



Control Number: 45702



Item Number: 125

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# State Office of Administrative Hearings



Lesli G. Ginn  
Chief Administrative Law Judge

April 28, 2017

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**TO: Stephen Journeay, Director  
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**RE: 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***

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in Phase 1 of this case, which the PFD addresses, but the Supplemental Preliminary Order requests that the case be expedited to the extent possible. Please notify me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Drews".

Elizabeth Drews  
Administrative Law Judge

Enclosure

xc: All Parties of Record

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

<b>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</b>	§ § § § § § §	<b>BEFORE THE STATE OFFICE     OF    ADMINISTRATIVE HEARINGS</b>
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**SOAH DOCKET NO. 473-16-5296.WS**  
**PUC DOCKET NO. 45702**

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

**PROPOSAL FOR DECISION—PHASE 1**

Pursuant to Texas Water Code (TWC) § 13.255, the City of Cibolo (Cibolo) filed with the Public Utility Commission of Texas (Commission) an application for single certification of an area (Decertification Area) within Cibolo's incorporated area in Guadalupe County and decertification of Green Valley Special Utility District (Green Valley or GVSUD) from the Decertification Area. The certificates of convenience and necessity (CCNs) are for retail sewer service. The single certification and decertification has not yet occurred.

The main issue in this first phase of the case is whether Green Valley has property that the decertification will render useless or valueless. If so, the amount of compensation Cibolo would pay Green Valley for such property would be determined in a later phase. Green Valley asserts that five items (Items) constitute such property:

- Dollars allocable to the Decertification Area that Green Valley expended for engineering and planning;
- Dollars allocable to the Decertification Area that Green Valley expended for its pending wastewater discharge permit application;
- Dollars allocable to the Decertification Area that Green Valley expended to purchase land on which it proposes to construct a wastewater treatment plant;
- Green Valley's lost expected net revenues from future customers allocable to the Decertification Area; and
- Dollars Green Valley expended for legal fees and appraiser expenses in this case.

Cibolo and the Commission staff (Staff) contend that Green Valley has no property that the decertification will render useless or valueless. As discussed later, shortly before issuance of this Proposal for Decision (PFD), the Commission issued its final Order in a similar case, *Celina*,<sup>1</sup> reaching conclusions consistent with positions taken by Cibolo and Staff here.

In this PFD, the Administrative Law Judge (ALJ) concludes that:

- Green Valley has no property that the decertification will render useless or valueless;
- Cibolo has not requested that any property of Green Valley be transferred to it; and
- Green Valley's existing appraisal is not limited to valuing property that the decertification will render useless or valueless but Cibolo's existing appraisal is so limited.

## **I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE**

On March 8, 2016, Cibolo filed the application with the Commission. On April 28, 2016, a Commission ALJ granted Green Valley's motion to intervene.<sup>2</sup> In its July 26, 2016 Order of Referral, the Commission referred this first phase to the State Office of Administrative Hearings (SOAH), requesting that a SOAH ALJ be assigned to conduct a hearing and to issue a PFD, if necessary.<sup>3</sup> On January 17, 2017, the hearing on the merits was held. Cibolo, Green Valley, and Staff appeared through their attorneys. On February 28, 2017, the record closed with the filing of reply briefs.

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<sup>1</sup> *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, SOAH Docket No. 473-16-5011.WS, Order (Apr. 13, 2017) (*Celina* Order).

<sup>2</sup> Order No. 3 (Apr. 28, 2016).

<sup>3</sup> Order of Referral (July 26, 2016). At various times, SOAH ALJs Travis Vickery, Steven D. Arnold, or Elizabeth Drews were co-assigned to this case. Judge Drews has been the only ALJ assigned to it since before the hearing on the merits.

The adequacy of notice of the application and notice of the hearing is not contested.<sup>4</sup> The Commission has jurisdiction over this proceeding pursuant to TWC chapter 13. SOAH has jurisdiction over matters relating to the conduct of the hearing and issuance of the PFD pursuant to Texas Government Code § 2003.049.

The procedural history, notice, and jurisdiction relating to this phase are further addressed in the Findings of Fact and Conclusions of Law.

## II. SCOPE OF THE ISSUES

The Commission issued two orders listing issues to be addressed in this case: a Preliminary Order (listing Issue Nos. 1-8) and a Supplemental Preliminary Order (listing Issue Nos. 9-11).<sup>5</sup> Consistent with the Order of Referral and an agreement by the parties, this case is bifurcated into two phases, with this first phase limited to Issue Nos. 9-11 in the Supplemental Preliminary Order.<sup>6</sup> Those issues are:

9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding? TWC § 13.255(c).
10. What property of Green Valley, if any, has Cibolo requested be transferred to it? 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 and the property that Cibolo has requested be transferred?<sup>7</sup>

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<sup>4</sup> Green Valley contests the sufficiency, for purposes of a TWC § 13.255 application, of Cibolo's August 18, 2015 notice to Green Valley of Cibolo's intent to provide sewer service. Green Valley Special Utility District's Proposed Findings of Fact and Conclusions of Law (Feb. 28, 2017) (Green Valley's Proposed FFs and CLs), Proposed Finding of Fact (FF) No. 1. That issue was not referred to SOAH, is not part of this phase, and is not further discussed.

<sup>5</sup> Preliminary Order (June 30, 2016); Supplemental Preliminary Order (July 20, 2016).

<sup>6</sup> SOAH Order No. 2 (Aug. 19, 2016) at 1.

<sup>7</sup> Supplemental Preliminary Order at 4-5. In quoting that order here and in the findings of fact, the PFD corrects typographical errors where the order referred to TWC § 13.254 instead of TWC § 13.255.

Two SOAH orders further defined the scope of the issues:<sup>8</sup>

- SOAH Order No. 5 concluded that the Commission did not refer to SOAH an issue raised by Green Valley about whether Cibolo's appraisal is an appraisal required under TWC § 13.255(l) and 16 Texas Administrative Code (TAC) § 24.120(m). That order interpreted the Commission's orders in this case as treating Cibolo's appraisal as an existing appraisal for purposes of Issue No. 11.<sup>9</sup>
- SOAH Order No. 7 granted in part and denied in part a motion for partial summary decision filed by Cibolo:
  - Regarding Issue No. 9, SOAH Order No. 7 denied the motion, which Staff had supported but Green Valley had opposed. Noting that the Commission had not (at that time) decided certain issues of first impression, the order found that Cibolo did not meet its burden to show, under the standards required to grant summary decision, that the decertification will not render any Green Valley property useless or valueless to Green Valley. Instead, a hearing would be held on that issue.
  - SOAH Order No. 7 granted the uncontested portion of the motion, which relates to Issue No. 10. The PFD addresses Issue No. 10 by including agreed Finding of Fact No. 54, stating that Cibolo has not requested that Green Valley transfer any of its property to Cibolo.<sup>10</sup>

As a result of SOAH Order No. 7, only two contested issues remain in this phase:

9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo 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?<sup>11</sup>

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<sup>8</sup> SOAH Order No. 5 (Nov. 22, 2016); SOAH Order No. 7 (Dec. 9, 2016). The PFD does not address post-hearing arguments about issues that those SOAH orders concluded are outside the scope of this phase. The parties' evidence and the ALJ's evidentiary rulings were based on the scope of the issues described in those orders. No party filed a motion to reconsider or appealed any SOAH order in this case.

<sup>9</sup> SOAH Order No. 5 at 3-4.

<sup>10</sup> SOAH Order No. 7 at 2-12.

<sup>11</sup> Green Valley argues that the decertification will create a checkerboard pattern of decertified tracts and tracts certified to Green Valley. Cibolo's decertification request was not referred to SOAH. The ALJ considered Green Valley's argument only in terms of whether it affects issues in this phase.

### III. BACKGROUND ABOUT THE EVIDENCE AND THE APPRAISERS

At the hearing, two witnesses testified for Cibolo:

- Rudolph F. Klein, IV, P.E., Director of Planning and Engineering for Cibolo; and
- Jack E. Stowe, Jr., Director of NewGen Strategies & Solutions, LLC, and Cibolo's appraiser in this case.<sup>12</sup>

Four witnesses testified for Green Valley:

- Joshua Korman, principal and founder of KOR Realty Consultants, LLC d/b/a KOR Group and Green Valley's appraiser in this case;
- David (Pat) Allen, General Manager of Green Valley;
- Garry Montgomery, P.E., CFM, Project Manager for River City Engineering (RCE), which provides contract engineering services to Green Valley; and
- Stephen H. Blackhurst, P.E., an environmental compliance and utility rates and services consultant.<sup>13</sup>

The evidence includes those witnesses' prefiled testimony and other exhibits. Staff participated in the hearing but did not offer witnesses or exhibits.

No third-party independent appraisal report was filed in this case. Cibolo and Green Valley each argue that its appraiser is more qualified. In summary:

- Cibolo appraiser Mr. Stowe has a bachelor's degree in accounting and decades of experience in consulting services, including work regarding water and wastewater ratemaking (including rate base determination), water and wastewater contract

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<sup>12</sup> Cibolo Ex. 1 (Klein direct) at 3; Cibolo Ex. 3 (Stowe rebuttal) at 3.

<sup>13</sup> GVSUD Ex. A (Korman direct) at 1; GVSUD Ex. B (Allen direct) at 1; GVSUD Ex. C (Montgomery direct) at 1; GVSUD Ex. D (Blackhurst direct) at 1; GVSUD Ex. 6 (Mr. Montgomery's resume); GVSUD Ex. 7 (Mr. Blackhurst's resume).

negotiations, and valuation of facilities within a water or sewer CCN in connection with the sale/transfer of ownership or donation of utility assets.<sup>14</sup>

- Green Valley appraiser Mr. Korman has a bachelor's degree in finance, is a Texas state-certified general real estate appraiser, and has decades of experience in consulting and appraisal services, including appraisal of real and personal property, mostly in the context of eminent domain.<sup>15</sup> He testified that he applied the TWC § 13.255 factors for compensation and, where applicable, the Uniform Standards of Professional Appraisal Practice (USPAP).<sup>16</sup>

Regarding the weight to give Mr. Korman's testimony, Cibolo and Staff argue that: (1) he is mainly a real estate appraiser but none of the Items is real property; (2) although qualified to value property affected by an action (such as a condemnation), he is not trained or experienced in identifying such property; and (3) he has little knowledge of wastewater infrastructure and operations, instead relying on what Green Valley and its engineers told him.<sup>17</sup> In response, Green Valley notes that Mr. Stowe also is not an engineer and, unlike Mr. Korman, is not a certified appraiser and did not apply USPAP. On that point, Mr. Stowe said he had opined on whether decertification renders property useless or valueless in more than a dozen cases and was not aware of TCEQ or the Commission ever indicating that a licensed appraiser would be given deference in deciding that issue or that TWC § 13.254 or § 13.255 requires use of a licensed appraiser.<sup>18</sup>

In ruling on objections to prefiled testimony, the ALJ concluded that Mr. Stowe and Mr. Korman are qualified to offer their expert testimony admitted in evidence.<sup>19</sup> As Cibolo and Staff point out, compared to another type of proceeding, Mr. Korman's certified appraiser/eminent domain background is relatively less of an advantage in this phase because:

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<sup>14</sup> Cibolo Ex. 3 (Stowe rebuttal) at 3-4, Ex. Stowe R-A.

<sup>15</sup> GVSUD Ex. A (Korman direct) at 1-6.

<sup>16</sup> GVSUD Ex. A (Korman direct) at 10-11. GVSUD Ex. 2 is excerpts of the 2016-2017 edition of USPAP.

<sup>17</sup> See Tr. at 69-81 (Korman).

<sup>18</sup> Cibolo Ex. 3 (Stowe rebuttal) at 9.

<sup>19</sup> SOAH Order No. 5; SOAH Order No. 8 (Dec. 30, 2016); Tex. R. Evid. 702. The ALJ sustained objections to some prefiled testimony by them and other witnesses. To reflect those rulings, the copies of the prefiled testimony admitted in evidence have some material "blacked out."

(1) it involves identifying, not valuing, property (if any) that the decertification renders useless or valueless; and (2) the Items are not real property or tangible personal property but rather intangible items such as dollars expended or lost expected net revenues from future customers.<sup>20</sup> In any event, the key conclusions in this PFD are based on the ALJ's application of relevant law to uncontested facts.<sup>21</sup>

#### IV. FACTUAL BACKGROUND

The issues in this phase are mainly questions of law; the basic facts are not in dispute.

##### A. Stipulations

At the hearing, the ALJ requested that: (1) the parties try to stipulate uncontested facts; and (2) Green Valley provide a list of the items it contends are its property that the decertification will render useless or valueless.<sup>22</sup> On February 9, 2017, Cibolo and Green Valley filed agreed stipulations (Stipulations), which Staff does not oppose.<sup>23</sup> The Stipulations list the Items and Cibolo's and Green Valley's contentions about them:

- Green Valley contends that the following five Items are property that the decertification will render useless or valueless to Green Valley:

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<sup>20</sup> See, e.g., Green Valley Special Utility District's Initial Post-Hearing Brief (Feb. 10, 2017) (Green Valley's Brief) at 10 ("Green Valley does not seek compensation for its purchased wastewater treatment plant real property itself (Property Item 3). Rather, Green Valley considers an allocable portion of the dollars expended to purchase the real property as intangible personal property that will be rendered useless or valueless upon decertification.").

<sup>21</sup> No expert witness in this case is an attorney. SOAH Order Nos. 5 and 8 concluded that they are qualified to offer the opinions in their testimony and in doing so could describe their experience with, and understanding of, regulatory policies and law that are a basis of those opinions, but those descriptions are not expert legal opinions.

<sup>22</sup> Tr. at 9 ("JUDGE DREWS: 'I'd like a lot more clarity in my own mind about exactly what property Green Valley is saying is within the scope here. I know that it's what is identified in your audit, but I would really like a list . . .").

<sup>23</sup> Agreed Stipulations (Feb. 9, 2017). The ALJ takes official notice of that filing and accepts the stipulated facts as true. In listing the Stipulations, the PFD slightly rephrased them for reasons such as consistent use of abbreviations.

- Dollars expended by Green Valley for engineering and planning to implement Green Valley's 2006 Wastewater Master Plan that are allocable to the Decertification Area;
  - Dollars expended by Green Valley to obtain a Texas Pollutant Discharge Elimination System (TPDES) permit from the Texas Commission on Environmental Quality (TCEQ) that are allocable to the Decertification Area;
  - Dollars expended by Green Valley to purchase an approximate 65-acre tract of land (Land) that are allocable to the Decertification Area;
  - Dollars expended by Green Valley for legal fees and appraiser expenses in this docket; and
  - Lost expected net revenues that are allocable to the Decertification Area.
- Cibolo contends that the decertification will not render any Green Valley property useless or valueless to Green Valley. (Although not stated in the Stipulations, Staff agrees with Cibolo on that point.)

Despite the Stipulations, in later filings Green Valley argues it might assert that additional items are property for which it should be compensated:

- "The Green Valley appraisal also identifies increased costs to customers measured by the effect of Cibolo's decertification approach on customer impact fees as a compensable item under TWC § 13.255(g), but does not contend that this is necessarily a property item for identification purposes in the first hearing phase."<sup>24</sup>
- "Green Valley did not consider its CCN to be property itself for purposes of this proceeding. Green Valley does not waive its right to compensation should the

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<sup>24</sup> Green Valley's Proposed FFs and CLs, FF No. 45. It is unclear to the ALJ whether this claim differs from Green Valley's claim that its property includes lost expected net revenues (which is one of the Items). Green Valley argues:

Should Cibolo's application ultimately be granted, Green Valley will have lost the economic opportunity to recoup its expenditures in the decertified area, while its costs to serve that area will simultaneously increase as the direct result of Cibolo's checkerboard approach to decertification. . . . Nor are these lost net revenues "lost profits" as Cibolo asserts . . . . Mr. Korman's testimony on cross was that Green Valley seeks only lost net operating income necessary to offset its operating costs.

Green Valley Reply Brief at 12, citing Tr. at 89 (Korman).

Commission determine that Green Valley's CCN or its rights to a TPDES permit is a property interest for purposes of compensation."<sup>25</sup>

Cibolo objects to Green Valley claiming that items omitted from its list in the Stipulations are property.<sup>26</sup> The ALJ concludes that Green Valley has waived any such claims. As discussed earlier, the Commission's Supplemental Preliminary Order and SOAH orders made clear that this phase will determine which Green Valley property, if any, the decertification will render useless or valueless. Green Valley's burden of production (discussed later in the PFD) included listing the items that Green Valley claims meet that standard, and Green Valley had ample time to do so. The Stipulations were filed the day before the parties' initial post-hearing briefs. Green Valley's positions above are inconsistent with the Stipulations, to which it agreed, and with some of its statements in evidence.<sup>27</sup> The PFD, therefore, addresses only the five Items listed in the Stipulations.

Other uncontested facts stated in the Stipulations are:

- Green Valley does not have any wastewater infrastructure in the Decertification Area.
- Green Valley does not have any retail wastewater customers in the Decertification Area.
- Green Valley has not adopted retail wastewater rates.
- Green Valley has not adopted wastewater impact fees.

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<sup>25</sup> Green Valley's Brief at 9-10. In *Celina*, the Commission concluded that CCNs and wastewater permits are not property. *Celina* Order CL Nos. 11 and 12.

<sup>26</sup> Reply Brief of City of Cibolo (Feb. 28, 2017) (Cibolo's Reply Brief) at 17-18.

<sup>27</sup> See, e.g., Stipulations at 2-3 ("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: [listing only the five Items]); Tr. at 100-01 (Korman) (testifying that he did not consider Green Valley's CCN to be property).

**B. Other Uncontroverted Facts**

Green Valley was founded as a rural water supply corporation in 1963 and has been a special utility district since 1992. It has more than 11,000 water customer connections.<sup>28</sup>

On October 10, 2005, Green Valley was issued sewer CCN No. 20973. In general terms, its sewer CCN area is bounded by Interstate Highway 35 on the north, Cibolo Creek on the south, the City of Cibolo on the west, and the Guadalupe River on the east. The Decertification Area is within Cibolo's corporate limits, and is generally bounded on the south by Interstate Highway 10; on the west by Cibolo Creek; on the north by Lower Seguin Road, Hackerville Road, and Arizpe Road; and on the east by the court-decreed extraterritorial jurisdiction boundary of the Cities of Cibolo and Marion and the boundaries of Guadalupe County Appraisal District Parcel Nos. 70979 and 71064.<sup>29</sup> The Decertification Area is approximately 1,694 acres, or 2.2%, of Green Valley's 76,000-acre sewer CCN area.<sup>30</sup>

Green Valley:

- Does not have any wastewater customers either within or outside the Decertification Area;
- Does not have TCEQ approval to construct wastewater infrastructure;
- Has not submitted to TCEQ designs for a wastewater treatment facility or a wastewater collection system; and
- Does not have a TPDES permit to treat and discharge wastewater or a Texas Land Application permit to treat and dispose of wastewater.<sup>31</sup>

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<sup>28</sup> GVSUD Ex. B (Allen direct) at 10-11.

<sup>29</sup> GVSUD Ex. A (Korman direct) at 13; Cibolo Ex. 1 (Klein direct) at 15-16.

<sup>30</sup> GVSUD Ex. B (Allen direct) at 13; GVSUD-3; Cibolo Ex. 1 (Klein direct) at 15.

<sup>31</sup> Tr. at 140 (Allen); Cibolo Ex. 1 (Klein direct) Ex. G at 573 (Green Valley admission).

On April 1, 2015, Green Valley applied to TCEQ for TPDES Permit No. WQ0015360001.<sup>32</sup> The permit would authorize the discharge of treated domestic wastewater from Green Valley’s proposed wastewater plant in three phases:<sup>33</sup>

Phase	Design flow (million gallons per day)	Estimated Start Date	
		Construction	Waste Disposal
I	0.25	January 2016	August 2016
II	2.50	January 2019	January 2020
III	5.00	January 2044	January 2045

In 2016, the TCEQ Executive Director (ED) issued a draft TPDES permit to Green Valley.<sup>34</sup> The Cities of Cibolo and Schertz and Cibolo Creek Municipal Authority (CCMA) contested the permit.<sup>35</sup> TCEQ referred the case to SOAH for a contested case hearing on several issues.<sup>36</sup> The case is pending at SOAH, with a hearing set for September 12-14, 2017.<sup>37</sup>

The Land on which Green Valley proposes to build its wastewater treatment plant is “just outside” the Decertification Area.<sup>38</sup> RCE helped Green Valley identify real property suitable for that purpose. Green Valley’s purchase of the Land was consummated in 2014.<sup>39</sup>

<sup>32</sup> GVSUD Ex. 1 at 100256.

<sup>33</sup> GVSUD Ex. 1 at 100382; Tr. at 140, 161 (Allen); GVSUD Ex. B (Allen direct) at 15; Cibolo Ex. 1 (Klein direct) Ex. G at 562 (Green Valley RFI response). *See also* GVSUD Ex. 1 at 100343-418, 100256-342.

<sup>34</sup> GVSUD Ex. 5 (ED’s Decision (Sept. 22, 2016), concluding that Green Valley’s TPDES permit application “meets the requirements of applicable law”).

<sup>35</sup> GVSUD Ex. B (Allen direct) at 15; GVSUD Ex. C (Montgomery direct) at 19; GVSUD Ex. 4 (ED’s Response to Public Comment); Cibolo Ex. 1 (Klein direct) at 27.

<sup>36</sup> Cibolo Ex. 2 (Klein rebuttal) at 6; Cibolo Ex. 3 (Stowe rebuttal) at 21.

<sup>37</sup> *Application of Green Valley Special Utility District for a New Texas Pollutant Discharge Elimination System Permit No. WQ001536001, in Guadalupe County, Texas*, SOAH Docket No. 582-17-1850, TCEQ Docket No. 2016-1876-MWD (pending), SOAH Order No. 2 (Mar. 10, 2017).

<sup>38</sup> GVSUD Ex. A (Korman direct) at 12.

<sup>39</sup> GVSUD Ex. B (Allen direct) at 15; GVSUD Ex. C (Montgomery direct) at 17-18, 20-21; GVSUD Ex. 1 at 100432-454 (sales contract and warranty deeds).

## V. LEGAL FRAMEWORK

Many of the legal issues are common to the five Items. They are discussed below, followed by discussion of each Item.

### A. *Celina* Order

*Celina* differs from this case in that: (1) in *Celina*, decertification had been approved in a previous docket but in this case, decertification will be addressed in a later phase; (2) *Celina* was brought under TWC § 13.254 and this case was brought under the similar, but not identical, provisions of TWC § 13.255; and (3) unlike Green Valley, the decertificated retail utility in *Celina*—Aqua Texas, Inc. (Aqua)—had a TCEQ-issued wastewater discharge permit.<sup>40</sup>

In most respects important to this phase, however, the two cases are alike.<sup>41</sup> For example, in the decertified area in *Celina*, Aqua: owned no real or personal property; built no physical improvements or infrastructure to serve it; had no wastewater treatment plant or attendant physical infrastructure, improvements, or structures; had not provided sewer service; and had no existing sewer customers.<sup>42</sup> Like Green Valley, Aqua incurred legal expenses and professional fees in the docket (and, in Aqua's case, also in the previous decertification docket) as a result of the decertification.<sup>43</sup> Similarly to this case, the items Aqua asserted were rendered useless or valueless by the decertification were not real or tangible personal property, but rather expenditures for planning, design, or (in Aqua's case) construction of service facilities; legal and professional fees; and lost economic opportunity.<sup>44</sup>

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<sup>40</sup> *Celina* Order FF Nos. 26, 43-44.

<sup>41</sup> In addition to legal and factual similarities of the two cases, Aqua had some of the same attorneys and witnesses in *Celina* as Green Valley had in this case. *See, e.g.*, GVSUD Ex. A (Korman direct) at 4 and GVSUD Ex. D (Blackhurst direct) at 5-6 (discussing their testimony on behalf of Aqua in *Celina*).

<sup>42</sup> *Celina* Order FF Nos. 22-23, 27-28, 32-33.

<sup>43</sup> *Celina* Order FF No. 47.

<sup>44</sup> *Celina* Order at 10.

In *Celina*, the Commission adopted an ordering paragraph that states: “Aqua does not have any property that was rendered useless or valueless as a result of the decertification in Docket No. 45329.”<sup>45</sup> Its conclusions of law include the following:

- 7A. Expenditures are not property.
- 7B. Aqua’s expenditures on permitting, planning, and design activities to serve the tract are not property.
- 7C. Aqua’s expenditures on reasonable and necessary legal expenses and professional fees incurred in this docket and in Docket No. 45329 are not property.
- 8A. The factors listed in TWC § 13.254(g) are limited to determining the value of personal property, if any, and are not themselves property interests.
- 10. The term property in TWC § 13.254(g) includes all property, real and personal, and tangible and intangible.
- 11. A CCN is not property. 16 Tex. Admin. Code §§ 24.113(a) and 24.116.
- 12. A wastewater permit issued by the TCEQ or the Commission is not property. Tex. Water Code § 26.029(c).
- 19. TWC § 13.254(g) limits recovery for the impact on future revenues to losses from existing customers. Aqua’s lost future revenues from currently non-existing customers are not property and are not compensable under TWC §§ 13.264(d) and (g).

## **B. Burden of Proof**

In *Celina*, the decertification had occurred in a previous docket. Like the PFD in *Celina*, the Commission concluded that Aqua had the burden of proof.<sup>46</sup> The *Celina* PFD distinguished the present case, stating: “The ALJs are familiar with SOAH Order No. 2 in the City of Cibolo

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<sup>45</sup> *Celina* Order Ordering Paragraph No. 1.

<sup>46</sup> *Celina* Order CL No. 5.

case, which places the burden of proof on the city seeking decertification. However, in that matter, decertification of the CCN holder's certified area has yet to occur."<sup>47</sup>

SOAH Order No. 2 in this case assigned the burden of proof to Cibolo because it is the applicant.<sup>48</sup> SOAH Order No. 7 stated that Cibolo therefore has the burden of persuasion—which never shifts—and the initial burden of production, but if Cibolo makes a *prima facie* case that Green Valley has no property that the decertification will render useless or valueless to Green Valley, the burden of production shifts to Green Valley to show that it has such property.<sup>49</sup> The agreed procedural schedule adopted in this case was based on that allocation of the burden of proof.<sup>50</sup> Since the time those SOAH orders were issued, no party has argued for a different allocation of the burden of proof.

Green Valley argues that Cibolo did not make the required *prima facie* showing. The ALJ concludes Cibolo made that showing through its direct case, which is summarized in this PFD. The burden of production thus shifted to Green Valley, with Cibolo retaining the overall burden of persuasion. For reasons discussed in the PFD, the ALJ concludes that Cibolo met its burden of proof in this phase.

### C. TWC Provisions Regarding Property Rendered Useless or Valueless

A CCN is not property.<sup>51</sup> Losing sewer CCN area, therefore, is not itself a loss of property. Under the statute, a retail utility decertified from part of its CCN area receives no compensation unless other requirements are met. TWC § 13.255(c) states:

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<sup>47</sup> *Celina* PFD (Jan. 27, 2017) at 9.

<sup>48</sup> SOAH Order No. 2 at 1 (citing a Commission rule, 16 TAC § 24.12, which states that in proceedings not involving a rate change, "the burden of proof is on the moving party," and a SOAH rule, 1 TAC § 155.427).

<sup>49</sup> SOAH Order No. 2 at 1; SOAH Order No. 7 at 5-6.

<sup>50</sup> Under that schedule, only Cibolo presented rebuttal testimony. SOAH Order No. 3 (Sept. 9, 2016) at 1.

<sup>51</sup> *Celina* Order CL No. 11; 16 TAC §§ 24.113(a), .116; *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 145 (Tex. App.—Austin 2014, pet. denied); *Creedmore-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 525-26 (Tex. App.—Austin 2010, no pet.).

The utility commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. . . .<sup>52</sup>

For an Item to be compensable, therefore, it must (1) be Green Valley’s “property” and (2) be rendered “useless or valueless” to Green Valley (3) as a result of the decertification.

The statute and Commission rules relating to cases like this do not define “property,” “useless,” or “valueless.” Green Valley argues that in interpreting TWC § 13.255, the Commission should construe those words based on eminent domain law or constitutional law on takings, rather than their plain meaning. Cibolo and Staff disagree. The ALJ concludes that the plain meaning of those words applies here. Under principles of statutory construction, unless words have been defined or have a technical meaning, they are construed based on their common usage.<sup>53</sup> TWC § 13.255 instructs the Commission to apply eminent domain concepts for other purposes but does not do so regarding the meaning of “property,” “useless,” or “valueless.”<sup>54</sup> Nor does it mention takings law, and the Commission’s powers do not include construing constitutional provisions.<sup>55</sup>

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<sup>52</sup> See also 16 TAC § 24.120(c).

<sup>53</sup> Tex. Gov’t Code ch. 311 (Code Construction Act), §§ 311.011, .002 (the Code Construction Act applies to each code and rule adopted under a code); *Tex. Dept. of Protective & Reg. Svcs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004); *State v. Pub. Util. Comm’n of Texas (State v. Public Utility Commission)*, 883 S.W.2d 190, 200 (Tex. 1994).

<sup>54</sup> See TWC § 13.255(g) (stating that for purposes of § 13.255, “the value of real property owned and utilized by the retail public utility for its facilities shall be determined according the standards set forth in Chapter 21, Property Code, governing actions in eminent domain . . .”).

<sup>55</sup> *City of Dallas v. Stewart*, 361 S.W.3d 562, 579 (Tex. 2012) (holding that the power of constitutional construction is inherent in, and exclusive to, the judiciary).

**D. Definition of “Property”**

**1. Whether “Property” Includes Intangible Personal Property**

Green Valley does not contend that any of the Items is real property or tangible personal property.<sup>56</sup> All five Items are intangible; the question is whether they are intangible personal property.

The parties agree that as used in TWC § 13.255, “property” includes real and personal property.<sup>57</sup> Some arguments by Cibolo and Staff suggest that it must be tangible. In *Celina*, however, the Commission concluded: “The term property in TWC § 13.254 includes all property, real and personal, and tangible and intangible.”<sup>58</sup> The ALJ reaches the same conclusion regarding TWC § 13.255. TWC § 13.002(9) defines “Facilities” to include “all tangible and intangible real and personal property.” In *State v. Public Utility Commission*, the Texas Supreme Court held that absent a statutory definition, “the term ‘property’ extends to ‘every species of valuable right and interest.’ It is ‘commonly used to denote everything to which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal.’”<sup>59</sup> The question, therefore, is whether the five Items are intangible property, *i.e.*, under *State*, whether they are a valuable right or interest that is the subject of ownership.

As Green Valley argues, money can be “property.”<sup>60</sup> The Items, however, are not money that Green Valley owns, but rather money it estimates it would receive (and thus does not own) from future customers or money it expended (and thus no longer owns) to purchase goods or

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<sup>56</sup> See, e.g., Tr. at 83-84 (Korman).

<sup>57</sup> See TWC § 13.255(g) (referring to real and personal property); Tex. Gov’t Code § 311.005(4).

<sup>58</sup> *Celina* Order CL No. 10.

<sup>59</sup> *State v. Public Utility Commission*, 883 S.W.2d at 200 (citations omitted).

<sup>60</sup> Cibolo conceded that point. Tr. at 233 (Stowe).

services.<sup>61</sup> As the Commission determined in *Celina*: “These expenditures may have been made using money that was formerly the property of the utility: an expenditure represents the transfer of the utility’s property (money or otherwise) to another. One generally does not retain any property interest in money spent to obtain products or services.”<sup>62</sup> The Commission further determined that “lost economic opportunity is not property, even in its broadest meaning.”<sup>63</sup> The ALJ concludes that under *State*, the Items are not Green Valley’s property because they are not a valuable right or interest that is the subject of Green Valley’s ownership.<sup>64</sup>

## **2. Whether the TWC § 13.255(g) Factors Define “Property”**

In arguing that the Items are property, Green Valley cites TWC § 13.255(g) factors used to determine the value of personal property rendered useless or valueless by decertification:

The factors ensuring that the compensation to a retail public utility is just and adequate, shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt, the value of the service facilities of the retail public utility located within the area in question, 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, the amount of the retail public utility's contractual obligations allocable to the area in question, any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification, the impact on future revenues lost from existing customers, necessary and reasonable legal expenses and professional fees, factors relevant to maintaining the current financial integrity of the retail public utility, and other relevant factors.

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<sup>61</sup> The Items claimed by Green Valley are not the goods or services it purchased but rather the money it expended. See Green Valley Special Utility District’s Post-Hearing Reply Brief (Feb. 28, 2017) (Green Valley’s Reply Brief) at 8-9 (referencing its 2006 Wastewater Master Plan, its TPDES permit application, and the Land, and stating: “Green Valley identifies as property its dollar investments in each of those items and not the items themselves”) (citing the Stipulations).

<sup>62</sup> *Celina* Order at 7. As in *Celina*, the evidence does not show that in its accounts, Green Valley capitalized the money expended or otherwise treated it as an asset rather than as an expense. See *Celina* Order at 7-8.

<sup>63</sup> *Celina* Order at 9.

<sup>64</sup> *Celina* Order CL Nos. 7A-7C, 19; <http://www.dictionary.com/browse/ownership?s=t> (defining “ownership” as the state or fact of being an owner; legal right of possession; proprietorship”) and <http://www.dictionary.com/browse/own> (defining “own” as “to have or hold as one’s own, possess”) (both sites last visited on April 7, 2017).

In support of its position, Green Valley cites SOAH Order No. 7 in this case, which states:

Although Phase I of this case does not include determining the amount, if any, of compensation owed, for the Commission to fulfill its duties under TWC § 13.255, “property” must be construed broadly enough to include items the statute lists as compensable if other requirements (such as that decertification renders them useless or valueless) are met. The ALJs also took into account that the precise meanings of “property,” “useless,” and “valueless” are not yet clear and the Commission will likely clarify them after further development of the issues in cases like this.<sup>65</sup>

The Commission subsequently concluded in *Celina* that the similar factors in TWC § 13.254(g) are limited to determining the value of personal property, if any, and are not themselves property interests.<sup>66</sup> The ALJ concludes that the same reasoning applies to the TWC § 13.255(g) factors.

### **3. Whether a Bill Sponsor’s Statement Defines “Property”**

In arguing for its broad interpretation of “property,” Green Valley also cites statements by Representative Hinojosa, who sponsored the bill that resulted in TWC § 13.255. He referred to its purpose including compensating the decertified utility for “any of its property”:

What this bill does, it allows for the city to provide water in those areas, and provides a procedure where the water supply corporation and the city can work out their differences and at the same time have the water supply corporation compensated for any bond indebtedness that it may have or for any other property that it may lose because the City going into the certified area and provided water. . . . And what this bill does it tries to provide for an orderly, logical procedure for them to work out their differences and for the water supply corporation to get compensated for any of its debt or any of its property through a neutral party.<sup>67</sup>

In response, Staff cites a Texas Supreme Court case, *Molinet v. Kimbrell (Molinet)*, discussing the effect of statements by individual legislators:

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<sup>65</sup> SOAH Order No. 7 at 9.

<sup>66</sup> *Celina* Order CL Nos. 8-8A.

<sup>67</sup> Green Valley Brief Ex. A (Senate Committee Meeting on HB 2035 (70th Leg., R.S. 1987)).

Statements 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. Moreover, the Legislature expresses its intent by the words it enacts and declares to be the law. “Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on.”<sup>68</sup>

Consistent with *Molinet* and other law on statutory construction, the ALJ concludes that the statutory language is the truest manifestation of legislative intent. As discussed previously, that language does not indicate that any of the Items is “property.” Moreover, in his remarks, Representative Hinojosa did not address how “property” should be defined; he used the term “property” and did not define it.

#### **E. Definition of “Useless or Valueless”**

As Cibolo and Green Valley agree, “useless” means “having or being of no use” and “valueless” means “having no monetary worth.”<sup>69</sup>

For four of the five Items (the exception being legal fees and appraiser expenses in this case), Green Valley states that only part of its expenditures or expected revenues will be rendered useless or valueless by the decertification.<sup>70</sup> Regarding those four Items (Allocable Items), Green Valley seeks to meet the “useless or valueless” requirement by defining the Item to include only the portion (of expended money or expected revenues, depending on the Item) that is “allocable” to the Decertification Area. Green Valley proposes an allocation based on the percentage (about 2.2%) of its sewer CCN area for which Cibolo seeks decertification in this case. For example, Green Valley calculates the “allocable costs associated with the purchase” of the Land as follows:<sup>71</sup>

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<sup>68</sup> *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011) (citations omitted).

<sup>69</sup> Green Valley’s Brief at 23 (citing <https://www.merriam-webster.com/dictionary/useless> and <https://www.merriam-webster.com/dictionary/valueless> (last visited on April 5, 2017)); see also Cibolo Ex. 3 (Stowe rebuttal) at 22-23 (citing Merriam-Webster definitions of “useless” as “not at all useful; not doing or able to do what is needed; not able to produce the effect you want” and of “valueless” as “having no usefulness”).

<sup>70</sup> Tr. at 100-12 (Korman).

<sup>71</sup> GVSUD Ex. 1 at 10004.

$$\frac{(\text{Decertification Area acres}/\text{Green Valley sewer CCN acres}) \times \text{Land purchase price} = \text{allocable cost}}{(1,694 \text{ acres}/73,175 \text{ acres}) \times \$325,000 = \$7,524}$$

In response, Cibolo and Staff make one legal argument and two factual arguments:

- Green Valley is simply trying to circumvent the requirement that the decertification renders property “useless or valueless.” Applying the plain meaning of those words, the statute requires that to be compensable, property must have no value or no use to the decertified retail utility after decertification.
- The evidence does not show that Green Valley’s decertification from 2.2% of its sewer CCN area would reduce the usefulness or value of any of the money it expended on the 2006 Wastewater Master Plan, its TPDES permit application, or the Land.
- The evidence does not show that such decertification would reduce by 2.2% the usefulness or value of such expended money or of Green Valley’s net revenues from future customers.

As discussed below, the ALJ finds Cibolo’s and Staff’s arguments persuasive. Even if the Allocable Items were property, the evidence does not show that they meet the useless or valueless requirement.

**1. Whether Defining an Item as an Allocable Portion Meets the “Useless or Valueless” Requirement**

Green Valley cites law allowing compensation for a portion of real property rendered useless or valueless by a taking.<sup>72</sup> Its appraiser, Mr. Korman, testified:

In eminent domain proceedings, . . . when a portion of a tract or a parcel of real property is condemned, compensation is determined for the part taken and any damages to the remainder property considering the impacts of the project and the

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<sup>72</sup> *Chicago, R.I. & G.R. Co. v. Tarrant County Water Control & Improvement Dist.*, 73 S.W.2d 55, 60-61 (Tex. 1934) (holding that in a suit by a water control and improvement district to condemn land, a railroad was entitled to compensation for the portion of its railway that would be rendered useless by construction of a lake on the land); Tex. Prop. Code § 21.042(c)-(d) (providing that when a portion of a tract or parcel of real property is condemned, compensation to the property’s owner is calculated by estimating the extent of the injury and benefit to the owner, including the effect of the condemnation on the value of the owner’s remaining property, such as a material impairment of direct access on or off the remaining property that affects its market value).

compensation. . . . This same concept applies to personal property takings. Personal property may be taken, damaged, or destroyed in whole or in part.<sup>73</sup>

At the hearing, Mr. Korman testified:

I've definitely been involved in cases, for instance, where there may like physically be like an office building there, for instance, but the other side may say it's past its economic life, so it's not really an office building; it's vacant land.

I've been involved in quarry cases before, where you might have one side that says, This is just a piece of raw land, and somebody has gone and—and, you know, done some of what I would call like this intangible work; i.e., geology, get permits, things like that that have increased the value of the land to something beyond that. . . .

I think the only time I can consider where there's like a situation like this is where maybe there's like an access denial, where I still think of that as a property right being taken; i.e., someone being able to get from a roadway onto a property.<sup>74</sup>

The ALJ concludes that his examples involve valuation of real, not personal, property.<sup>75</sup> As previously discussed, none of the Items is real property and eminent domain and constitutional takings law do not apply.

Green Valley also points out that some of the TWC § 13.255(g) factors refer to amounts allocable to service in the decertified area. As noted previously, however, in *Celina* the Commission concluded that the factors do not themselves define property.

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<sup>73</sup> GVSUD Ex. A (Korman direct) at 14.

<sup>74</sup> Tr. 110-12 (Korman).

<sup>75</sup> See definitions of “real property” (“an estate or property consisting of lands, as buildings, crops, or mineral rights (distinguished from personal property)”) at <http://www.dictionary.com/browse/real-property?s=t> and “personal property” (“an estate or property consisting of movable articles both corporeal, as furniture or jewelry, or incorporeal, as stocks or bonds (distinguished from real property)”) at <http://www.dictionary.com/browse/personal-property> (both sites last visited on April 7, 2017).

## **2. Evidence about Usefulness or Value of the Items after Decertification**

As discussed later regarding specific Items, the evidence does not show that Green Valley's decertification from 2.2% of its sewer CCN area: (1) would reduce the usefulness or value of money Green Valley expended on the 2006 Wastewater Master Plan, a TPDES permit (if obtained), or the Land; or (2) would reduce the usefulness or value of such expended money or of expected net revenues by approximately 2.2%. For example, Mr. Stowe testified:

GVSUD's argument that a percentage of these expenditures are somehow rendered useless or valueless based upon the percentage of acreage to be decertified out of total CCN acreage is unrealistic, because to provide wastewater service, GVSUD would still need to make all of those expenditures. GVSUD still needs a TPDES permit, land for a wastewater treatment plant, and other high-level design and planning documents prepared by engineers and other consultants.<sup>76</sup>

The evidence also supports Staff's argument that loss of only 2.2% of the decertified area is too small to render the Items useless or valueless. As Green Valley points out, after annexing additional areas Cibolo expects to file other applications to decertify Green Valley's sewer CCN area.<sup>77</sup> The issues referred to SOAH in this case, however, are limited to Cibolo's current application.

## **F. Whether Any Loss of Usefulness or Value Was Caused by the Decertification**

Cibolo disputes Green Valley's contention that the Items will be useless or valueless as a result of the decertification. According to Cibolo, the Items are already useless or valueless because: (1) Green Valley lacks the TPDES permit it would need in order to use them; and (2) TCEQ will deny Green Valley's TPDES permit application because the Decertification Area is in CCMA's regional sewerage area and the permit would violate TCEQ's regionalization policy. Green Valley disagrees with assertion (2).

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<sup>76</sup> Cibolo Ex. 3 (Stowe rebuttal) at 23.

<sup>77</sup> Tr. at 47-48 (Klein).

Based on its regionalization argument, Cibolo moved for summary decision on Issue No. 9. SOAH Order No. 7 denied that part of the motion, concluding that Cibolo did not meet its burden of proof under the standards required to grant summary decision. Before reaching that issue, the order rejected Green Valley's challenge to the Commission's jurisdiction to consider Cibolo's regionalization argument. Green Valley still asserts that jurisdictional challenge,<sup>78</sup> which the ALJ rejects for the same reasons as in SOAH Order No. 7. The ALJ agrees with Green Valley that TCEQ, not the Commission, has jurisdiction to grant or deny the TPDES permit, including deciding whether it would conflict with the regionalization policy. The Legislature required the Commission, however, to determine whether decertification will render property of a decertified retail utility useless or valueless to it. In doing so, the Commission has authority to consider Cibolo's argument that Green Valley's property is already useless or valueless because its TPDES permit has not been approved. The Commission is not required to wait many months for TCEQ to decide the TPDES permit case before the Commission decides issues in this case.

In support of Cibolo's regionalization argument, Mr. Klein explained that TCEQ implements a state policy under TWC chapter 26 relating to regionalization of wastewater systems in Texas. In general, the policy is to encourage and to promote development and use of regional and area-wide waste collection, treatment, and disposal systems to serve waste disposal needs.<sup>79</sup> In that regard, Cibolo cites several TCEQ rules:

- 30 TAC § 351.62 states: "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."
- 30 TAC § 351.65 states: "All future permits and amendments to existing permits pertaining to discharges of domestic wastewater effluent within the Cibolo Creek regional area shall be issued only to the authority."

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<sup>78</sup> Green Valley's Proposed FFs and CLs, CL No. 4 (citing TWC §§ 13.002(19)-(21), .242, .250(a)).

<sup>79</sup> TWC ch. 26; Cibolo Ex. 1 (Klein direct) at 16-17.

- 30 TAC § 351.61 defines “Cibolo Creek regional area” as “That portion of the Cibolo Creek Watershed lying in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base.”<sup>80</sup>

Citing a Texas Parks and Wildlife Department (TPWD) map, Mr. Klein opined that the entire Decertification Area is within the Cibolo Creek Watershed, in the vicinity of Cibolo and within its corporate limits, and thus CCMA is the sole TCEQ-regional wastewater entity for the Decertification Area.<sup>81</sup> He concluded that decertification will not render the Items useless or valueless because they are already useless or valueless—Green Valley lacks, and will not obtain, the TPDES permit required for Green Valley to collect, transport, treat, or dispose of/discharge wastewater generated within the Decertification Area.<sup>82</sup>

In this PFD the ALJ concludes that Green Valley does not have property that the decertification will render useless or valueless to Green Valley. That conclusion, however, is not based on Cibolo’s regionalization argument, for two reasons.

First, as Mr. Klein conceded, even without a TPDES permit, Green Valley could provide retail sewer service within its sewer CCN area by using its own collection system and connecting it to CCMA’s wastewater treatment plant.<sup>83</sup> Thus a retail sewer utility with no TPDES permit could have property (such as a collection system that is complete or under construction) that decertification renders useless or valueless. Those are not, however, the facts here.

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<sup>80</sup> Mr. Klein testified that “sewerage system” includes the treatment and can include the collection system. Tr. at 60-61 (Klein).

<sup>81</sup> Cibolo Ex. 1 (Klein direct) at 19-22, 26-27, Ex. F (TPWD map); Cibolo Ex. 2 (Klein rebuttal) at 28-30; Tr. at 58-59 (Klein).

<sup>82</sup> Cibolo Ex. 1 (Klein direct) at 19, 26-28. *See also* Cibolo Ex. 3 (Stowe rebuttal) at 17-18, 20-21.

<sup>83</sup> Tr. at 39-40, 53 (Klein). Mr. Klein explained that wholesale wastewater service involves collecting and treating wastewater at a wastewater treatment facility, whereas retail wastewater service involves collecting wastewater at the point of service (the retail customer’s location).

Second, TCEQ's Executive Director (ED) disagreed with Cibolo's position that Green Valley's TPDES permit application was inconsistent with CCMA's status as the regional wastewater provider.<sup>84</sup> The ED explained:

CCMA commented that Green Valley SUD's application violates title 30, chapter 351, subchapter F of the Texas Administrative Code because Green Valley SUD seeks to obtain a permit to discharge domestic wastewater effluent within area where only CCMA is authorized to obtain a permit related to discharging domestic wastewater effluent. The cities of Cibolo and Schertz supported this comment . . .

CCMA's questions regarding the proposed permit suggest that if a facility's service area overlaps its own service area, then chapter 351 applies. Assuming what CCMA refers to as its service area is the Cibolo Creek regional area as that area is defined in chapter 351, the ED disagrees that the service area's location is the appropriate method for determining if chapter 351 applies. . . . Therefore, the location of the discharge point is what determines if chapter 351 applies, not the location of the proposed service area. . . .

Green Valley SUD intends to discharge into Santa Clara Creek, not Mid Cibolo Creek. Therefore, chapter 351, subchapter F does not apply to this application.<sup>85</sup>

Although the ED's position is not binding on TCEQ, in the present docket Cibolo has the burden of proof. Cibolo did not prove in this docket that TCEQ's regionalization policy will prevent Green Valley from being granted a TPDES permit. How TCEQ will decide that issue and whether it will grant the TPDES permit remain unknown.

## **VI. SPECIFIC ITEMS THAT GREEN VALLEY CLAIMS ARE PROPERTY THAT THE DECERTIFICATION WILL RENDER USELESS OR VALUELESS**

As the ALJ's conclusions above indicate, none of the Items is property that will be rendered useless or valueless to Green Valley because of the decertification. The specific Items are discussed briefly below.

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<sup>84</sup> Tr. at 41 (Klein).

<sup>85</sup> GVSUD Ex. 4 (ED's Response to Public Comment) at 3, 5-6.

**A. Allocable Dollars Green Valley Expended for Engineering and Planning to Implement the 2006 Wastewater Master Plan**

Working with Green Valley, RCE created the 2006 Wastewater Master Plan.<sup>86</sup> As described by Mr. Montgomery of RCE, a master plan includes multiple scenarios for building out a system, including a phasing approach to identify interim steps and associated costs. The master planning process plans, at a high level, service to an entire certified area. Planning occurs on a more micro level as requests for service in smaller parts of the area are received and feasibility studies are developed. Mr. Montgomery conceded that the 2006 Wastewater Master Plan is “an aging document with out of date costs.” He explained that the economic downturn slowed Green Valley’s efforts to develop a wastewater system, but after renewed interest beginning in 2013, RCE prepared some feasibility studies for Green Valley.<sup>87</sup> Its appraiser, Mr. Korman, stated that decertification will not render the planning and design activities useless or valueless entirely, only reduce their value as a whole.<sup>88</sup>

Cibolo witness Mr. Klein opined that dollars Green Valley expended on its 2006 Wastewater Master Plan will not be rendered useless or valueless by the decertification. He explained:

- A master plan is a high-level document that must be reviewed and updated continually. For example, Cibolo’s Wastewater Master Plan is reviewed and, if needed, amended and updated every five years, and is updated more thoroughly by a consultant every 10 years. In contrast, Green Valley’s 2006 Wastewater Master Plan would require major updating, and has already outlived its usefulness.
- Green Valley’s 2006 Wastewater Master Plan does not address specific areas, but instead its sewer CCN area as a whole. Mr. Klein thought the decertification could not have any real impact on such a high-level planning document.<sup>89</sup>

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<sup>86</sup> GVSUD Ex. B (Allen direct) at 14; GVSUD Ex. 1 at 100041-139 (2006 Wastewater Master Plan excerpts).

<sup>87</sup> GVSUD Ex. C (Montgomery direct) at 11, 17, 22; GVSUD Ex. 1 at 100462-486 (feasibility studies). Green Valley is not claiming that dollars expended for feasibility studies are its property.

<sup>88</sup> Tr. at 106-08 (Korman).

<sup>89</sup> Cibolo Ex. 1 (Klein direct) at 28; Cibolo Ex. 2 (Klein rebuttal) at 9-12.

As discussed previously, under *Celina*, dollars Green Valley expended on its 2006 Wastewater Master Plan are not “property.” Green Valley concedes that the decertification will not cause those expenditures to have no use or value to Green Valley. For reasons identified by Mr. Klein, the evidence does not show that the decertification will render them useless or valueless to Green Valley and does not support allocating 2.2% of them to the Decertification Area. The ALJ concludes that this Item is not Green Valley property that the decertification will render useless or valueless to Green Valley.

**B. Allocable Dollars Green Valley Expended to Obtain a TPDES Permit from TCEQ**

Mr. Korman acknowledged that decertification will not render the TPDES permit, if granted, useless or valueless entirely, only in part.<sup>90</sup>

Mr. Klein opined that dollars Green Valley expended to obtain a TPDES permit will not be rendered useless or valueless by the decertification. He explained that:

- Whether Green Valley will obtain a TPDES permit is uncertain.
- Green Valley has not provided design plans to TCEQ.
- In its permit application, Green Valley proposed that the final phase of the wastewater treatment plant not be constructed until 2044.
- The application does not detail how or when Green Valley plans to serve any particular part of its CCN area.
- The draft permit does not address the area to be served if the permit is issued; instead it generally discusses effluent quantity, quality, and point of discharge.
- Green Valley did not show that the decertification will result in the plant having unused capacity.<sup>91</sup>

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<sup>90</sup> Tr. at 108-09 (Korman).

<sup>91</sup> Cibolo Ex. 1 (Klein direct) at 26-27; Cibolo Ex. 2 (Klein rebuttal) at 17-21.

Under *Celina*, dollars Green Valley expended on its TPDES permit are not “property.” Green Valley concedes that the decertification will not cause those expenditures to have no use or value to it. For reasons identified by Mr. Klein, the evidence does not show that the decertification will render them useless or valueless to Green Valley and does not support allocating 2.2% of them to the Decertification Area. The ALJ concludes that this Item is not Green Valley property that the decertification will render useless or valueless to Green Valley.

**C. Allocable Dollars Green Valley Expended to Purchase the Land**

Mr. Korman stated that decertification will not render all or any specific part of the Land useless or valueless, merely reduce its overall value to Green Valley.<sup>92</sup>

Mr. Klein opined that the Land is not useless or valueless, in whole or in part, and the decertification will not render Green Valley’s expenditures to purchase it useless or valueless. He explained:

- Mr. Klein saw the Land recently and it is undeveloped. No activities have occurred on it that negatively impact its usability for any purpose, so its value should not change, aside from market conditions.
- He thought Green Valley purchased the Land prematurely, because: (1) Green Valley lacks a TPDES permit and TCEQ-approved construction plans; and (2) TCEQ does not require TPDES permit applicants to own the land in fee. He thought Green Valley should have obtained an option to buy the Land instead.
- If Green Valley obtains a TPDES permit, it could still use the Land to build the plant and would use the same amount of the Land for that purpose regardless of the decertification. Green Valley has not indicated that loss of 2.2% of its sewer CCN area would cause it to downsize the plant.<sup>93</sup>

Under *Celina*, dollars Green Valley expended to purchase the Land are not “property.” Green Valley concedes that the decertification will not cause those expenditures to have no use

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<sup>92</sup> Cibolo Ex. 1 (Klein direct), Ex. G at 574 (Green Valley admission); Tr. at 106-07 (Korman).

<sup>93</sup> Cibolo Ex. 1 (Klein direct) at 28-29; Cibolo Ex. 2 (Klein rebuttal) at 6-8; Tr. at 49-50 (Klein).

or value to it. For reasons identified by Mr. Klein, the evidence does not show that the decertification will render them useless or valueless to Green Valley and does not support allocating 2.2% of them to the Decertification Area. The ALJ concludes that this Item is not Green Valley property that the decertification will render useless or valueless to Green Valley.

**D. Dollars Green Valley Expended for Legal Fees and Appraiser Expenses in this Case**

Asked if he contended that legal expenses incurred at the hearing are a property interest, Green Valley appraiser Mr. Korman testified: “If—given kind of the—I guess the new outlook on all this, if this is—if this is the,—in these high growth areas, if this is what is required for CCN holders like Green Valley to defend themselves, then I believe it could be.”<sup>94</sup>

Cibolo argues that dollars Green Valley expended on legal fees or appraisal costs in this case are not property. Cibolo also argues that because the decertification is mandated by statute, the act of decertification will not render such expenditures useless or valueless.

Under *Celina*, dollars Green Valley expended for legal fees and appraiser expenses in this case are not “property.” For the above reasons argued by Cibolo, the ALJ concludes that this Item is not Green Valley property that the decertification will render useless or valueless to Green Valley.

**E. Allocable Lost Expected Net Revenues from Future Customers**

Green Valley’s estimate of lost expected net revenues from future customers that is allocable to the Decertification Area is based on analysis (including assumptions such as projected growth rate and projected rate structure) by Mr. Montgomery.<sup>95</sup>

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<sup>94</sup> Tr. at 109 (Korman).

<sup>95</sup> GVSUD Ex. 1 at 1000003-004, 100014-018; GVSUD Ex. C (Montgomery direct) at 20-21.

As noted previously, one TWC § 13.255(g) factor for valuing personal property rendered useless or valueless by decertification is the impact on future revenues lost from existing customers. Green Valley argues that it should nevertheless be compensated for revenues lost from future customers:

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.” 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.<sup>96</sup>

The ALJ finds that argument unpersuasive given the express limitation to existing customers in TWC § 13.255(g). The Texas Supreme Court has held: “it is settled that every word in a statute is presumed to have been used for a purpose, and a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible.”<sup>97</sup>

Mr. Klein opined that future lost revenues from potential customers are speculative; Green Valley does not even have an approved sewer impact fee.<sup>98</sup> Mr. Stowe opined that Green Valley’s alleged lost revenue interests are not property because (1) “they cannot be attached to any other existing property right, namely the necessary authorization to collect an impact fee”; (2) Green Valley has no TPDES permit; and (3) the Decertification Area is within the city limits of Cibolo, which has the exclusive right to provide wastewater service if it decides to do so.<sup>99</sup> Cibolo and Staff also argue that where a retail utility has no wastewater customers or facilities in the decertified area, to treat its expected lost revenues from future customers as property equates to treating a CCN as property.

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<sup>96</sup> Green Valley’s Reply Brief at 13.

<sup>97</sup> See, e.g., *Tex. Worker’s Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (citations omitted).

<sup>98</sup> Cibolo Ex. 1 (Klein direct) at 29-30.

<sup>99</sup> Cibolo Ex. 3 (Stowe rebuttal) at 21-22, 29-30.

Under *Celina*, lost future revenues from currently non-existing customers are not property. The ALJ concludes this Item is not Green Valley property that the decertification will render useless or valueless to Green Valley.

## **VII. WHETHER THE APPRAISALS ARE LIMITED TO VALUING PROPERTY THAT THE DECERTIFICATION WILL RENDER USELESS OR VALUELESS**

Consistent with this PFD, Cibolo's existing appraisal concludes that Green Valley has no property that will be rendered useless or valueless by the decertification. In contrast, Green Valley's existing appraisal lists Items the ALJ has found are not such property.<sup>100</sup> The ALJ concludes that Cibolo's appraisal, but not Green Valley's appraisal, is limited to valuing property that will be rendered useless or valueless by decertification.

## **VIII. THE DATE TO USE IN DECIDING WHETHER GREEN VALLEY HAS PROPERTY RENDERED USELESS OR VALUELESS BY THE DECERTIFICATION**

TWC § 13.254(e) states: "The determination of the monetary amount of compensation, if any, shall be determined at the time another retail public utility seeks to provide service in the previously decertified area . . . ." No analogous provision is in TWC § 13.255. Unlike cases brought under TWC § 13.254, the Commission has not yet decertified Green Valley from the Decertification Area and the date that will occur remains unknown. This case thus presents an issue of first impression as to what date to use in determining whether Green Valley has property that the decertification will render useless or valueless. As requested by the ALJ, Cibolo and Green Valley addressed that issue in post-hearing briefs. Staff did not take a position on it.

Cibolo advocates using August 18, 2015, the day that Cibolo sent Green Valley notice of the application pursuant to TWC § 13.255(b) and 16 TAC § 24.120(b), informing Green Valley that, as the statute requires, it will be decertified from the Decertification Area.<sup>101</sup> In the

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<sup>100</sup> City Ex. 3 (Stowe rebuttal) at 40-41, Ex. Stowe R-C (Cibolo's appraisal); GVSUD Ex. 1 (Green Valley's appraisal). *See also* Cibolo Ex. 1 (Klein direct) at 31-32; Cibolo Ex. 2 (Klein rebuttal) at 25-26.

<sup>101</sup> TWC § 13.255(b)-(c); 16 TAC § 24.120(b)-(c).

alternative, Cibolo advocates using March 8, 2016, the date Cibolo's application was filed at the Commission.

Green Valley argues that, given the bifurcated process ordered by the Commission, it would be reasonable to use the January 17, 2017 date of the hearing, consistent with the approach used in eminent domain and condemnation proceedings.<sup>102</sup> According to Green Valley, a distinction is that here, valuations based on property identifications in this phase must be determined in the second phase.

Given Cibolo's and Green Valley's proposed dates and the facts here, the ALJ finds it unnecessary to determine which proposed date to use in deciding whether Green Valley has personal property that the decertification will render useless or valueless. That determination should instead be made in a case where it matters (or in a rulemaking). In this docket, the facts relevant to whether the Items are property that the decertification will render useless or valueless to Green Valley are not materially different whether August 18, 2015 (Cibolo's proposed date), March 8, 2016 (Cibolo's alternative proposed date), or January 17, 2017 (Green Valley's proposed date) is used.

## IX. FINDINGS OF FACT

### Procedural History

1. On August 18, 2015, the City of Cibolo (Cibolo) provided notice to Green Valley Special Utility District (Green Valley) of its intent to provide sewer service to portions of land within the corporate limits of Cibolo.
2. On March 8, 2016, Cibolo filed at the Public Utility Commission of Texas (Commission) an application (Application) under Texas Water Code (TWC) § 13.255 relating to certificates of convenience and necessity (CCNs) to provide wastewater utility service in Guadalupe County. The Application requests single sewer certification and

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<sup>102</sup> *Edwards Aquifer v. Bragg*, 421 S.W.3d 118, 147 (Tex. App.—San Antonio, 2013) (pet. denied) (holding that in a Texas Property Code chapter 21 statutory condemnation proceeding, “[t]he assessment of damages when a portion of or an entire tract or parcel of real property is condemned is made according to evidence presented at the condemnation hearing” and “these assessments are made at the time of trial because that is the time at which the government’s authority to condemn is determined”) (citations omitted).

decertification of 1,694 acres of area (Decertification Area) to which Green Valley holds sewer CCN No. 20973.

3. Notice of the Application was published in the March 25, 2016 issue of the *Texas Register*.
4. On April 12, 2016, a Commission Administrative Law Judge (ALJ) issued an order finding the Application materially deficient, requiring Cibolo to serve Green Valley with notice of the Application, and establishing deadlines for filings by Cibolo and the Commission staff (Staff) regarding those matters.
5. On April 13, 2016, Cibolo served Green Valley with a copy of the Application.
6. On April 22, 2016, Green Valley filed a motion to intervene. On April 28, 2016, a Commission ALJ granted the motion.
7. On April 29, 2016, Green Valley filed a plea to the jurisdiction and motion to dismiss.
8. On May 11, 2016, Cibolo filed its designation of Jack E. Stowe, Jr., of NewGen Strategies & Solutions, LLC as its independent appraiser.
9. On May 12, 2016, Green Valley filed a pleading arguing that Cibolo's designation of its appraiser was premature because the Commission had not yet made a determination of administrative completeness and other events had not yet occurred.
10. On May 13, 2016, a Commission ALJ issued an order setting a May 13, 2016 deadline for the parties to indicate whether they had reached agreement on an independent appraiser.
11. On May 27, 2016, the Commission issued an order requesting that the parties brief threshold issues, including matters raised in Green Valley's plea to the jurisdiction.
12. On May 27, 2016, the parties filed documents stating that they failed to agree on the appointment of an independent appraiser.
13. On June 2, 2016, Green Valley filed an emergency motion to abate based on its May 27, 2016 filing of a lawsuit in Cause No. 1:16-cv-00627, *Green Valley Special Utility District v. City of Cibolo, Texas*, before the United States District Court for the Western District of Texas.
14. On June 3, 2016, the Commission ALJ issued Order No. 5, denying Green Valley's motion to abate and establishing a deadline for Green Valley to appoint an independent appraiser.

15. On June 6, 2016, Cibolo, Green Valley, and Staff filed briefs on threshold issues in response to the Commission's May 27, 2016 order.
16. On June 7, 2016, Green Valley filed its designation of Joshua Korman of KOR Realty Consultants, LLC d/b/a KOR Group as its independent appraiser.
17. On June 14, 2016, a Commission ALJ issued Order No. 6, establishing deadlines relating to the appraisers' meeting in an effort to agree on compensation under TWC § 13.255. On June 22, 2016, the ALJ issued an order revising the deadlines.
18. On June 22, 2016, Cibolo filed a plea to the jurisdiction and motion to dismiss.
19. On June 28, 2016, Cibolo and Green Valley filed their appraisals.
20. On June 30, 2016, the Commission issued its Preliminary Order, ruling on threshold issues and listing Issue Nos. 1-8 to be addressed in this case.
21. On July 20, 2016, the Commission filed its Supplemental Preliminary Order, establishing a phased process, concluding that administrative completeness and certain other issues would not be addressed until after the first phase, and listing Issue Nos. 9-11 to be addressed in the first phase. Those three issues are:
  9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding? TWC § 13.255(c).
  10. What property of Green Valley, if any, has Cibolo requested to be transferred to it? 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 and the property that Cibolo has requested be transferred?
22. On July 26, 2016, the Commission referred the case to the State Office of Administrative Hearings (SOAH), requesting the assignment of a SOAH ALJ to conduct a hearing and issue a proposal for decision, if necessary.
23. Pursuant to the Supplemental Preliminary Order and an agreement the parties reached at an August 17, 2016 prehearing conference, SOAH Order No. 2 provided that the first phase of this case will address Issue Nos. 9-11. SOAH Order No. 2 also assigned the burden of proof to Cibolo.
24. On September 2, 2016, the parties filed an agreed proposed procedural schedule, which was adopted in SOAH Order No. 3, issued September 9, 2016.

25. SOAH Order Nos. 1, 2, and 3, the Preliminary Order, and the Supplemental Preliminary Order provide a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statute and rules involved; and a short, plain statement of the factual matters asserted.
26. On November 8, 2016, Cibolo filed a motion for partial summary decision.
27. On November 22, 2016, SOAH Order No. 5 was issued, concluding that: (1) the Commission did not refer to SOAH the issue of whether Cibolo's appraisal is an appraisal required under TWC § 13.255(l) and 16 Texas Administrative Code (TAC) § 24.120(m); and (2) for purposes of Issue No. 11, the ALJ would assume that Cibolo's appraisal is an existing appraisal.
28. On December 9, 2016, SOAH Order No. 7 was issued, granting in part and denying in part Cibolo's motion for partial summary decision. The order granted the motion with respect to uncontested Issue No. 10 and denied it with respect to contested Issue No. 9. Regarding Issue No. 10, the order accepted the parties' agreement that Cibolo has not requested Green Valley to transfer any Green Valley property to Cibolo.
29. SOAH Order No. 7 also stated that as the party with the burden of proof, Cibolo has the burden of persuasion, which never shifts, and the burden of production, and that if Cibolo makes a *prima facie* case that Green Valley has no property that the decertification will render useless or valueless to Green Valley, the burden of production shifts to Green Valley to show that it has such property.
30. As a result of SOAH Order No. 7, the contested issues remaining in this first phase are:
  9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo 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?
31. On January 17, 2017, the hearing on the merits was held at SOAH's hearing facility in Austin, Texas. Cibolo, Green Valley, and Staff appeared through their attorneys.
32. On February 9, 2017, the parties filed Agreed Stipulations regarding the procedural history, the parties' contentions, and certain facts.
33. The record closed on February 28, 2017, when the parties filed their reply briefs and Cibolo and Green Valley filed proposed findings of fact and conclusions of law.

34. In its proposed findings of fact and conclusions of law, Cibolo proposed that it and Green Valley split evenly the costs of the transcript at the rate for non-expedited service, and that Cibolo pay all additional costs to obtain the transcript on an expedited basis. Green Valley did not address that issue.
35. Cibolo's proposal regarding the cost of the transcript is reasonable and should be adopted.

**Issue No. 9: What Green Valley Property, If Any, Will the Decertification Render Useless or Valueless to Green Valley?**

36. Green Valley obtained its sewer CCN in October 2005. The Decertification Area is approximately 1,694 acres, or 2.2%, of Green Valley's 76,000-acre sewer CCN area.
37. The Decertification Area is within the corporate limits of Cibolo, and is generally bounded on the south by U.S. Interstate Highway 10; on the west by Cibolo Creek; on the north by Lower Seguin Road, Hackerville Road, and Arizpe Road; and on the east by the court-decreed extraterritorial jurisdiction boundary of Cibolo and the City of Marion, as well as the boundaries of Guadalupe County Appraisal District Parcel Nos. 70979 and 71064.
38. As stated in the Agreed Stipulations, Green Valley contends that the following items (Items) are its property that the decertification will render useless or valueless to Green Valley:
  - a. Dollars expended by Green Valley for engineering and planning to implement Green Valley's 2006 Wastewater Master Plan allocable to the Decertification Area;
  - b. Dollars expended by Green Valley to obtain a Texas Pollutant Discharge Elimination System (TPDES) permit from the Texas Commission on Environmental Quality (TCEQ) allocable to the Decertification Area;
  - c. Dollars expended by Green Valley to purchase an approximate 65-acre tract of land (Land) allocable to the Decertification Area;
  - d. Dollars expended by Green Valley for legal fees and appraiser expenses in this docket; and
  - e. Lost expected net revenues allocable to the Decertification Area.
39. As stated in the Agreed Stipulations, Cibolo contends that Green Valley has no property that the decertification will render useless or valueless to Green Valley. Staff agrees with that position.

40. Green Valley has not adopted either retail sewer rates or sewer impact fees.
41. Green Valley does not have any wastewater infrastructure in the Decertification Area.
42. Green Valley does not have any retail wastewater customers in the Decertification Area.
43. Green Valley does not have a TPDES permit to construct or operate a wastewater treatment plant.
44. On April 1, 2015, Green Valley filed at TCEQ an application for a TPDES permit.
45. In 2016, the TCEQ Executive Director (ED) issued a draft TPDES permit to Green Valley and the TCEQ Commissioners referred the matter to SOAH for a contested case hearing on several issues. The ED disagreed with Cibolo's position that Green Valley's TPDES permit application was inconsistent with Cibolo Creek Municipal Authority's status as the regional wastewater provider. The hearing in that case is set for September 12-14, 2017.
46. The estimated construction schedule in Green Valley's TPDES permit application contemplates phased construction of the wastewater treatment facility, with the final phase being constructed in 2044. The schedule allows Green Valley to reevaluate whether it needs more capacity before constructing the additional phases.
47. Green Valley does not have, and has not applied for, TCEQ approval of designs for a wastewater collection system or a wastewater treatment facility.
48. Green Valley purchased the Land in order to construct a wastewater treatment plant on it. The Land is currently undeveloped.
49. The decertification will not affect Green Valley's ability to sell the Land or to use it for a wastewater treatment plant to serve the rest of its sewer CCN area.
50. Green Valley's 2006 Wastewater Master Plan is a high-level planning document that does not address specific areas, but rather discusses Green Valley's sewer CCN area as a whole. It would require substantial updates in order to be used.
51. Green Valley concedes that the decertification will not result in the dollars it expensed on the 2006 Wastewater Master Plan, a TPDES permit (if obtained), or the Land having no use or value to it.
52. The evidence does not show that Green Valley's decertification from 2.2% of its sewer CCN area will (1) reduce the usefulness or value of money Green Valley expended on the 2006 Wastewater Master Plan, a TPDES permit (if obtained), or the Land; or (2) reduce the usefulness or value of such expended money or expected net revenues by approximately 2.2%.

53. None of the Items is Green Valley property that the decertification will render useless or valueless to Green Valley.

**Issue No. 10: What Green Valley Property, If Any, Has Cibolo Requested Be Transferred to Cibolo?**

54. Cibolo has not requested that Green Valley transfer any Green Valley property to Cibolo.

**Issue No. 11: Are the Existing Appraisals Limited to Valuing Green Valley Property that the Decertification Will Render Useless or Valueless?**

55. Cibolo's existing appraisal is limited to valuing Green Valley property that will be rendered useless or valueless by the decertification because it concludes that Green Valley has no such property.
56. Green Valley's existing appraisal is not limited to valuing Green Valley property that will be rendered useless or valueless by the decertification.

**X. CONCLUSIONS OF LAW**

1. Cibolo and Green Valley are retail public utilities as defined in TWC § 13.002(19).
2. The Commission has jurisdiction and authority over this case under TWC §§ 13.041 and 13.255(c).
3. SOAH has jurisdiction over matters related to the hearing of this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code §§ 2001.058 and 2003.049.
4. Notice of the hearing was provided in compliance with Texas Government Code § 2001.052 and 16 TAC § 24.106.
5. As the applicant, Cibolo has the burden of proof in this case, including the burden of persuasion, which never shifts. Through its direct case, Cibolo made a *prima facie* showing that Green Valley has no property that the decertification will render useless or valueless. As a result, the burden of production shifted from Cibolo to Green Valley to show that it has such property. 16 TAC § 24.12; 1 TAC § 155.427.
6. TWC § 13.255(c) provides that the Commission shall grant single certification to the municipality. TWC § 13.255(c) further provides that the Commission shall determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility, and if so, shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property.

7. As used in TWC § 13.255(c), the words “property,” “useless” and “valueless” should be given their ordinary or plain meaning. Tex. Gov’t Code §§ 311.011, .002; *Tex. Dept. of Protective & Reg. Svcs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004); *State v. Pub. Util. Comm’n of Texas*, 883 S.W.2d 190, 200 (Tex. 1994).
8. The word “property” in TWC § 13.255 includes all property, real and personal, and tangible and intangible. *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, SOAH Docket No. 473-16-5011.WS, Order (April 13, 2017) (*Celina Order*), Conclusion of Law No. 10.
9. TWC § 13.255(g) sets forth factors for the Commission to consider if a retail public utility decertified as a result of single certification has personal property that is rendered useless or valueless by the decertification. The factors the Commission shall consider to ensure that the compensation to the retail public utility is just and adequate at a minimum include: the impact on the existing indebtedness of the retail public utility and its ability to repay that debt; the value of the service facilities of the retail public utility located within the area in question; 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; the amount of the retail public utility’s contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; factors relevant to maintaining the current financial integrity of the retail public utility; and other relevant factors.
10. The factors listed in TWC § 13.255(g) are limited to determining the value of personal property, if any, rendered useless or valueless by the decertification and are not themselves property interests. TWC § 13.255(c) and (g); *Celina Order Conclusion of Law No. 8A*.
11. A CCN is not property and thus loss of CCN area is not itself property. 16 TAC §§ 24.113(a) and 24.116; TWC § 13.255(c); *Celina Order Conclusion of Law No. 11*.
12. Expenditures are not property. TWC § 13.255(c); *Celina Order Conclusion of Law No. 7A*.
13. Green Valley’s expenditures on permitting, planning, and design activities to provide wastewater service are not property. TWC § 13.255(c); *Celina Order Conclusion of Law No. 7B*.
14. Green Valley’s expenditures on reasonable and necessary legal expenses and professional fees incurred in this docket are not property. TWC § 13.255(c); *Celina Order Conclusion of Law No. 7C*.

15. TWC § 13.255(g) limits recovery for the impact on future revenues to losses from existing customers. Green Valley's lost future revenues from currently non-existing customers are not property and are not compensable under TWC § 13.255(c) and (g). TWC § 13.255(c) and (g); *Celina* Order Conclusion of Law No. 19.
16. As used in TWC § 13.255(c), "useless" means "having or being of no use" and "valueless" means "having no monetary worth."
17. There is no property of Green Valley that will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this matter. TWC § 13.255(c).
18. Cibolo's appraisal is limited to property that will be rendered useless or valueless by the decertification. TWC § 13.255(c) and (g).
19. Green Valley's appraisal is not limited to property that will be rendered useless or valueless by decertification. TWC § 13.255(c) and (g).

#### **XI. PROPOSED ORDERING PARAGRAPHS**

1. Green Valley does not have any property that will be rendered useless or valueless as a result of the decertification requested by Cibolo in this case. Cibolo therefore does not owe any compensation to Green Valley as a result of such decertification.
2. The second phase of this proceeding will address Cibolo's application for single certification and decertification.
3. Cibolo and Green Valley shall split evenly the costs for the hearing transcript at the rate for non-expedited service, and Cibolo shall pay for all of the additional costs to obtain the transcript on an expedited basis.
4. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted, are denied.

**SIGNED April 28, 2017.**

  
**ELIZABETH DREWS**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**