory argument that money is not property, as well as its corollary: that *only* infrastructure is property. In attempting to bolster this theory, Cibolo argues in briefing that Green Valley's list of invoices is inadequate or unreliable.<sup>35</sup> Green Valley acknowledges that one or more items on its list of invoices may have incorrectly included or miscoded when that list was submitted with its appraisal in June 2016, prior to the Commission-instituted phased hearing process. However, this issue is a red herring for purposes of this phase of the proceeding limited to identification, *not* quantification, of Green Valley property.<sup>36</sup> Green Valley was not required to provide a valuation of its property interests here, but only to establish those property interests exist.

Cibolo's initial brief devotes many pages to its incorrect position that Green Valley is claiming that its wastewater master plan, its TPDES permit application, and its real property are themselves the property interests for which Green Valley seeks compensation.<sup>37</sup> Cibolo's position

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<sup>34</sup> Cibolo Initial Brief at 10. Cibolo's characterization is directly controverted by the TCEQ Executive Director's thorough technical and legal analysis addressing and rejecting the position Cibolo asserts here. Ex. GVSUD-4 at 3-6.

<sup>35</sup> Cibolo Initial Brief at 10-12.

<sup>36</sup> Green Valley's invoice summary was admitted into evidence as part of Ex. GVSUD-1 and relied on by Green Valley's expert, Mr. Korman, in preparing the appraisal. Cibolo did not seek these invoices through discovery. An expert witness may properly rely on a summary of voluminous records. *Duncan v. Haney*, 634 S.W.2d 811, 812-813 (Tex. 1982).

<sup>37</sup> Cibolo Initial Brief at 12-13 (Master Plan); 14-15 (TPDES permit application); 15-17 (real property).

that Green Valley's property interests will not be rendered useless or valueless is *wholly dependent* on Cibolo's fictional assertions regarding Green Valley's property interests. The Agreed Stipulations submitted by the parties bely Cibolo's blatant mischaracterization of Green Valley's property interests.<sup>38</sup> To be clear, Green Valley identifies as property its dollar investments in each of those items and not those items themselves. This position is wholly consistent with the plain language of the statute, which requires compensation for, *inter alia*, "the amount of any expenditures for planning, design, or construction of service facilities...that are allocable to service in the area in question..."<sup>39</sup> Moreover, this position is wholly consistent with the concessions of Cibolo's witness at rehearing that Green Valley has an obligation to plan to serve its entire sewer CCN area,<sup>40</sup> which includes the area to be decertificated.

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

Green Valley did not initiate this proceeding and would not be here but for Cibolo's application for single certification. Green Valley had a reasonable expectation that it would be providing service to the decertificated area, particularly in light of Cibolo's participation in Green Valley's sewer CCN application process and its approval of the sewer CCN area boundary.<sup>41</sup> If Green Valley did not participate to protect its property interests, Cibolo would simply walk away with nearly 1,700 acres of high-growth service area without paying a penny. Accordingly, as

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<sup>38</sup> Agreed Stipulations (Feb. 9, 2017) at 2-3 (identifying Green Valley's property interests as: "*Dollars expended* by GVSUD for engineering and planning to implement GVSUD's 2006 Wastewater Master Plan allocable to the proposed decertification area; *Dollars expended* by GVSUD to obtain a Texas Pollutant Discharge Elimination System permit from the Texas Commission on Environmental Quality allocable to the proposed decertification area; *Dollars expended* by GVSUD to purchase an approximate 65 acre tract of land allocable to the proposed decertification area..") (emphasis added).

<sup>39</sup> TWC § 13.255(g).

<sup>40</sup> Tr. at 33-34 (Klein Testimony); Tr. at 223 (Stowe Testimony); *see also* TWC § 13.250(a).

<sup>41</sup> Tr. at 46-47 (Klein Testimony) (acknowledging that Cibolo approved the final Green Valley sewer CCN boundary).

Cibolo's witness acknowledged at hearing,<sup>42</sup> Green Valley undertook reasonable investments in legal and consulting expert representation to defend its property rights and receive just and adequate compensation, and these costs continue to escalate.<sup>43</sup> Thus, Cibolo's implication that Green Valley's legal and professional expenses were somehow a poor business decision<sup>44</sup> is specious, as they were *caused* by Cibolo's actions. Similarly, Green Valley's professional appraisal fees were both caused by Cibolo's actions and *required* by the Commission.<sup>45</sup>

These expended funds constitute intangible personal property that is compensable under TWC § 13.255(g).<sup>46</sup> In Docket No. 45848, the ALJs considered similar legal costs in the context of a TWC § 13.254 decertification, and recommended finding that legal fees and professional services are "property."<sup>47</sup> In so doing, the ALJs rejected the very positions argued by Cibolo and Staff here.<sup>48</sup> Similarly, here, Cibolo and Staff agree that money can be property.<sup>49</sup> Green Valley submits that the ALJs in Docket No. 45848 correctly found both that: (1) the retail public utility whose CCN area is

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<sup>42</sup> Tr. at 33-34 (Klein testimony).

<sup>43</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.

<sup>44</sup> Cibolo Initial Brief at 29-30.

<sup>45</sup> Commission ALJ Order No. 7 (June 22, 2016) at 1 (setting deadline to submit appraisals to the Commission).

<sup>46</sup> *See* Tr. at 109 (Korman Testimony) (testifying that legal fees can constitute a property interest).

<sup>47</sup> PUC Docket No. 45848, Proposal for Decision (Jan. 27, 2017) at 21.

<sup>48</sup> *Id.* at 22-25.

<sup>49</sup> Tr. at 233 (Stowe Testimony); Staff Statement of Position (Jan. 10, 2017) at 5-6 (implicitly acknowledging that money is property but that "spent money" is not).

to be decertified would not have spent the money but for the decertification;<sup>50</sup> and that (2) “spent money” does not somehow become non-property.<sup>51</sup>

Cibolo’s argument that, because decertification under TWC § 13.255 is mandatory, it was somehow unwise of Green Valley to incur legal expenses to defend its property interests,<sup>52</sup> is belied by the statute itself and the policy upon which the statute is grounded. Green Valley submits that the policy underlying the recommended treatment of legal expenses as “property” in Docket No. 45848 is even stronger in a TWC § 13.255 proceeding than in a TWC § 13.254 proceeding such as that faced by the ALJs in Docket No. 45848. Whereas decertification has already occurred in a TWC § 13.254 decertification, the decertification in a TWC § 13.255 proceeding will occur, if at all, only after both a finding of a proper application and payment of just and adequate compensation, neither of which has occurred here.<sup>53</sup> Such payment is dependent upon both the identification and evaluation of property to determine what compensation is sufficient to meet the statutory standards and constitutional requirements. Determination of these issues is the very purpose of the legal and professional fees expended in this proceeding and required by the decertification procedures that are part of the “new normal” for CCN holders. Cibolo’s reading of TWC § 13.255 decertifications as “mandatory” to bolster its position simply ignores prerequisites to complete TWC § 13.255 decertification, none of which has occurred here.

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<sup>50</sup> PUC Docket No. 45848, Proposal for Decision (Jan. 27, 2017) at 23.

<sup>51</sup> *Id.* at 24.

<sup>52</sup> Cibolo Initial Brief at 29-30.

<sup>53</sup> TWC § 13.255(c) (“The grant of single certification by the utility commission shall go into effect on the date the municipality or franchised utility, as the case may be, pays adequate and just compensation pursuant to court order, or pays adequate and just compensation pursuant to court order, or pays an amount into the registry of the court or to the retail public utility under Subsection (f).”)

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

Should Cibolo's application ultimately be granted, Green Valley will have lost the economic opportunity to recoup its expenditures in the decertificated area, while its costs to serve that area will simultaneously increase as the direct result of Cibolo's checkerboard approach to decertification.<sup>54</sup> The uncontroverted testimony is that Cibolo's approach will result in dual facilities and collection systems in the area that Cibolo has cherry-picked.<sup>55</sup> Thus, decertification will result in a loss of revenues and zero corresponding decrease in the investments required to serve the remaining area. Green Valley's sewer CCN obligates it to serve the remaining area.<sup>56</sup> That Cibolo is taking this "piecemeal" approach in a high-growth area only magnifies the negative economic impact to Green Valley.<sup>57</sup> These lost net revenues are a relevant intangible personal property interest and therefore compensable under the statute.<sup>58</sup>

Nor are these lost net revenues "lost profits" as Cibolo asserts in briefing.<sup>59</sup> The transcript reference cited by Cibolo to support its repeated characterization of Green Valley's property interest as "lost profits" does not support its characterization.<sup>60</sup> To the contrary, Mr. Korman's testimony on cross was that Green Valley seeks only lost net operating income necessary to offset its operating costs.<sup>61</sup> The costs for this item will increase in light of Cibolo's scattershot decertification approach,

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<sup>54</sup> Ex. GVSUD-C (Montgomery Direct) at 21; Ex. GVSUD-1 at GVSUD 100003.

<sup>55</sup> Ex. GVSUD-C (Montgomery Direct) at 21.

<sup>56</sup> Ex. GVSUD-B (Allen Direct) at 11-12, 16-17.

<sup>57</sup> Ex. GVSUD-A (Korman Direct) at 13; Tr. at 27 (Klein Testimony); Tr. at 109 (Korman Testimony).

<sup>58</sup> Ex. GVSUD-A (Korman Direct) at 13; Ex. GVSUD-1 at 100003.

<sup>59</sup> Cibolo Initial Brief at 17 (citing to Tr. at 89:19-90:3).

<sup>60</sup> *Id.*

<sup>61</sup> Tr. at 89:12-90:11 (Korman Testimony).

but Green Valley's conservative methodology results in recovery of only those operating costs.<sup>62</sup> The accuracy of the methodology is a second phase hearing issue, but the ALJs and Commission must recognize there will be a loss of some amount. That is a relevant lost property right for which compensation must be paid.

Cibolo's statutory construction argument to support its contention that net lost revenues are not property is equally unpersuasive.<sup>63</sup> The plain wording of the statute requires "*at a minimum*" that *each* of the nine factors be considered in determining that compensation is "just and adequate."<sup>64</sup> A reading of the statute that restricts compensation to net lost revenue from current wastewater customers would undermine the stated purpose of the analysis, which is to ensure just and adequate compensation. Such a restrictive reading would require the ALJs and Commission to disregard both the "at a minimum" and "other relevant factors" language of the statute. Rather than limiting or restricting the Commission, as Cibolo contends, a plain reading of these provisions directs that the Commission's approach must ensure that the retail public utility whose CCN area is partially decertified will be made whole. Such an inclusive approach is mandated by constitutional requirements.<sup>65</sup>

Moreover, such an approach is consistent with compensation for partial takings in eminent domain proceedings.<sup>66</sup> Green Valley witness Joshua Korman's expertise in eminent domain

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<sup>62</sup> Tr. at 173-177 (Montgomery Testimony); Ex. GVSUD-C (Montgomery Direct) at 20-21; Ex. GVSUD-A at 13 (Korman Direct); Ex. GVSUD-1 at GVSUD 100003-100004.

<sup>63</sup> Cibolo Initial Brief at 18-22.

<sup>64</sup> TWC § 13.255(g).

<sup>65</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>66</sup> The legal basis for such an approach is set forth in Green Valley Initial Brief at 22-25.



proceedings<sup>67</sup> is uncontroverted, and his testimony demonstrating the factual similarity between the eminent domain partial takings cases and the TWC § 13.255 decertification and compensation process support the approach that Mr. Korman applied in the Green Valley Appraisal.<sup>68</sup>

Finally, Cibolo's argument that no property interest exists because Green Valley has no current customers and no permits<sup>69</sup> is specious, given that Cibolo has gone to extreme lengths to obstruct Green Valley's efforts to implement a wastewater system, both through Cibolo's application in this proceeding and through its intervention and opposition to Green Valley's TPDES permit application at the TCEQ. Cibolo's actions have directly contributed to the absence of permits, infrastructure, and customers upon which its argument is based.

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

Cibolo elected not to take a position in briefing with regard to Green Valley's identification of increased future costs to customers. Green Valley reasserts its position in its Initial Brief, as specifically authorized by TWC § 13.255(g), that its increased costs to future customers is a compensable item that must be included "at a minimum" to "ensur[e] that the compensation to a retail public utility is just and adequate."<sup>70</sup> Green Valley is a political subdivision and has an obligation for the benefit of its constituents to keep its fees reasonable consistent with the

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<sup>67</sup> Ex. GVSUD-A (Korman Direct) at 1; Tr. at 70, 96, 99, 123 (Korman Testimony).

<sup>68</sup> Ex. GVSUD-A (Korman Direct) at 13-14.

<sup>69</sup> Cibolo Initial Brief at 23-26. Cibolo's restrictive reading is also undermined by the recent appraisal submitted by NewGen, Mr. Stowe's firm, in PUC Docket No. 45679, *Zipp Road utility Co., LLC's Notice of Intent to Provide Sewer Service to Area Decertified from Guadalupe-Blanco River Authority in Guadalupe County*. That appraisal, of which the ALJ took judicial notice at hearing (Ex. GVSUD-8), recommended compensation allocable to the decertified CCN area in which there was no physical infrastructure or current customer. The compensation was measured by an analysis of lost revenues from future customers. The NewGen appraisal further recommended compensation for attorney fees and expenses. Ex. GVSUD-8 at GVSUD 002920.

<sup>70</sup> TWC § 13.255(g) ("...any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification...").

Commission's obligation to ensure just and reasonable rates.<sup>71</sup> Green Valley took a reasonable approach to measuring this impact to the remaining parcels should Cibolo's piecemeal annexation and decertification approach be approved.<sup>72</sup> These increased costs are the direct result of Cibolo's questionable approach.

**C. LEGAL DEFINITION OF "PROPERTY" FOR THE PURPOSE OF IDENTIFICATION.**

Green Valley fully briefed the legal basis supporting its identification of property items for this phase of the proceeding.<sup>73</sup> The unequivocal purpose of the TWC § 13.255 compensation provisions is to ensure that decertification of a portion of a retail public utility's CCN does not occur without 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> Preventing a regulatory taking 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 decertificated retail public utilities whole.<sup>76</sup> Indeed, failure to apply a broad definition of

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<sup>71</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).

<sup>72</sup> Ex. GVSUD-C (Montgomery Direct) at 20-22. Cibolo witness Klein acknowledged on cross-examination by Staff that Cibolo has taken a "piecemeal" approach to decertification arising from its practice of annexing only certain selected tracts within its extraterritorial jurisdiction. Tr. at 47-48 (Klein Testimony).

<sup>73</sup> Green Valley Initial Brief at 17-22.

<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)).

<sup>76</sup> *State v. Public Util. Comm'n*, 883 S.W.2d 190, 199-200 (Tex. 1994).

property would not only prevent the Commission from fulfilling its duties under the statute, as recognized by the ALJs,<sup>77</sup> but would render the entire statute unconstitutional as applied.<sup>78</sup>

Cibolo continues to disregard its own witness's testimony<sup>79</sup> and unabashedly claim both that money is not property and that property consists merely of "infrastructure" located "within" the area sought to be decertified.<sup>80</sup> Because Cibolo has not met its burden of proof to support its legal theory, Green Valley's property identification must be accepted as the basis for valuation and compensation in the second phase hearing.<sup>81</sup>

Staff's theory that "spent money" is not property is unsupported by any record evidence.<sup>82</sup> The only legal authority referenced in Staff's briefing is *State v. Public Utility Commission*.<sup>83</sup> Nothing in that decision even addresses, much less supports, Staff's "spent money" theory. Moreover, the ALJs in Docket No. 45848 have recommended rejection of this theory, determining that "[r]egardless of whether service facilities were ever constructed for the Tract, [the CCN holder] invested money in related permit and CCN expenses. That money *did not suddenly transform into non-property once spent*."<sup>84</sup>

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<sup>77</sup> SOAH Order No. 7 at 9.

<sup>78</sup> TEX. CONST. Art. I, § 17; *Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980).

<sup>79</sup> Tr. at 233 (Stowe Testimony).

<sup>80</sup> Cibolo Initial Brief at 8, 14, 15.

<sup>81</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).

<sup>82</sup> Staff Initial Brief at 4-6.

<sup>83</sup> *State v. Public Util Comm'n*, 883 S.W.2d at 199-200.

<sup>84</sup> Docket No. 45848, Proposal for Decision (Feb. 7, 2017) at 18 (emphasis added). The ALJs in Docket No. 45848 deemed this "spent money" theory, in which "the property (money spent) enters a sort of property purgatory, transformed into non-property until some form a actual property (a physical facility) attaches-to and rescues it, at which point, the expended money once again becomes property," as "strained and narrow," requiring removal of statutory language

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

Green Valley has fully briefed the legal definition for “useless or valueless.”<sup>85</sup> 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. These terms that were incorporated into TWC § 13.255 were derived from takings jurisprudence which allows *part* of a property to be rendered useless or valueless and taken.<sup>86</sup> The common thread shared by eminent domain proceedings and proceedings under TWC § 13.255 is that “takings” give rise to constitutionally-guaranteed protections requiring that the deprivation of property interests be offset with just and adequate compensation. Giving effect to the purpose underlying TWC § 13.255 from a constitutional perspective is more important than a technical, narrow reading of the statute’s provisions in assessing the practical result of a partial CCN area decertification on 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 a reasonable means to address constitutional concerns.

**IV. CIBOLO AND STAFF’S CONTENTIONS REGARDING PROPERTY IDENTIFICATION AND “USELESS OR VALUELESS.”**

Green Valley has addressed above Cibolo and Staff’s contentions as to each of Green Valley’s identified property interests, including their continued insistence that “useless or valueless”

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altogether. *Id.* at 19.

<sup>85</sup> Green Valley Initial Brief at 22-25.

<sup>86</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).

requires a 100% taking without regard to the constitutional implications of such a position.<sup>87</sup> The Staff and Cibolo position requiring a complete taking as to each species of property item is unsupported by fact or law.<sup>88</sup> Their position fails to address Green Valley's expert testimony and established precedent supporting compensation for partial takings in analogous eminent domain proceedings and the fact that nearly all CCN decertifications are partial in nature.<sup>89</sup>

Green Valley reiterates that the Green Valley Appraisal Report and supporting testimony is the only competent evidence on the identification of property to be rendered useless and valueless offered by a qualified individual as required by TWC § 13.255(l).<sup>90</sup> In contrast, Cibolo relies on conclusory, unsubstantiated opinions.<sup>91</sup> 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>92</sup> Each dollar lost must be offset with compensation.

**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

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<sup>87</sup> Cibolo Initial Brief, *passim*; Staff Initial Brief at 7-8.

<sup>88</sup> City and Staff briefs cite to no legal authority requiring a complete taking as a prerequisite to compensation.

<sup>89</sup> In the context of TWC § 13.255, a city would have to annex the entirety of a CCN area for it not to be partial. This will be the exception and not the rule.

<sup>90</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>91</sup> *E.g.*, Ex. Cibolo-1 at 22 (Klein Direct) ("It is my opinion that there is no property of GVSUD that has been rendered useless or valueless by the Application."); Ex. Cibolo-3 (Stowe Rebuttal) at 17 (GVSUD's property interests "are not for wastewater infrastructure, much less wastewater infrastructure located in the GVSUD sewer CCN.").

<sup>92</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.").

decertification in this docket.<sup>93</sup> The Green Valley Appraisal Report does not identify any non-property items.<sup>94</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.<sup>1</sup>

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

Cibolo agrees with Green Valley that neither TWC §13.255 nor the Commission substantive rules address the date for property to be considered for compensation purposes. In the absence of direct authority on the issue, Cibolo seeks to fill the gap with the *extreme* and *illogical* position that the date that it notified Green Valley of its intent to decertify portions of Green Valley’s CCN area should be the operative date for property identification.<sup>95</sup>

Cibolo’s position is extreme and illogical for several reasons. First, on that date, Cibolo’s application was not filed and Cibolo’s hostile taking efforts might have been abandoned or modified. Second, Cibolo’s application has not been declared administratively complete. Cibolo’s position that decertification is mandatory and automatic ignores the fact that its application may be determined deficient on a number of grounds in the second phase hearing.<sup>96</sup>

As a practical matter, Cibolo’s proposal would require the utility whose CCN area is to be decertificated to make one of two choices: (2) halt all sewer investment for a sought area, in violation of its CCN-imposed obligation “to provide continuous and adequate ... utility service to that service

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<sup>93</sup> Ex. GVSUD-1.

<sup>94</sup> *Id.*; Tr. at 165-166 (Allen Testimony).

<sup>95</sup> Cibolo Initial Brief at 31-32.

<sup>96</sup> Supplemental Preliminary Order (July 20, 2016) at 3.

area;”<sup>97</sup> or (2) continue sewer investments consistent with its obligation and thereby create the risk for more stranded costs that, if left uncompensated, would violate state and federal constitutional requirements. Cibolo’s attempt to impose such a choice between two evils must be rejected.

Green Valley’s suggested approach that property identification be determined at the time evidence is admitted supporting such identification is consistent with the statutory framework. Texas Water Code 13.255(g) requires that real property valuation be determined according to the eminent domain standards set forth in the Texas Property Code Chapter 21. Green Valley’s proposal for the timing of property identification similarly adopts the general approach developed in Chapter 21 eminent domain and inverse condemnation proceedings outlined in the recent *Bragg* decision, which held that the assessment of damages occurs at the time of trial.<sup>98</sup> Green Valley’s suggestion here varies slightly from the approach outlined in *Bragg*, due to the Commission’s phased hearing approach. An alternative Commission approach that calls for the simultaneous identification and valuation of property would eliminate the potential for creating stranded costs that could arise from the time gap between identification and valuation phases. However, given the nature of the current phased hearing structure, Green Valley’s proposal represents a reasonable compromise that takes into account the Commission’s phased hearing requirement.

## VII. CONCLUSION

Green Valley respectfully requests that the Honorable Administrative Law Judge find and recommend 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

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<sup>97</sup> Ex. GVSUD-3 (Green Valley CCN No. 20973).

<sup>98</sup> *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 147 (Tex. App. –San Antonio, 2013)(pet. denied) (citing TEX. PROP. CODE § 21.042).

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,

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**CERTIFICATE OF SERVICE**

I hereby CERTIFY that on February 28, 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:

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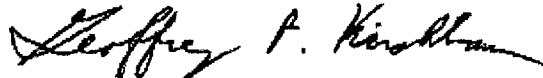
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