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PUC DOCKET NO. 45702

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

REPLY BRIEF OF CITY OF CIBOLO

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FEBRUARY 28, 2017

REPLY BRIEF OF CITY OF CIBOLO

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

REPLY BRIEF OF THE CITY OF CIBOLO

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The City of Cibolo (the "City") files this, its Reply Brief ("Reply") to the Initial Briefs of Green Valley Special Utility District ("GVSUD") and Public Utility Commission ("Commission") Staff regarding the City's application (the "Application") to decertify portions of GVSUD's sewer certificate of convenience and necessity ("CCN") within the corporate limits of the City (the "Decertified Area") under Texas Water Code ("TWC") § 13.255, in accordance with the Administrative Law Judge's ("ALJ") Order No. 9 in this matter. This Reply Brief is timely filed.

I. REPLY

In light of all of the evidence in the record in this matter, the City has clearly met its burden to establish that GVSUD has no property that will be rendered useless or valueless to GVSUD by the decertification under TWC § 13.255. In its Initial Brief, GVSUD attempts to challenge the wealth of evidence in the record provided by the City, contending that there is property of GVSUD rendered useless or valueless to GVSUD by the Application. However, such unpersuasive arguments do not contradict the City's credible evidence. Instead, GVSUD's Initial Brief asserts unsupportable, conclusory theories regarding what should be "property" and

what should be "useless or valueless" in an effort to shoehorn its far-fetched and unsupported property interests, alleged by its suspect witnesses, into Referred Issue No. 9[1] in this TWC § 13.255 matter. Further, the City supports the Initial Brief of Commission Staff.

A. GVSUD failed to provide a definition of the term "property" and its interpretation of the term "property" is contrary to the plain and legal meaning of the term for purposes of TWC § 13.255.

While it is uncontroverted that the term "property" is undefined under TWC § 13.255, GVSUD's Initial Brief does not offer a definition of that term and its general interpretation of that term ignores the rules of statutory construction. Such omission is not surprising, however, as without having any (i) wastewater infrastructure, (ii) wastewater customers, (iii) wastewater rates, (iv) wastewater impact fees, (v) up-to-date, detailed wastewater plans and specifications, or (vi) (perhaps most importantly) a Texas Pollutant Discharge Elimination System ("TPDES") permit from the Texas Commission on Environmental Quality ("TCEQ") to collect, treat, and discharge domestic wastewater, GVSUD has no choice but to propose an unsupportable interpretation of the term "property" in an attempt to shoehorn in far-fetched or non-existent items as "property" in this matter.

1. GVSUD fails to provide a proposed definition for the term "property".

While over five pages of GVSUD's Initial Brief was purportedly dedicated to the "Legal Definition of 'Property' for the Purpose of Identification", not once does GVSUD ever actually assert a definition of the term "property" or explain exactly what, in GVSUD's mind, the term "property" means.[2] GVSUD does not even provide a dictionary definition of "property." Rather, GVSUD relies almost exclusively on the notion that "property" must be broadly applied and

[1] Referred Issue No. 9 is established in the Commission's July 20, 2016 Supplemental Preliminary Order and the ALJ's Order No. 2 in this matter, as modified by the ALJ's December 9, 2016, Order No. 7.

[2] GVSUD Initial Brief, at 17-22.

includes intangibles.[3] Contrary to GVSUD's assertion in its Initial Brief, the City's position has never been to narrow the scope of what could be considered "property",[4] but rather to apply it according to its plain meaning consistent with relevant statutes.

In the case upon which GVSUD exclusively relies in asserting its overly broad interpretation of what constitutes "property," the court does not entertain the notion of including within the realm of "property" frivolous items that are incongruous with the plain language of the statute at issue in that case.[5] The court did not opine that a broad application of "property" necessitates the inclusion of any and all items that could be considered property in any and all contexts, which is what GVSUD continues to insist upon.[6] Rather, the court broadly considered all items that could be property within the context and confines of the operative statute.[7] As discussed in more detail in Section I.A.2., below, without a definition of "property" in TWC § 13.255, Texas law requires that the plain and ordinary meaning of the word must be considered. In any event, the court in GVSUD's cited case still required there to actually be property.[8]

Instead of considering the plain and ordinary meaning for the term "property" or providing a reasoned explanation for its view of what constitutes "property," GVSUD only repeatedly makes the statement that a broad view is required and lists reasons (all of which are not from TWC Chapter 13 as stated in GVSUD's Initial Brief) that allegedly bolster GVSUD's non-existent definition of "property."[9] Such reasons are neither determinative nor persuasive to

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[3] GVSUD Initial Brief, at 17.

[4] *Id.*, at 22.

[5] *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 199-200 (Tex. 1994).

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] GVSUD Initial Brief, at 17-19.

acknowledge GVSUD's alleged "property" interests in this matter, and are flawed for at least the following reasons:

- **The definition of "facilities" in TWC § 13.002(9) does not define "property."** Instead, this definition merely states the various items that may be considered a facility, which includes the certain types of property listed therein that relate to physical equipment. It is circular and unhelpful to argue that the definition of "facilities" helps define the scope of "property" when "property" is a term used in that definition. Moreover, although facilities includes "all tangible and intangible real and personal property without limitation," as emphasized by GVSUD, GVSUD tellingly de-emphasizes the fact that the definition itself limits the facilities to the property related to the ownership, operation, licensing, furnishing, etc. of the physical plant and equipment. Thus, the definition of "facilities" supports the City's consistent position of broadly applying "property" within the context of relevant statute.

- **GVSUD's citations to the legislative record are legally unreliable and unpersuasive in this matter.** The Texas Supreme Court has consistently held that "[s]tatements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted a statute" and thus cannot be used to demonstrate legislative intent.[10] Also, GVSUD's conclusion about Rep. Hinojosa's statement is incompatible with the statement itself.[11] GVSUD provides one isolated quote from the entirety of the hearings on TWC § 13.255 and concludes that because that one statement uses the phrase "any property", that no limitation on "property" was contemplated by the legislature.[12] To the contrary, Rep. Hinojosa's statement is consistent with TWC § 13.255: that a utility should be compensated for any property that it may lose by decertification. To the extent this text is considered in this proceeding, it is important to note that the Representative recognized that property, however defined, must first exist in order for a utility to receive compensation.

- **Mr. Blackhurst's testimony regarding the legislative history and implementation of TWC § 13.255 remains uncontested because it supports the City's definition of "property".**[13] As explained in the City's Initial Brief, some TWC § 13.255 compensation factors do identify property, but a reference in TWC § 13.255(g) does not itself make that referenced item a property interest.[14] There must be some other basis in law for an item to be property. Though instructive in some regards, TWC § 13.255 does not define "property" and does not support GVSUD's irreconcilably

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[10] *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011) (citing *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993)).

[11] GVSUD Initial Brief, at 19.

[12] *Id.*

[13] Cibolo Initial Brief, at 22.

[14] *See* TWC § 13.255; *e.g.*, Cibolo Initial Brief, at 27.

broad application of "property". Rather, it provides the context within which "property" will be identified for purposes of this proceeding.

- **The definition of "service" in TWC § 13.002(21) has absolutely nothing to do with property identification or a broad application of "property."**[15] Such definition is about what constitutes a service that GVSUD would provide to its customers, if it had any.[16] GVSUD again completely misconstrues this definition and baselessly asserts that this definition somehow stands for the proposition that intangible assets may be used to provide service.[17] Nothing in that definition even suggests whether and how intangible assets can be used to provide service. To the contrary, references to "anything furnished or supplied" and "facilities or lines committed", on its face, really refers to tangible assets and actual infrastructure.

- **Neither a CCN nor a governmental permit is property.** As discussed in Cibolo's Initial Brief,[18] just because a CCN or permit may be sold does somehow render them property for purposes of § 13.255 and certainly does not speak to the broadness of the application of "property." That the sale of a CCN does not require any physical assets is irrelevant; the buyer is purchasing the obligation to serve an area when it purchases a CCN. Similarly, the purchase of a permit is buying some legal authorization. But again, a CCN and permits are not property for the purposes of TWC § 13.255.

- **The USPAP has no substantive application in this proceeding.**[19] First, USPAP is only relevant to property valuation; it does not provide any standards whatsoever for identifying what constitutes property, much less what constitutes property rendered useless and valueless in a TWC § 13.255 proceeding.[20] But even if it did, as Mr. Korman admits[21] and Mr. Stowe emphasizes,[22] an exception to the USPAP standards is applicable in this case. Therefore, USPAP is not relevant here for any purpose, particularly providing any instruction on what constitutes property.

In addition to failing to explain how legal principles shaped GVSUD's definition of property, citations in GVSUD's own Initial Brief negate GVSUD's assertions of what constitutes property. First, GVSUD cites to a portion of the Texas Supreme Court case holding that property

[15] *See* TWC § 13.002(21) (defining the term "service").

[16] *Id.*

[17] GVSUD Initial Brief, at 20.

[18] Cibolo Initial Brief, at 25-26.

[19] GVSUD Initial Brief, at 20.

[20] Tr. at 118:2-11 (Korman Cross) (January 17, 2017).

[21] Direct Testimony of Joshua Korman, GVSUD Ex. A, at 10:6-11.

[22] Tr. at 116:21-117:3, 118:2-11 (Korman Re-Cross); Tr. at 219:22-220:3 (Stowe Cross).

must be broadly defined; however, that excerpt discusses how the principles of statutory construction require the plain meaning of a phrase to be applied, and property is "commonly used to denote everything to which is the subject of ownership . . . ."[23] Yet, as discussed in Section I.A.2., herein, GVSUD urges an interpretation of "property" that includes items that are no longer subject to GVSUD's ownership or that never were subject to GVSUD's ownership.

Next, GVSUD's takings discussion under the Texas Property Code amounts to a distraction to conceal that GVSUD cannot provide any on-point legal basis for its desired definition of "property." Such discussion wholly fails to acknowledge and reconcile that there must first be property to take. In essence, GVSUD would have the City compensate GVSUD for things that do not currently and may not ever exist (*e.g.*, revenues from future customers) and for things that GVSUD no longer owns (*e.g.*, money). Because GVSUD cannot define "property", much less explain how it has anything within that meaning, the takings should be disregarded.

2. The plain and ordinary meaning of "property" precludes GVSUD's stipulated property interests.[24]

In applying (i) the Texas Code Construction Act, Tex. Gov't Code, Chapter 311, (ii) common law principles of statutory construction, and (iii) the ALJ's stated methodology for determining "property" in Order No. 7, the plain and ordinary meaning of the term "property" controls in this proceeding. To this end, the dictionary definition of "property" means "something owned or possessed", "the exclusive right to possess, enjoy, and dispose of a thing", "something to which a person or business has legal title."[25] In a legal context, "property" is further refined as "any external thing over which the rights of possession, use, and enjoyment are

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[23] GVSUD Initial Brief, at 18 (citing *State v. Pub. Util. Comm'n*, 883 S.W.2d at 199-200).

[24] Agreed Stipulations (Feb. 9, 2017).

[25] MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003).

exercised" and reflects "one's exclusive right of ownership of a thing."[26] Thus, fundamental to these definitions are that the owner presently has control over the interest claimed as property.[27]

(a) GVSUD's "Dollars Spent" notion defies the plain and ordinary meaning of the word "property"

GVSUD's "dollars spent" notion to allege planning, engineering, land, and attorney's and professional fees is inconsistent with the plain meaning of the word "property", even when that term is broadly construed.[28] By the precise words used to describe the status of this money–*money spent*–GVSUD implicitly admits that it is no longer under the possession or control of the money. Said another way, GVSUD has released its rights of ownership in that money. As Commission Staff succinctly noted, "[s]pent money has no inherent value. A person cannot transfer or acquire spent money."[29] The very control that makes something property is entirely lacking.[30] An "investment", on the other hand, is "an *expenditure to acquire property* or asserts to produce revenue; a capital outlay."[31] That is why it is imperative to look at the thing for which money was allegedly expended. Mr. Stowe's testimony, continuously misconstrued by GVSUD, accurately notes that money can be- *not is*- property.[32] But when that money is spent on actual property, the ownership is not in the money spent to acquire that item, but rather it is transferred

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[26] BLACK'S LAW DICTIONARY (10th ed. 2014).

[27] *See id.* (explaining that for something to be property, the owner must possess the inherent rights of ownership, which provide the holder of those rights the exclusive control over the property)

[28] GVSUD Initial Brief, at 10-13.

[29] Staff Initial Brief, at 5.

[30] *See State v. Pub. Util. Comm'n.* 883 S.W.2d at 200 (citing BLACK'S LAW DICTIONARY 1216 (6th ed. 1991) (explaining that "property" is anything that is the subject of ownership, which provides the owner the exclusive right to possess, use, enjoy, and dispose of the property).

[31] BLACK'S LAW DICTIONARY (10th ed. 2014).

[32] Tr. at 233:9-10 (Stowe Cross).

to the item itself. GVSUD's argument that money spent and no longer in its possession is property, is ludicrous and should be rejected.[33]

(b) GVSUD's "Economic Opportunity" argument does not constitute "property" under the plain and ordinary meaning of the word "property".

Likewise, under the plain and ordinary meaning of "property" and in reading TWC § 13.255(g) in its plain and ordinary meaning,[34] GVSUD also does not have any intangible economic opportunity property interest in this matter. To be clear, the City need not address whether intangible property interests are property for purposes of TWC § 13.255; rather, the City only contends that if intangible property interests are "property," then GVSUD has failed to demonstrate that it owns any actual intangible property interest in this case. Mr. Stowe testified that an economic opportunity interest is one that arises from the ownership or possession of another vested property interest, and, consistent with the plain meaning of "property", requires the ownership of and ability to use that vested interest in order for it to have any value.[35] Moreover, as explained at length in Cibolo's Initial Brief, the plain language of TWC § 13.255(g), Factors 6 and 9, prohibit the type of economic opportunity interest GVSUD asserts.[36] This explanation has not been refuted in the record or in GVSUD's Initial Brief. Rather, GVSUD merely asserts without legal substantiation that this alleged property interest should be treated like a takings and tries to justify its calculation by unqualified witnesses for lost profits from non-existent future customers that way.[37] GVSUD thus completely ignores the statute that

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[33] GVSUD Initial Brief, at 10.

[34] Cibolo Initial Brief, at 17-26.

[35] Rebuttal Testimony of Jack Stowe, Cibolo Ex. 3, at 18:12-18.

[36] Cibolo Initial Brief, at 17-22.

[37] GVSUD Initial Brief, at 14.

GVSUD insists that the ALJ use in determining what property it has that will be rendered useless and valueless.

B. GVSUD's Initial Brief still fails to identify property that is rendered useless or valueless to GVSUD by the decertification.

1. GVSUD avoids applying the plain and ordinary meaning of the terms "useless" and "valueless" to its alleged property interests.

Whether GVSUD property, to the extent it has any, is rendered useless or valueless to GVSUD by decertification is a crucial component of the first phase of this proceeding. This is understandable, as even if there is property, if it is not rendered useless or valueless to GVSUD by the decertification, then compensation is obviously unnecessary. In its Initial Brief, GVSUD recites the common usage of the phrases "useless" and "valueless".[38] Remarkably, however, GVSUD then asks that those plain meanings be set aside for a creative and unfounded interpretation based in takings jurisprudence.[39] Not only does such a position wholly rebuke the Code Construction Act, but it is even contradictory to the caselaw precedent cited in GVSUD's brief regarding using the plain ordinary meaning of words, discussed above at Section I.A.1, above.[40] The basic principles of statutory construction and the common meaning of the phrases "useless" and "valueless" cannot be ignored. Moreover, the cases GVSUD cites for its position that TWC § 13.255 should be treated as a takings claim do not relate to TWC § 13.255 at all; they are purely about takings and eminent domain in insolation.[41]

Just as before, GVSUD disingenuously attempts to distract from well-established principles of statutory construction–*i.e.*, reading a statute in its plain meaning–by referencing takings jurisprudence because the legally supported application of these phrases is contrary to

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[38] *Id.* at 23.

[39] *Id.*

[40] Tex. Gov't Code, Ch. 311; *State v. Pub. Util. Comm'n*, 883 S.W.2d at 199.

[41] GVSUD Initial Brief, at 23.

GVSUD's interests. And again, rather than provide a reasoned approach, GVSUD puts forth an absurd argument wrapped in a takings threat with the hope that no party or arbiter in this proceeding will notice. GVSUD admits as much (without legal substantiation): "In sum, the application of these terms from a constitutional perspective is more important than their plain meaning for assessing what will actually happen in a CCN decertification."[42] This statement glaringly contradicts another principle in the Code Construction Act: that it is presumed that a statute is in compliance with the constitutions of this state and the U.S. and the statute is just and reasonable.[43] GVSUD has not overcome that presumption. A plain reading is warranted and prevents an interpretation that would authorize unjust and unreasonable compensation for something from which GVSUD can still derive use or value. A plain reading, therefore, ensures a just and reasonable result, which is supported by the very jurisprudence GVSUD cites.

2. GVSUD still fails to explain how its alleged property is rendered useless or valueless by the decertification.

Regardless of whether GVSUD's methodology that an allocable portion of its property interests is rendered useless or valueless by the decertification, the record is void of any evidence or explanation of *how* any property is rendered useless or valueless by that allocable portion. This is also evident from GVSUD's Initial Brief, which is also silent. Rather than using legally-founded arguments, GVSUD just appears to be "splitting the baby" on how GVSUD could be compensated without a legal basis, which is simply not how legal determinations are made.

Aside from the fact that after stipulating to the property that *GVSUD* claims will be rendered useless and valueless by decertification, GVSUD's Initial Brief amazingly adds an additional "property interest," GVSUD's Initial Brief still wholly fails to focus on *how* any of its

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[42] *Id.* at 25.

[43] Tex. Gov't Code § 311.021.

claimed "property" will be rendered useless or valueless to GVSUD by the decertification. Rather, GVSUD provides an argument regarding the appraisers, which is contrary to existing precedent at the Commission and off the table in this hearing under the ALJ's Order No. 5 at page 4. The City reasserts its many reasons as to how (and why) no GVSUD property is rendered useless or valueless from the City's Initial Brief into this Reply.

Aside from the fact that spent money is not property under TWC § 13.255, to the extent that GVSUD allegedly spent money on planning and engineering activities, including in the TPDES permit process, to serve its sewer CCN area, the record is clear that those alleged activities have been at high level of planning and are not specific to the Decertified Area. Plus, the record is uncontroverted that when more detailed planning and engineering services are needed for a specific subdivision, GVSUD requires the non-standard service requestor to pay for such study.[44] Again, the City asserts its arguments in Initial Brief Section V.A.1-3. in this Reply.

Further, GVSUD's evidence on this issue in the record is unreliable, such evidence comes from the testimony of GVSUD's impeached and unknowledgeable witnesses, Mr. Montgomery and Mr. Allen—witnesses that Mr. Korman generally relied upon.[45] For example, Mr. Montgomery's direct testimony indicates that the process to develop a wastewater system was to complete the following actions in the following order: (1) obtain a CCN;[46] (2) develop a wastewater master plan;[47] (3) determine a location to construct a wastewater treatment plant;[48] (4) apply for a TPDES permit from TCEQ;[49] and then (5) secure easements for a collection

[44] Tr. at 145:3-13 (Allen Cross).

[45] Tr. at 71:5-16 and 76:21-77:1 (Korman Cross).

[46] Direct Testimony of Pat Allen, GVSUD Ex. B, at 10:4-10.

[47] *Id.* at 10:9-12.

[48] *Id.* at 12:4-9.

[49] *Id.* at 12:20-13:7.

system, prepare detailed site plans and continue exploring financing options, develop detailed system and treatment plant designs, and other steps based on the specific plans, including obtaining construction permits.[50] But Mr. Montgomery, on cross-examination, contradicted his prefiled, direct testimony several times, as follows:

- Obtaining a CCN is not always, or even usually, the first step in planning;[51]
- Mr. Montgomery claimed having a CCN is a necessary step; but special utility districts do not need CCNs to provide retail service,[52] a fact which supposed expert Mr. Montgomery was not sure about;[53]
- Mr. Montgomery is not familiar with the CCN process GVSUD would have gone through at the time it received its sewer CCN,[54] and even though he claims to be an expert in the types of authorizations necessary to provide retail service to an area,[55] Mr. Montgomery has only been "involved with" two CCN applications at the PUC;[56]
- Some level of master planning is required before an entity can obtain a CCN;[57]
- Retail sewer service does not require an entity to construct a wastewater treatment facility[58] or obtain a TPDES permit, and constructing a treatment facility is often an option of last resort;[59] and
- Mr. Montgomery admitted to making two conflicting statements under oath.[60]

The assertion that Mr. Montgomery and Mr. Allen provided relevant documents that substantiate GVSUD's claims is likewise easily challenged by the record, including evidence and testimony of GVSUD's own witnesses:

- The Decertified Area is within the service area of the regional provider CCMA,[61] which is a possible wholesale service provider to at least part of GVSUD's CCN

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[50] *Id.* at 14:8-15.

[51] Tr. at 177:9-178:6; 179:1-18; and 180:14-181:2 (Montgomery Cross).

[52] TWC § 13.242(a) (West 2017).

[53] Tr. at 185:18-186:3 (Montgomery Cross).

[54] *Id.* at 183:22-24; 184:9-14; 184:20-22.

[55] Tr. at 176:22-25 (Montgomery Cross).

[56] *Id.* at 184:7-19.

[57] *Id.* at 180:14-181:2.

[58] Rebuttal Testimony of Rudolph "Rudy" F. Klein, IV, P.E., Cibolo Ex. 2 at 27:7-10.

[59] *Id.* at 27:11.

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

[61] Tr. at 163:19-164:1 (Allen Cross).

area[62]; in fact, GVSUD supported the process of a portion of its CCN area being annexed by the regional wholesale provider.[63]

- Mr. Montgomery admitted to not providing full documentation for GVSUD's TPDES permit application to Mr. Korman, then provided conflicting testimony about the incomplete document[64]; the missing portion of the TPDES permit application contained relevant regionalization information;[65]
- Mr. Montgomery provided feasibility studies that were not relevant to the decertified area,[66] were likely paid for by service requestors,[67] and were not included in GVSUD's alleged "investments" in planning;[68]
- Mr. Montgomery provided a Water Master Plan, which is not relevant to sewer service;[69]
- Mr. Montgomery or Mr. Allen provided a list of invoices and but did not provide documentation to substantiate whether the work claimed by those invoices was relevant to the area to be decertified or even relevant to implementing its Wastewater Master Plan;[70] and
- Mr. Allen included documentation about GVSUD's water revenue bonds, even though they are not related to the provision of wastewater service, and GVSUD had a letter from the United States Department of Agriculture indicating as much.[71]

Further, GVSUD's witness, Mr. Korman, is presented as an expert witness in identifying property rendered useless or valueless by decertification based on his expertise in condemnation proceedings, which GVSUD likens to the TWC § 13.255 process. Plainly, Mr. Korman is a real estate appraiser inexperienced in identifying utility property rendered useless and valueless by decertification,[72] or for that matter, property taken in condemnation.[73] He knows little about

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[62] *Id.* at 162:11-164:1.

[63] *Id.* at 163:19-164:1.

[64] Tr. at 187:16-189:18; 190:6-12 (Montgomery Cross); 191:9-21 (Montgomery Redirect); 192:9-193:10 (Montgomery Recross).

[65] Tr. at 189:1-18 (Montgomery Cross).

[66] Cibolo Ex. 2 at 24:1-22; Tr. at 104:11-105:6 (Korman Cross).

[67] Cibolo Ex. 2 at 23:5-14; Tr. at 141:14-144:17; and 145:21-146:25 (Allen Cross).

[68] Tr. at 104:11-106:6 (Korman Cross).

[69] Cibolo Ex. 2, at 13:8-18 and at 14:4-10.

[70] Tr. at 76:21-77:1 and 77:13-81:7 (Korman Cross).

[71] Cibolo Ex. 3, at 26:15-29:5, Ex. E.

[72] Tr. at 95:15-20 (Korman Cross); Ex. GVSUD-1 at GVSUD 100009

[73] Tr. at 97:9-98:21 (Korman Cross).

utilities other than what he has learned from GVSUD's other unreliable witnesses. He claims to have identified property that will be rendered useless or valueless in this proceeding, but in almost every instance, he has clearly relied on GVSUD or Mr. Montgomery to identify what they think GVSUD should be compensated for.[74] While GVSUD's Initial Brief goes so far as to claim Mr. Korman has "significant experience with impact fees."[75] the reality is, he only testified about general familiarity with impact fees.[76] There is nothing in the record to suggest Mr. Korman understands how an impact fee is calculated or imposed, which is evidenced by his reliance on Mr. Montgomery for the portion of his appraisal dealing with impact fees.[77] Lastly, GVSUD, through Mr. Korman, continues to claim the applicability of USPAP even though those portions of his testimony discussing USPAP were found by the ALJs to be irrelevant, and he even admits to not applying USPAP.[78]

GVSUD also devotes portions of its Initial Brief to misconstruing the City's testimony. For example, GVSUD asserts that all of GVSUD's "investments in planning and design for the entire wastewater CCN area...constitute intangible property assets of belonging to Green Valley, a portion of which will be stranded upon decertification."[79] GVSUD cites to a portion of Mr. Klein's testimony to support this leap in logic. In reality that portion of Mr. Klein's cited testimony directly contradicts GVSUD's assertion:

> Q If Green Valley loses the right to serve the decertification areas, won't some amount of money spent on all those items be rendered useless or valueless?
> A Not in my opinion, no, sir.
> . . .

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[74] Tr. at 73:5-6; 79:2-4; 79:12-19; 80:23-25 (Korman Cross); Ex. GVSUD-1 at 100014-15.

[75] GVSUD Initial Brief, at 15.

[76] Tr. at 70:6-23 (Korman Cross).

[77] Ex. GVSUD-1, at 100014-15.

[78] GVSUD Ex. A, at 11:1-9.

[79] GVSUD Initial Brief, at 11.

Q If your opinion, can portions of property be rendered useless or valueless on an allocated or incremental basis?
A No, sir.
Q Green Valley won't be able to serve these areas anymore. Correct?
A That's correct.[80]

Likewise, GVSUD actively misconstrues other portions of Mr. Klein's and Mr. Stowe's testimony. In the first paragraph of page 12 of its Initial Brief, GVSUD cites portions of Mr. Klein' testimony as contradicting a supposed assertion by the City that planning by a CCN holder to serve its CCN is speculative. In fact, neither Mr. Klein nor Mr. Stowe assert that a CCN holder should not plan to serve. Rather, the cited testimony says that (1) the planning GVSUD has done to date is itself speculative; for example, it is not clear that a wastewater treatment plant is needed; or (2) it is speculative to include certain items as rendered useless or valueless (*e.g.*, the 65-acre tract cannot be assumed to be rendered useless or valueless because it is not certain that the land can be used for its intended purpose until GVSUD holds a TPDES permit).

Ultimately, GVSUD is pinning its arguments on misrepresentations of the testimony of the City's witnesses and the documents and testimony of GVSUD's unreliable, inexperienced, and untrustworthy witnesses.

C. An increased cost to GVSUD customers as a result of decertification is not property rendered useless or valueless to GVSUD because GVSUD has no wastewater customers.

Despite not claiming it in the Agreed Stipulations as property that will be rendered useless or valueless by decertification, GVSUD's Initial Brief surprisingly and incorrectly asserts that an increased cost to future GVSUD wastewater customers is an alleged lost economic opportunity property interest under Factor 5 of TWC § 13.255(g) and is property rendered

[80] Tr. at 35:1-19 (Klein Cross).

useless and valueless.[81] GVSUD's allegation that future wastewater customers must pay an additional impact fee amount of $20.00 per equivalent dwelling unit ("EDU") with the removal of the Decertified Area, despite having no wastewater customers in that area now,[82] is not a lost economic opportunity property interest as it is not included in the applicable statute.[83] TWC § 13.255(g) 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 5] any . . . increase of cost *to consumers* of the retail public utility *remaining after the single certification*.[84]

The Texas Legislature specifically limited whose increased costs may be considered for purposes of the TWC § 13.255(g) compensation factors: *customers remaining after decertification*.[85] Thus, the plain language of the statute clearly and unambiguously indicates the Legislature's intent, and such intent must be applied in this proceeding.[86]

In this case, for Factor 5 to apply, GVSUD must (1) currently have wastewater customers, and (2) at least some of those customers must still be GVSUD customers after decertification by the City.[87] Only then can an evaluation of the costs associated with those customers be evaluated for impacts of decertification.[88] GVSUD, however, fails at the first step

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[81] Agreed Stipulations (Feb. 9, 2017); GVSUD Initial Brief, at 9, 15-17; *see also* GVSUD-1 at GVSUD 100005; TWC 13.255(g).

[82] GVSUD-1, at GVSUD 100005.

[83] The same principles regarding lost net revenues from future customers, contained in Cibolo Initial Brief at 17-26, apply here.

[84] TWC § 13.255(g) (emphasis added).

[85] *Id.*

[86] Tex. Gov't Code § 311.011; *Tex. Dep't of Protective & Reg. Svcs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176-77 (Tex. 2004).

[87] *See* TWC § 13.255(g).

[88] *Id.*

because GVSUD has no wastewater customers.[89] Therefore, it is impossible for any customers to remain after decertification. Plus, as Mr. Allen testified, GVSUD has not adopted sewer rates or a sewer impact fee.[90] Unless and until that happens, there are no increased costs for GVSUD customers, even if they had wastewater customers. This allegation under TWC § 13.255(g) certainly cannot be a viable property interest.

D. The threat of checkerboarding as a result of decertification by the City is nonexistent.

The City's decertification of portions of GVSUD's sewer CCN will not result in "checkerboarding" of GVSUD's service, and such a claim is contrary to TWC § 13.255.[91] First, checkerboarding only occurs if there is infrastructure already in place and there is no flexibility to expand the system to efficiently serve customers. Here, however, GVSUD has no infrastructure, has no specific plans for such infrastructure, and does not even have customers in the Decertified Area.[92] Therefore, at this point, GVSUD has 100% flexibility to efficiently design its system to avoid checkerboarding altogether and as a practical matter should take efforts to mitigate the adverse impacts it alleges will result.

Additionally, and more importantly, the legislature has granted the Commission with the authority to decertify more land than was requested by the City in the Application to avoid any such perceived checkerboarding.[93] In other words, the Commission can require that the City take on certain areas that were not specifically requested by the City because it is more practical for

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[89] Tr. at 154:25-157:19 (Allen Cross). *See also* GVSUD-1 at GVSUD 100005 (admitting that the GVSUD Appraisal bases its evaluation of increased costs to future, currently nonexistent customers based on projections in the now outdated 2006 Wastewater Master Plan, not on actual customers).

[90] Tr. at 139:14-25 (Allen Cross).

[91] GVSUD Initial Brief at 16.

[92] Direct Testimony of Rudolph "Rudy" F. Klein, IV, P.E., Cibolo Ex. 1, Ex. G at 558 (Response to Cibolo Request RFI 1-4, RFAs 1-2, 1-4, 1-10, 2-4, 2-5, 2-6, 2-7, 2-8, and 2-9); Tr. at 140:1-19; 164:22-165:2; 169:17-170:4 (Allen Cross-Examination); Tr. at 179: 12-14 (Montgomery Cross).

[93] TWC § 13.255(c).

the City to serve than for GVSUD to suffer this alleged checkerboarding.[94] The City is not opposed to the Commission's exercise of such authority if the Commission determines that it is in the best interest for the City to take on more property.

E. A finding that there is no property of GVSUD rendered useless or valueless to GVSUD by the decertification is a fair result.

Contrary to GVSUD's contention, fairness necessitates the finding that no property of GVSUD is rendered useless or valueless to GVSUD by the decertification. The City has presented a wealth of detailed testimony and exhibits supporting this claim in light of TWC § 13.255, the applicable law, and GVSUD has failed to explain how any of its alleged property is rendered useless or valueless. It would be unfair to the City if GVSUD, an entity that is subject to CCN decertification by the City under Texas law, was to prevail without providing evidence into the record to substantiate its claims.

As your Honor stated during the hearing on the merits, "The question is what does the law provide."[95] Because GVSUD has nothing, it gets nothing. To require the City to give GVSUD money for something that it has not lost or, in some instances, ever even owned, would not only be contrary to the very purpose of TWC § 13.255, but also would be unfair to the City.

F. The date for identification of property rendered useless and valueless is the date of the notice of intent to provide service by the municipality.

Unlike GVSUD, the City's position on the date for identification of property relevant in this proceeding is based specifically in the operative statute and corresponding regulations at issue here: TWC § 13.255(b) and 16 TAC § 24.120(b). Thereunder, the City was required to notify GVSUD of its intent to provide service in the portions of its annexed area within GVSUD's sewer CCN boundaries, which triggers the 180-negotiating period, upon the

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[94] *Id.*

[95] Tr. at 211:25-212:2 (Klein Rebuttal Cross).

conclusion of which the Commission **shall** grant single certification to the City.[96] Thus, on the date the notice of intent was provided, GVSUD is informed of what CCN area and corresponding property (if any) would be decertified pursuant to the mandate in TWC § 13.255(c). To consider any later date would allow GVSUD to continue to acquire property that would ultimately be rendered useless or valueless by the decertification that is certain to occur. Additionally, from a policy perspective, one problem arising from setting a date after the notice of intent date is that the decertified entity could frivolously acquire more property, potentially generating additional, unnecessary compensation from the municipality, wasting public funds. That cannot be the legislature's goal of TWC § 13.255.

There is nothing in either statute or applicable regulations that support the type of potentially abusive self-help that GVSUD is encouraging with this contrived "at-risk property" concept.[97] The very purpose of bifurcating the § 13.255 process was, in part, to get more clarity on what all property would be considered and ultimately compensated. GVSUD muddles that effort with their suggestion for the operative date because there would be no certainty in what property GVSUD will have up until the moment compensation is due. Thus, the separate proceeding on identifying property would be merely hypothetical and inefficient as it would consider an overly broad amount of property that may ultimately not be affected at all.

The parallel to the eminent domain case cited in GVSUD's brief is ill-supported.[98] The determination of the operative date in that case was in the context of assessing damages, not identifying property; in other words, it would parallel the compensation phase, if at all.[99]

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[96] TWC § 13.255(b); 16 Tex. Admin. Code § 24.120(b) (TAC).

[97] GVSUD Initial Brief, at 28.

[98] GVSUD Initial Brief, at 28 (citing *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118 (Tex. App.—San Antonio, 2013 (pet. denied)).

[99] *Bragg*, 421 S.W.3d at 147.

Moreover, because the cited case is about assessments, the property at issue has presumably already been identified and all that is left is to determine damages.[100] Regardless, even if this case is persuasive, the justification for using the time of the trial as the operative date was because "that is the time at which the government's authority to condemn is determined."[101] Here, the City's corresponding authority to decertify, according to TWC § 13.255(c), is the date that the City requests decertification because the Commission *shall* grant single certification when it is so requested by a City. In the alternative, the date that a TWC § 13.255 application is filed at the Commission is the latest possible operative date for determining what property is rendered useless or valueless.

II. CONCLUSION AND PRAYER

The City has met its burden of proof in this matter for the Referred Issues,[102] 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 its Initial Brief and grant any other relief to the City of Cibolo to which it may be entitled.

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[100] *Id.* at 146-147.

[101] *Id.* at 147.

[102] Referred Issue No. 11 was whether 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 to be transferred. For the reasons stated above and in Cibolo's Initial Brief, the GVSUD appraisal is not limited to evaluating property rendered useless or valueless, and the City's Appraisal is so limited.

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 28th day of February, 2017 to the parties of record.

David J. Klein