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

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

GREEN VALLEY SPECIAL UTILITY DISTRICT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

May 12, 2017

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

GREEN VALLEY SPECIAL UTILITY DISTRICT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Green Valley Special Utility District ("Green Valley") submits its Exceptions to the Administrative Law Judge's ("ALJ") April 28, 2017 Proposal for Decision ("PFD") in the above-referenced Docket. These Exceptions are timely filed pursuant to Commission Advising & Docket Management's May 1, 2017 letter to all parties of record establishing deadlines in this proceeding. In support of its Exceptions, Green Valley respectfully submits as follows:

I. SUMMARY OF EXCEPTIONS

Green Valley excepts to the PFD's recommended finding that no property will be rendered useless or valueless by decertification of a significant portion of high growth area in its wastewater Certificate of Convenience and Necessity ("CCN") No. 20973, as requested in the TWC § 13.255 single certification application ("Application") filed by the City of Cibolo ("Cibolo") in this docket. If the Commission were to adopt the PFD, Green Valley will be deprived of adequate and just compensation as mandated by TWC § 13.255(c) and the Federal and State constitutions, which place no limits on the type of "property" that may be lost. Nor does the statute, constitutional provisions or applicable precedent prohibit allocated partial property losses, which losses will constitute the overwhelming majority of takings requiring compensation under the statutory decertification scheme. Cibolo failed to meet its burden of proof in this proceeding. In fact, the PFD offers very little analysis of the merits of the record evidence and, instead, relies almost exclusively on the

Commission's erroneous determinations in *Celina*.[1] It is inappropriate for the PFD to rely on *Celina* because that decision is not final, is subject to rehearing and appeal, and thus has no precedential value. Moreover, *Celina* was wrongly decided.

Green Valley respectfully requests that the Commission modify the PFD to reflect these exceptions and direct a second phase hearing to establish the value of compensation that will reasonably make Green Valley whole for its property interests that will be rendered useless or valueless on an allocated basis upon decertification.

II. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

Green Valley largely agrees with the PFD's description of the procedural history of this docket as well as its description of the Commission's jurisdiction over the City of Cibolo's ("Cibolo") application.[2] However, Green Valley excepts to the PFD's statement that the adequacy of notice of the application is not contested, but that is a second hearing issue.[3] Green Valley agrees that the sufficiency of notice was not an issue to be determined in this first phase pursuant to the Commission's Preliminary and Supplemental Preliminary Orders, but as the ALJ recognizes, Cibolo's August 18, 2015 notice of intent remains a second phase issue.[4] The PFD's suggestion that all Cibolo's Application notices are adequate is misleading. Other administrative completeness requirements were also referred for the second phase.[5] Green Valley does not waive its right to

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[1] *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, Docket No. 45848, Order (April 13, 2017). A motion for rehearing was filed on May 8, 2017.

[2] Green Valley notes that Finding of Fact No. 18 is factually incorrect: Cibolo filed a *surreply* to Green Valley's plea to the jurisdiction rather than its own plea to the jurisdiction.

[3] PFD at 3.

[4] *Id.* at 3, n. 4.

[5] Supplemental Preliminary Order (July 20, 2016) at 3 (determining that "administrative completeness should not be addressed by the SOAH ALJ during this phase of the proceeding.").

contest the sufficiency of Cibolo's notice of intent or any other administrative requirements in the second phase.

III. SCOPE OF THE ISSUES

Green Valley accepts the PFD's description of the scope of issues addressed in this first phase of the proceeding.

IV. BACKGROUND ABOUT THE EVIDENCE AND THE APPRAISERS

Green Valley excepts to the PFD's description of the relative expertise of Green Valley witness Joshua Korman and Cibolo witnesses Jack Stowe and Rudy Klein. Mr. Korman was the only qualified appraiser to present testimony in this proceeding.[6] To the contrary, Cibolo's "appraisal" did not conform with applicable standards governing appraisals,[7] and therefore failed to meet the plain wording of TWC § 13.255(l) requiring an "appraiser" who is "qualified."[8] Beyond the absence of a competent Cibolo appraisal, its witnesses were unqualified to identify property that is rendered useless or valueless. Mr. Klein directly acknowledged both: (a) that he has zero experience identifying or valuing intangible property;[9] and (b) that he could not provide *any opinion* on whether money constitutes property.[10] Mr. Stowe's "appraisals" have to date never been accepted

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[6] Tr. at 123 (Korman Testimony); Ex. GVSUD-A (Korman Direct) at 3.

[7] Ex. GVSUD-A (Korman Direct) at 9-10; Ex. GVSUD-1, at GVSUD 100001; Ex. GVSUD-2 (referencing Mr. Korman's use of the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition ("USPAP"), the standards licensed appraisers typically use for appraisals along with the TWC §13.255 compensation factors in place of USPAP where applicable.). There is no evidence to support the PFD's conclusion that Mr. Korman's expertise is somehow "less of an advantage" simply because this phase only concerns property identification rather than valuation.

[8] TWC §13.255(l); 16 TAC §24.120(m). Mr. Korman relied on extensive information provided by Green Valley, as evidenced by the testimonies of Mr. Korman, Mr. Allen and Mr. Montgomery. Ex. GVSUD-A (Korman Direct) at 9-10; Ex. GVSUD-B (Allen Direct) at 6-7; Ex. GVSUD-C (Montgomery Direct) at 5-6, 18, 20-22; *see also* Ex. GVSUD-1 (Green Valley Appraisal Report).

[9] Tr. at 26 (Klein Testimony).

[10] *Id.* at 31 (Klein Testimony).

in a case that proceeded to a final order before a settlement agreement was reached between the parties.[11] Mr. Stowe further acknowledged that his "appraisal" was not prepared using USPAP.[12] This is important because, as the ALJ acknowledges, Cibolo bears the burden of proof in this proceeding.[13]

V. FACTUAL BACKGROUND

A. Stipulations

While Green Valley generally agrees with the factual background outlined in the PFD, it excepts to the PFD's unfounded conclusion that Green Valley waived its rights to compensation for increased costs to customers.[14] Green Valley did not assert that increased costs constitute property and this item was therefore not included in the parties' Agreed Stipulations. Green Valley briefed this issue, which was included in Green Valley's appraisal and constitutes record evidence,[15] simply for the purpose of preserving its right to argue that such increased customer costs are compensable under the plain language of TWC § 13.254(g) without regard to whether they are considered "property" for the purpose of this limited initial phase of the hearing. Green Valley is a political subdivision and has an obligation for the benefit of its constituents to keep its fees reasonable consistent with the Commission's obligation to ensure just and reasonable rates.[16] Green Valley took a reasonable approach to measuring this impact to the remaining parcels should Cibolo's piecemeal

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[11] Tr. at 216 (Stowe Testimony).

[12] *Id.*

[13] PFD at 37, CoL No. 5.

[14] *Id.* at 8-9.

[15] Ex. GVSUD-1 at GVSUD 100005-100006.

[16] Ex. GVSUD-B (Allen Direct) at 10; TWC §13.001(3). Green Valley's retail rates are potentially appealable to the Commission under TWC § 13.043(b).

annexation and decertification approach be approved.[17] These increased costs are the direct result of Cibolo's questionable checkerboarding approach to decertification,[18] regardless of whether they constitute property interests for purpose of this hearing phase. The PFD's finding of waiver is unsupported by the record and the Commission should decline this portion of the PFD.

B. Other Uncontroverted Facts

Green Valley accepts the PFD's description of other uncontroverted facts.

VI. LEGAL FRAMEWORK

A. *Celina* Order

While Green Valley accepts as accurate the PFD's description of the *Celina* order, Green Valley excepts to the PFD's virtually exclusive reliance on that decision as the basis for its recommendation that Green Valley has no property that will be rendered useless or valueless upon decertification. Green Valley addresses the propriety of such reliance in other sections of these Exceptions, explaining why the *Celina* decision was wrong as a matter of law. But as a fundamental premise of administrative law, the PFD is wrong to rely on *Celina* because it is not a final under the explicit requirements of Section 2001.144 of the Administrative Procedure Act.[19] The *Celina* decision is subject to rehearing and appeal to the courts, should the Commission fail to reverse its decision. Aqua Texas, Inc., the retail public utility whose partially-decertificated CCN area was the

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

[18] *Id.*

[19] TEX. GOV'T CODE § 2001.144(a) provides: "A decision or order in a contested case is final: (1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing; (2) if a motion for rehearing is filed on time, on the date: (A) the order overruling the motion for rehearing is signed; or (B) the motion is overruled by operation of law." None of the enumerated circumstances has occurred in the *Celina* docket.

subject of that proceeding, has timely filed a motion for rehearing.[20] Thus, the PFD's reliance on *Celina* is inappropriate and cannot serve as the basis for the PFD recommendations.

B. Burden of Proof

Green Valley agrees with the PFD's determination that Cibolo bears the burden of proof on all issues in this proceeding. However, Green Valley excepts to the PFD's conclusion that Cibolo met its burden in this proceeding.[21] Regarding the competency of Cibolo's witnesses to identify property rendered useless and valueless, Green Valley incorporates herein its exceptions to Section IV.A. of the PFD. Regarding the legal theories asserted by Cibolo and Commission Staff, Green Valley incorporates herein its exceptions to Sections V. and VI. of the PFD.

C. TWC Provisions Regarding property Rendered Useless or Valueless

While Green Valley generally agrees with the PFD's recommendation that the plain meaning of the terms "property," "useless," and "valueless" should be utilized in ascertaining their meaning, such terms must also be construed in a manner that gives plain meaning to the governing purpose of TWC § 13.255(c) and (g), which is to ensure that reatail public utilities such as Green Valley are provided just and adequate compensation for property that will be lost upon decertification.[22] By failing to do so, the PFD, if adopted by the Commission, will result in an unlawful regulatory taking, damaging, or destruction of property for public use in violation of the Texas and U.S.

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[20] Docket No. 45848, Motion for Rehearing (May 8, 2017).

[21] PFD at 14.

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

Constitutions.[23]

The PFD erroneously characterizes these fundamental constitutional issues as outside the scope of the Commission's jurisdiction.[24] Green Valley is *not* asking the Commission to "constru[e] constitutional provisions."[25] The *Stewart* case, upon which the ALJ relied in the PFD, simply holds that only the judiciary may construe the state constitution, and thus has no relevance or application to the issues in this proceeding.[26] To the contrary, Green Valley is requesting only that the Commission fulfill its mandate under the Code Construction Act that it interpret the *statute* in a manner that is consistent with the plain mandate of the state and federal constitutions,[27] which gives effect to the entire statute and presumes "a just and reasonable result is intended."[28]

D. Definition of "Property"

1. Whether "Property" Includes Intangible Personal Property

Green Valley excepts to the PFD's adoption of a broad definition of property and facilities, consistent with the Texas Supreme Court's mandate in *State v. Public Utility Commission* and the definition of "facilities" in Section 13.002(9) of the Texas Water Code.[29] However, Green Valley

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

[24] PFD at 15.

[25] *Id.*

[26] *City of Dallas v. Stewart*, 361 S.W.3d 562, 579 (Tex. 2012). This case only addresses the issue of whether an agency's determination of a constitutional-based claim has preclusive effect on the courts, and *not* whether an agency must interpret and apply a statutory scheme consistently with constitutional mandates, which is the issue here.

[27] TEX. GOV'T CODE § 311.021(1) (requiring a presumption that "compliance with the constitutions of this state and the United States is intended.").

[28] *Id.* at § 311.021(2) and (3).

[29] PFD at 116.

adamantly disagrees with, and excepts to, the PFD's adoption of the determination in *Celina* that money, once spent, somehow loses its property status as to the CCN holder. Neither the PFD nor the *Celina* order cites to any applicable statutory provision for this proposition. Neither the PFD nor the *Celina* order cits to any legal precedent to support this determination. Indeed, the PFD cites to no record evidence at all for its conclusion.[30] Rather, the PFD's entire "analysis" in support of the erroneous conclusion that spent money is no longer property consists of quoting the *Celina* decision.[31]

As set forth in Section V.A., the PFD is wrong to rely on *Celina* because it is not a final order.[32] The *Celina* decision is subject to rehearing and appeal, and Aqua Texas has in fact moved for rehearing.[33] In its motion, Aqua Texas has challenged the order on several grounds. As it pertains to this PFD's adoption of the theory that spent money is no longer property, Aqua Texas argued that not only did the Commission fail to provide any legal support for its decision,[34] but also that the Commission's determination simply makes no sense.[35] Thus, the ALJs in the *Celina* docket correctly found that such a theory would require spent money to enter "*a sort of property purgatory*, transformed into non-property until some form of actual property (a physical facility) attaches-to and

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[30] Commission Staff, who originated this "spent money is not property" theory through a statement of position, did not even submit any testimony or documentary evidence in this proceeding. Its statement of position does not contain any precedent or statutory interpretation to support its theory.

[31] Docket No. 45848, Order at 7.

[32] TEX. GOV'T CODE § 2001.144(a).

[33] Docket No. 45848, Motion for Rehearing (May 8, 2017).

[34] The "legal" basis on which the Commission determined in *Celina* that spent money was no longer property consisted solely of its statement that it "disagrees with the [*Celina*] ALJs." Docket No. 45848, Order at 7.

[35] Docket No. 45848, Motion for Rehearing at 6.

rescues it, at which point the expended money once again becomes property."[36] The *Celina* ALJs found "no support for such a strained and narrow reading" of the statute.[37] Green Valley agrees with the *Celina* ALJs' analysis. The Commission's decision in *Celina* was wrong, and the ALJ's reliance here on the "spent money" theory reflected in the *Celina* order is misplaced.

2. Whether the TWC § 13.255(g) Factors Define "Property"

Green Valley excepts to the PFD's recommendation here to adopt the Commission's rationale in *Celina* to prohibit the factors enumerated in TWC § 13.255(g) from informing the identification of property interests. The *Celina* decision, which is not final and is therefore inappropriately relied upon in the PFD here. The unambiguous statutory language in TWC § 13.255(g) dictates that the Commission "shall, at a minimum, include" these factors in its consideration in order to ensure "that the compensation to a retail public utility is just and adequate" for personal property.[38] The ALJs in *Celina* correctly applied the broad meaning of property mandated by *State v. Public Utility Commission* to conclude that the factors *identify* a utility's property interests.[39] The *Celina* ALJs rejected arguments to the contrary as "insupportably narrow"[40] and "incompatible with *State v. Public Utility Commission of Texas*."[41]

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[36] Docket No. 45848, Proposal for Decision (Jan. 27, 2017) at 19.

[37] Docket No. 45848, Proposal for Decision at 19.

[38] TWC § 13.255(g).

[39] Docket No. 45848, Proposal for Decision at 17; *see also State v. Public Util. Comm'n*, 883 S.W.2d 190, 200 (Tex. 1994).

[40] Docket No. 45848, Proposal for Decision at 17, 20.

[41] *Id.* at 21.

3. Whether a Bill Sponsor's Statement Defines "Property"

Green Valley agrees with the PFD's statement that the statutory language itself "is the truest manifestation of statutory intent."[42] However, Green Valley excepts to the PFD's discussion to the extent that it could be read to preclude legislative history from being used as a tool to inform the meaning of the statutory language. Such a determination would run afoul of the Code Construction Act, which provides that "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the (1) *object sought to be attained*; (2) *circumstances under which the statute was enacted*; (3) *legislative history*..."[43] Green Valley properly relied on legislative history,[44] along with numerous other statutory arguments, as an aid to assist the Commission in determining the scope of the terms "property" and "useless or valueless" that is consistent with the statutory mandate to determine an amount of compensation that is "adequate and just to compensate the retail public utility for such property" rendered useless or valueless upon decertification.[45]

E. Definition of "Useless" or "Valueless"

Green Valley excepts to the PFD's adoption of Cibolo and Staff's arguments that: (1) the terms must be defined in a manner to require the entire identified property interest to be rendered useless or valueless as a prerequisite to any compensation; and (2) a mere 2.2% reduction of the usefulness or value or Green Valley's property interests is insufficient to meet some unknown and

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[42] PFD at 19.

[43] TEX. GOV'T CODE § 311.023 (emphasis added).

[44] *See* Green Valley Initial Brief (Feb. 10, 2017) at 16-21.

[45] TEX. WATER CODE § 13.255(c).

unspecified threshhold that triggers compensation.[46] The PFD's adoption of these standards renders the statutory scheme meaningless. The practical effect of such a standard would be no compensation in virtually every imaginary scenario, and the effect here is an unconstitutional taking.

1. Whether Defining an Item as an Allocable Portion Meets the "Useless or Valueless" Requirement

The PFD's determination that property may not be rendered useless or valueless on an allocable basis is untenable. The determination relies on two grounds: (1) that eminent domain and constitutional takings law does not apply because the property at issue is not real property; and (2) that under *Celina*, the TWC § 13.255(g) factors, which the Commission *must* consider for valuing property, *must not* be read to support identification of that same property.[47] Both stated grounds are wrong.

As to the PFD's first asserted ground, the analysis is in direct conflict with applicable law and must be rejected. Green Valley witness Joshua Korman correctly testified that eminent domain principles, including partial takings, apply to personal property.[48] In *Horne v. Department of Agriculture*, the U.S. Supreme Court addressed the precise issue of a *partial taking* in the context of *personal property*, holding that the federal government's requirement that raisin growers set aside as a reserve a percentage of their raisins, allegedly for the public good, without providing just and adequate compensation constituted a taking under the Fifth Amendment of the U.S. Constitution.[49] Addressing the alleged distinction between real and personal property (such as relied upon in the PFD), the Court found:

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[46] PFD at 20.

[47] PFD at 20-21.

[48] Tr. at 110-112 (Korman Testimony).

[49] *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

> There is no dispute that the "classic taking is one in which the government directly appropriates private property for its own use. Nor is there any dispute that in the case of real property, such an appropriation is a *per se* taking that requires just compensation. *Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.*[50]

The Court further held that the Takings Clause "protects 'private property' without any distinction between different types."[51]

The record evidence in this proceeding includes Mr. Korman's analogy between the decertification process set forth in TWC § 13.255 and partial takings in eminent domain proceedings.[52] Mr. Korman testified that, as with eminent domain proceedings, where partial takings are common and are compensated based on the portion taken, GVSUD's property interests at stake in this proceeding are analogous to a "bundle of sticks" in which a number of those individual sticks will be wholly taken, or rendered "useless or valueless" by the decertification.[53] Similarly, the *Horne* Court, addressing the federal government theory that the growers were not deprived of the whole economic value of the set aside raisins because they might be partially reimbursed if the set aside raisins were later sold, found that "growers subject to the reserve requirement thus lose the *entire 'bundle' of property rights in the appropriated raisins...*"[54] The Court further found in *Horne* that "when there has been a physical appropriation, 'we do not ask whether it deprives the owner of *all*

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[50] *Id.* at 2425-2426 (internal quotes and citations omitted) (emphasis added).

[51] *Id.* at 2426

[52] Ex. GVSUD-A (Korman Direct) at 13-14.

[53] Tr. at 70 (Korman Testimony); Ex. GVSUD-A (Korman Direct) at 13-14.

[54] *Horne*, 135 S. Ct. at 2428. Texas courts have similarly found that compensation is required for personal property taken, damaged, or destroyed by the government for public use. *E.g.*, *Steele v. Houston*, 603 S.W.2d 786, 788-793 (Tex. 1980) (holding that "one could recover damages by proof that [property] was inflicted with special injury such as will 'practically deprive him of the ordinary use and enjoyment of it'" and that a damage means "every loss or diminution of what is a man's own, occasioned by the fault of another.").

economically valuable use.'"[55] Green Valley submits that the same concept should apply to intangible personal property rendered useless or valueless as the result of partial appropriation of physical service territory.[56] The Commission must interpret the terms "useless" and "valueless" in a manner that does not run afoul of the constitutional principles set forth in the *Horne* decision by recognizing that personal property can be rendered useless or valueless on an allocated basis.

The PFD's second argument for rejecting Green Valley's approach of identifying property rendered useless or valueless on an allocable basis consists solely of pointing to the Commission's determination in *Celina* that the factors in the similar statutory provision found in TWC § 13.254(g) may not be used to inform the identification of the property. The *Celina* decision was simply wrong, and the PFD's reliance on *Celina* was therefore improper. Not only is the *Celina* decision not a final order but, as the PFD in *Celina* correctly determined when confronted with the same arguments, limiting the statutory factors to mere "compensation factors" separates property from its value and, as such, is "insupportably narrow" and "incompatible with *State v. Public Utility Commission of Texas*." [57]

A straightforward reading of the statute requires compensation for partial takings. The *Celina* decision's imposition of an artificial barrier between property identification and quantification is simply unsupported by the plain language of TWC § 13.255(g), which requires the Commission to consider "the amount of expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area *that are allocable to the area in question.*"[58] The

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[55] *Id.* at 2429.

[56] The dollars the State would effectively appropriate here by partial decertification if Cibolo's application is granted are equivalent to the government's appropriation of a percentage of the raisin grower's crop in *Horne.*

[57] Docket No. 45848, PFD at 17-18, 20-21.

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

Celina decision's interpretation of the statute as requiring identification and valuation to be conducted in mutual isolation leads to absurd results. As just one example, under the third factor, this approach would *require* compensation for items that are not property at all under the Commission's "spent money is not property" theory. In other words, the Commission's interpretation would impose the requirement that planning and design expenditures allocable to the decertificated area be compensated *even though* such expenditures are not property. The *Celina* approach makes no sense when applied to the plain words in the statute and frustrates its overall purpose. Further, partial compensation is required because it would be unjust to require compensation for the entirety of these types of expenditures when only partial deceritifcation occurs. Partial decertifications are the norm. The PFD should not have relied upon the improper and illogical interpretations proferred in the *Celina* decision.

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

Green Valley emphatically disagrees with the PFD's strained analysis supporting its conclusion that the usefulness or value of Green Valley's property interests will not be reduced in a sufficient amount to justify compensation.[59] The flaw in the analysis is revealed by its reliance on Cibolo witness Stowe's testimony to the effect that Green Valley would still have had to make all of these investments in the absence of Cibolo's application.[60] What that passage omits is the fact that those investments will no longer be recovered through customer bills in the decertificated areas.

Similarly, the PFD's reliance on Staff's assertion that the percentage of Green Valley's sewer CCN subject to decertification is "too small" is unsupported by record evidence,[61] which shows that

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[59] PFD at 22.

[60] *Id.*

[61] Importantly, Staff offered no testimony or evidence in this proceeding at all and specifically failed to offer any opinion regarding what percentage of the Green Valley sewer CCN area Staff would not consider to be "too small."

this is just one of several current and anticipated decertifications. Cibolo witness Klein testified at hearing that more decertification proceedings are expected.[62] Tellingly, Cibolo witness Stowe testified that, even if Cibolo were to take over Green Valley's entire sewer CCN area, it would only require compensation for the real property that Green Valley purchased.[63]

Given this reality, the PFD's determination that the amount of area decertificated is too small constitutes tacit approval of decertification of the entire Green Valley sewer CCN area so long as it is done in the piecemeal manner undertaken by Cibolo thus far. In other words, the PFD's analysis authorizes Green Valley's "death" so long that it is administered by a thousand cuts. The PFD's adoption of this analysis renders the statute meaningless and encourages a strategic approach to seeking decertification in order to avoid reasonable and just compensation. Moreover, the analysis again fails to give consideration to constitutional principles, which mandate just and adequate compensation for partial takings.[64] As such, this approach must be rejected.

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

Green Valley agrees with the PFD's analysis rejecting Cibolo's "regionalization" contentions.[65] The PFD correctly found that Cibolo did not meet its burden of proof on this issue. However, Green Valley excepts to the following isolated statement in this section of the PFD: "In this PFD the ALJ concludes that Green Valley does not have property that the decertification will

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[62] Tr. at 47-48 (Klein Testimony).

[63] Tr. at 248 (Stowe Testimony).

[64] *E.g.*, *Horne*, 135 S. Ct. at 242.

[65] PFD at 22-25. It is somewhat telling that the PFD devotes several pages to this single argument raised by Cibolo, while elsewhere in the PFD simply adopting the *Celina* determination, which is itself devoid of legal analysis, in addressing the primary issue in this proceeding, which is the identification of property.

render useless or valueless to Green Valley."[66] Green Valley addresses this recommended finding throughout these Exceptions and incorporates its arguments here for the purpose of addressing this erroneous conclusion.

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

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

Green Valley excepts to the PFD's recommendation that no dollars invested in engineering and planning to implement the 2006 wastewater master plan were rendered useless or valueless. The PFD's recommendation is based solely on: (1) the incorrect theory adopted in *Celina* that "spent money" is no longer property; and (2) the determination, contrary to applicable law, that a property interest must be rendered totally useless or valueless to merit compensation under the statutory scheme. Green Valley has addressed the absence of any statutory or constitutional support for these erroneous propositions throughout Section V of these Exceptions and incorporates them herein for all purposes.

The record evidence also fails to support the PFD's recommendation. Green Valley supported its monetary investments in permitting, planning, and design activities through extensive testimony and documentary support as evidenced in the testimony of Mr. Allen, Mr. Montgomery, and Mr. Korman, as well as the Green Valley Appraisal Report and its addenda.[67] An allocable

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[66] *Id.* at 24.

[67] Ex. GVSUD-B (Allen Direct) at 6-7, 10-17; Tr. at 154-155 (Allen Testimony); Ex. GVSUD-C (Montgomery Direct) at 6, 9-19; Exhibit GVSUD-A (Korman Direct) at 8 12-13, 15-16; GVSUD-1 at GVSUD 100041-100139 (Wastewater Master Plan; GVSUD 100256-100342 (TPDES permit application); GVSUD 100343-100368 (TCEQ domestic wastewater permit application); GVSUD 100432-100454 (warranty deeds for 65-acre parcel); GVSUD-100459-100461 (invoices); GVSUD-100455 (legal costs summary).

portion of these dollar investments will be stranded upon decertification.[68] Cibolo conceded at hearing that money is property,[69] that Green Valley made planning and design investments for its entire CCN area,[70] that it was prudent for Green Valley to do so,[71] and that such planning was *not* speculative,[72] but instead constitutes "good planning" in anticipation of future service requests.[73] Cibolo witness Stowe agreed that Green Valley "should go ahead and plan" to serve its CCN area without anticipation that Cibolo would seek to decertify the area.[74] Given that Cibolo both agreed to and approved Green Valley's sewer CCN boundary at the time it was obtained,[75] Stowe's agreement makes sense. The PFD reflects total disregard of this substantial record evidence. The PFD should be rejected as contrary to law and the evidentiary record.

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

Green Valley excepts to the PFD's recommendation to find that no dollars invested in obtaining a TPDES permit constitute property interests rendered useless or valueless.[76] Green Valley

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[68] Ex. GVSUD-A (Korman Direct) at 8 ("Monetary assets are a type of property interest that may be devalued by the decertification for reasons that have no use to GVSUD."), 12-13; Ex. GVSUD-1, at GVSUD 100004-100005; *see also* Tr. at 35 (Klein Testimony) (acknowledging that Green Valley will no longer be able to serve in the area where decertification is sought).

[69] Tr. at 233 (Stowe Testimony) (Q. Is money property? A. It can be, yes.).

[70] Tr. at 31-32 (Klein Testimony).

[71] Tr. at 33-34 (Klein Testimony).

[72] Tr. at 45 (Klein Testimony).

[73] Tr. at 55-56 (Klein Testimony).

[74] Tr. at 223 (Stowe Testimony).

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

[76] PFD at 27-28.

addressed in Section V of its Exceptions the incorrect statutory interpretations underlying the *Celina* decision on which the PFD's recommendation is based and incorporates its arguments herein for all purposes. In Section VI.A., above, Green Valley addressed the PFD's reliance on selective portions of the evidentiary record that support its conclusion and the PFD's disregard of contrasting evidence that does not. Green Valley incorporates herein its Exceptions raised Section VI.A. for all purposes. The Klein testimony on which the PFD relies is undermined by the uncontroverted record evidence that Green Valley's investments were made in order to serve its entire CCN area, including the area for which Cibolo seeks decertification.

C. Allocable Dollars Green Valley Expended to Purchase the Land

Green Valley excepts to the PFD's recommendation to find that no dollars invested in Green Valley's acquisition of real property constitutes property that will be rendered useless or valueless.[77] In Section V, above, Green Valley addressed the incorrect statutory interpretations relied upon by the PFD and the similar incorrect interpretations in the *Celina* decision. Green Valley incorporates herein its exceptions raised in Section V for all purposes. In Section VI.A., above, Green Valley addressed the PFD's reliance on selective portions of the evidentiary record that support its conclusion and the PFD's disregard of contrasting evidence that does not. Green Valley incorporates herein its Exceptions raised in Section VI.A. for all purposes. All of Green Valley's investments in planning and design for the entire wastewater CCN area, including its permitting activities, and its real property investment, constitute intangible property assets belonging to Green Valley, a portion of which will be stranded upon decertification.[78]

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

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[77] PFD at 28-29.

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

The PFD's recommendation that Green Valley is not entitled to compensation for necessary and reasonable legal and professional expenses is premised on the same legally unsupported positions adopted in the *Celina* decision that spent money does not constitute property and that property must be considered as divisible from its value, the plain wording of statutorily mandated factors notwithstanding.[79] In Section V, above, Green Valley addressed the legal shortcomings in the PFD's analysis, including the PFD's improper reliance on the incorrect statutory interpretations *Celina* decision. Green Valley incorporates that discussion herein for all purposes.

Green Valley, which did not initiate this proceeding, would not have spent its money on legal expenses or professional fees if it had not been compelled to defend its property interests in light of Cibolo's position that Green Valley was not entitled to *any* compensation for its property interests that will be rendered useless or valueless. Green Valley had a reasonable expectation that it would be providing service to the area, particularly in light of Cibolo's participation in Green Valley's sewer CCN application process and its approval of the sewer CCN area boundary.[80] Green Valley presented substantial evidence supporting the fact that the legal and professional fees that were incurred were necessary and that they have continued to mount.[81] Even Cibolo's witness correctly acknowledged at hearing that Green Valley undertook reasonable investments in legal representation and consulting experts to defend its right to adequate and just compensation.[82]

If adopted in its present form, the PFD will have failed to give plain meaning to the

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[79] Docket No. 45848, Final Order (April 13, 2017) at CoL No. 7A.

[80] Tr. at 46-47 (Klein Testimony) (acknowledging that Cibolo approved the final Green Valley sewer CCN boundary).

[81] Ex. GVSUD-B (Allen Direct) at 16; Ex. GVSUD-A (Korman Direct) at 13; Ex. GVSUD-1 at GVSUD 100007, GVSUD 1000455; Ex. GVSUD-D (Blackhurst Direct) at 13-14. The precise amount of this Green Valley compensation component was relegated to a second phase hearing issue.

[82] Tr. at 33-34 (Klein testimony). Indeed, Green Valley was required to retain an appraiser prior to the Commission's adoption of the bifurcated hearing process.

governing purpose of TWC § 13.255(c) and (g), which together require just and adequate compensation in single certification decertification matters. Accordingly, the PFD will result in an unlawful taking, damaging, or destruction of property for public use in violation of the state and federal constitutions if adopted by the Commission.[83]

E. Allocable Lost Expected Net Revenues from Future Customers

Green Valley excepts to the PFD's recommendation that expected lost net revenues do not constitute property rendered useless or valueless upon decertification. The PFD incorrectly relies on: (1) the Commission's legally-insufficient reasoning in *Celina*; and (2) an unduly narrow statutory interpretation of the statutory scheme; which together would result in the taking of Green Valley's property interests without adequate and just compensation as required by the statute and the state and federal constitutions. The evidentiary record shows that if the PFD is adopted and if Cibolo's application is eventually granted, Green Valley will lose the economic opportunity to recoup its expenditures inside the decertificated area, while its costs to serve that area will simultaneously increase as the direct result of Cibolo's checkerboard approach to decertification.[84] The uncontroverted testimony is that Cibolo's approach will result in dual facilities and collection systems in the area that Cibolo has cherry-picked.[85] Green Valley's sewer CCN obligates it to serve the remaining area.[86] That Cibolo is taking this "piecemeal" approach in a high-growth area only magnifies the negative economic impact to Green Valley.[87] The right to these lost net revenues are

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[83] *City of Blue Mound v.Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.–Fort Worth 2014, no pet.).

[84] Ex. GVSUD-C (Montgomery Direct) at 21; Ex. GVSUD-1 at GVSUD 100003.

[85] Ex. GVSUD-B (Allen Direct) at 16-17; Exhibit GVSUD-C (Montgomery Direct) at 21.

[86] Ex. GVSUD-C (Montgomery Direct) at 21.

[87] Ex. GVSUD-A (Korman Direct) at 13; Tr. at 27 (Klein Testimony); Tr. at 109 (Korman Testimony).

a relevant intangible personal property interest and therefore compensable under the statute which requires consideration of other relevant factors in its non-exclusive list of compensation factors.[88]

The PFD adopts an unduly restrictive reading of the statute to prohibit consideration of lost revenues from future customers. This undermines the stated purpose of the analysis, which is to ensure just and adequate compensation for all property interests lost. Specifically, the PFD's recommendation, relying on the Commission's *Celina* decision,[89] requires reading the terms "at a minimum" and "other relevant factors" out of the statute. A plain reading of these provisions directs that the Commission's approach must ensure that the retail public utility whose CCN area is partially decertified will be made whole. Such an inclusive approach is mandated by constitutional requirements[90] and is consistent with compensation for partial takings in other contexts, such as eminent domain proceedings.[91]

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

Green Valley excepts to the PFD's determinations that: (1) Cibolo's "appraisal" was limited to identification of property rendered useless or valueless; and (2) Green Valley's was not. As with the recommendations as to virtually every issue in this proceeding, the PFD's determination rests on the unsupportable foundation that Green Valley's identified property interests are not in fact "property" and will not be rendered "useless or valueless" upon decertification. In short, the PFD's recommendation is primarily based on the non-final *Celina* order's legally unsupportable notion that

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[88] Ex. GVSUD-A (Korman Direct) at 13; Ex. GVSUD-1 at 100003.

[89] Aqua Texas elected not to challenge the ALJs' determination of this issue in the *Celina* proposal for decision.

[90] TEX. CONST. Art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . ."); *Horne v. Dep't of Agric.*, 135 S. Ct. at 2426, 2428-2429; *Steele v. Houston*, 603 S.W.2d at 792-93786, 792-93.

[91] The legal basis for such an approach is set forth in Green Valley Initial Brief at 22-25.

money, once spent, is no longer property. Regarding Green Valley's property interest in net lost revenue, the PFD's reliance on the *Celina* order is likewise misplaced and incorrect. Green Valley cannot be made whole without this compensation component.

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

Green Valley disagrees with and excepts to the PFD's characterization of the correct date for identification of property as an issue that does not "matter" for purposes of this proceeding.[92] The PFD's election to defer this decision until a "case that matters" comes along is premised on the PFD's erroneous premise that Green Valley has no property that will be rendered useless or valueless if Cibolo's application is granted. As a practical matter, the Commission's unduly restrictive reading of TWC § 13.254 and the PFD's similar approach to TWC § 13.255 here results in there never being a "case that matters." This is so for two reasons. First, from a practical standpoint, a municipality would be highly unlikely to see an economic benefit to the acquisition of a built-out system. The normal situation in which a municipality would invoke TWC § 13.255 is the situation presented here, where the municipality grabs an area that is on the verge of being developed. Second, application of the definitions of "useless" and "valueless" as requiring the entirety of a property interest to be rendered as such, rather than an allocable portion, will result in no compensation ever being granted as the result of decertification. The only theoretical situation in which compensation could be granted under the restrictive statutory interpretations adopted by the PFD would involve a municipality's annexation and decertification of a retail public utility's entire CCN area. Because this will likely never happen, the interpretations that the PFD recommends be adopted render the entire statutory scheme meaningless *regardless* of the date on which property is identified.

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[92] PFD at 31-32.

X. FINDINGS OF FACT

Green Valley excepts to the Proposed Findings of Fact in the PFD to the extent that they are inconsistent with Green Valley's Exceptions described above.

XI. CONCLUSIONS OF LAW

Green Valley excepts to the Proposed Conclusions of Law in the PFD to the extent that they are inconsistent with Green Valley's Exceptions described above.

XII. PROPOSED ORDERING PARAGRAPHS

Green Valley excepts to the Proposed Ordering Paragraphs in the PFD to the degree they are inconsistent with Green Valley's Exceptions described above.

XIII. CONCLUSION

Green Valley respectfully requests that the Commission decline to adopt the Proposal for Decision's analysis, findings of fact, conclusions of law and ordering paragraphs that are inconsistent with these exceptions. Green Valley further requests that the Commission adopt an order finding that the following Green Valley property will be rendered useless and valueless by Cibolo's proposed decertification:

1. Dollars expended by Green Valley for engieering and planning to implement Green Valley's 2006 Wastewater Master Plan allocable to the proposed decertification area;

2. Dollars expended by Green Valley to obtain a Texas Pollutant Discharge Elimination System permit from the Texas Commission on Environmental Quality allocable to the proposed decertification area;

3. Dollars expended by Green Valley to purchase an approximate 65 acre tract of land allocable to the proposed decertification area;

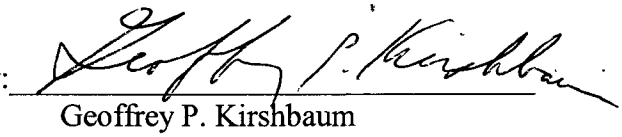
4. Dollars expended by GVSUD for legal fees and appraiser expenses in this docket; and

5. Lost expected net revenues allocable to the proposed decertification area.

Green Valley further requests that the Commission's order find and conclude that a second hearing

must be held to determine the just and adequate compensation owed to Green Valley by Cibolo in the event that decertification is granted and other referred issues. Green Valley further requests that the Commission grant such other relief to which the Company is justly entitled.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on May 12, 2017, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

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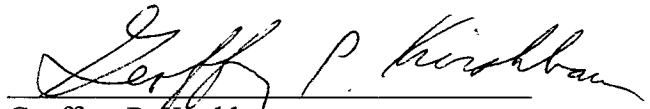

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