



Control Number: 45702



Item Number: 134

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INCORPORATED AREA AND TO §
DECERTIFY PORTIONS OF GREEN §
VALLEY SPECIAL UTILITY DISTRICT'S §
SEWER CERTIFICATE OF §
CONVENIENCE AND NECESSITY IN §
GUADALUPE COUNTY §

PUBLIC UTILITY COMMISSION
PUBLIC UTILITY COMMISSION
OF TEXAS

CITY OF CIBOLO'S REPLY TO GVSUD'S EXCEPTIONS TO THE PROPOSAL FOR
DECISION

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

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**CITY OF CIBOLO'S REPLY TO GVSUD'S EXCEPTIONS TO THE PROPOSAL FOR
DECISION**

TO: THE HONORABLE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION
OF TEXAS

The City of Cibolo ("Cibolo") submits the following Reply to Green Valley Special Utility District's ("GVSUD") Exceptions to the Proposal for Decision (the "Reply"), responding to GVSUD's¹ Exceptions ("Exceptions") in the above-referenced matter.

The primary issue in this first phase of this matter whether GVSUD has property that will be rendered useless or valueless to GVSUD by the decertification. To this end, Cibolo's Application for single sewer certification under Texas Water Code ("TWC") § 13.255 is the poster child for an application in which no property is—or could possibly be—rendered useless or valueless. The record is uncontroverted that:

- GVSUD has no wastewater customers within the property requested to be decertified by Cibolo (the "Decertification Area");²
- GVSUD has no wastewater customers outside the Decertification Area;³

¹ On May 12, 2017, PUC Staff informed the Commission that Staff would not be filing exceptions to the PFD, so this Reply is limited to GVSUD's Exceptions to the PFD.

² Tr. at 140:14-16 (Allen Cross) (January 17, 2017).

³ *Id.*

- GVSUD has no wastewater infrastructure within the Decertification Area;⁴
- GVSUD has no wastewater infrastructure outside the Decertification Area that could be used to serve within the Decertification Area;⁵
- GVSUD has not adopted wastewater rates;⁶
- GVSUD has not adopted wastewater impact fees;⁷
- GVSUD's wastewater planning documents are outdated and in critical need of an update;⁸
- GVSUD has no permit from TCEQ authorizing GVSUD to construct and operate a wastewater treatment plant ("WWTP");⁹ and
- GVSUD has not obtained a loan to pay for the costs to construct a wastewater system.¹⁰

Moreover, with respect to whether its alleged property interests are rendered useless or valueless,

GVSUD fails to:

- explain *how* dollars spent for its high-level engineering and planning constitute GVSUD property or property rendered useless or valueless;
- assert that the removal of the Decertification Area would result in GVSUD spending any less money on or foregoing its pursuit of its pending wastewater discharge permit application;

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

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

⁶ Tr. at 139:13-16 (Allen Cross).

⁷ *Id.* at 139:17-25.

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

⁹ Tr. at 140:7-13 (Allen Cross).

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

- reconcile how dollars spent for a piece of real property is somehow rendered useless or valueless when GVSUD still intends to use the property as it originally planned and, notwithstanding that planned use, has at the very least retained its value;
- explain how it could lose future profits from currently nonexistent wastewater customers, even if it could present legally sufficient authority to ignore the plain language of TWC § 13.255(g) to even consider the speculative lost profits from currently non-existent wastewater customers; and
- assert that the money expended on legal fees and appraiser expenses is rendered useless or valueless once the Decertification Area is finally decertified, even if GVSUD could present legally sufficient authority to consider such fees under TWC § 13.255(g).

GVSUD relies on dubious theories that ignore fundamental principles of statutory construction and constitutionality, while simultaneously failing to produce any credible evidence in the record that GVSUD has, in any way, lost any use or value in its alleged property interests, which also do not even constitute property.

While it is true that the *Celina* Order¹¹ supports the Proposal for Decision (“PFD”) issued by the ALJ in this docket, the evidence in the record in this matter independently support the ultimate decision that no GVSUD property is rendered useless or valueless to GVSUD by the decertification. GVSUD has done nothing to contest those facts. Rather, GVSUD’s Exceptions reiterate the same unpersuasive and ill-supported arguments providing in its closing brief. Cibolo continues to fully support the ALJ’s ultimate finding that Cibolo has met its burden of proof in this matter, recommending that (1) no property of GVSUD will be rendered useless or valueless to GVSUD by the decertification sought by Cibolo in this proceeding; and (2) Cibolo’s

¹¹ *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, PFD (January 27, 2017) and Order (April 13, 2017).

appraisal, but not GVSUD's appraisal, is limited to valuing property that will be rendered useless or valueless by decertification, of which there is none.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

Cibolo acknowledges that the adequacy of the notice of the Application is not a referred issue for this phase of the matter. In any event, Cibolo affirms that proper notice was provided.

II. SCOPE OF THE ISSUES

The scope of the issues, as presented in the PFD, is acceptable to all parties.

III. BACKGROUND ABOUT THE EVIDENCE AND THE APPRAISERS

GVSUD's Exceptions regarding the PFD's description of the expertise of the appraisers in this case should be rejected. With complete disregard to the ALJ's Order,¹² GVSUD continues to encourage the ALJ to ignore the fact that TWC § 13.255 does not require the appraiser in this proceeding to be a licensed or certified appraiser.¹³ In any event, TWC § 13.255 only requires the appraiser to be "qualified". GVSUD's argument simply does not exist under this statute.

GVSUD's Exceptions also incorrectly assert that Cibolo's experts are not competent to identify property that is rendered useless or valueless.¹⁴ As the record evidence demonstrates, Mr. Jack Stowe has extensive experience in the accounting, finance, and wastewater industries and has prepared multiple appraisals for purposes of TWC § 13.255, as well as TWC § 13.254.¹⁵ His appraisals have never been rejected by the Commission for lack of expertise.¹⁶ GVSUD has attempted throughout this process to discredit Mr. Stowe with the assertion that Mr. Stowe did

¹² SOAH Order No. 5, at 4.

¹³ E.g., Tr. at 127:13-16 (Korman Cross); Tr. at 216:22-216:2, 219:22-220:9 (Stowe Cross) GVSUD Initial Brief, at 27.

¹⁴ GVSUD Exceptions, at 3.

¹⁵ Rebuttal Testimony of Jack Stowe, Cibolo Ex. 3 at 9:1-5.

¹⁶ Although GVSUD is correct that the appraisals have never progressed through the Commission to a final order, GVSUD conveniently leaves out the fact that no one has ever challenged his ability to provide those appraisals. Cibolo Ex. 3 at 5:16-9:5 (Stowe Rebuttal); Tr. at 216:14-25 (Stowe Cross).

not prepare his appraisal according to USPAP standards.¹⁷ However, USPAP is inapplicable in this case, as Mr. Korman admits¹⁸ and Mr. Stowe emphasizes.¹⁹ Moreover, the initial phase of this matter is about identification of property rendered useless and valueless, and real estate appraisers, like Mr. Korman, are not hired to identify property, but rather to value property, if any exists. Mr. Stowe is certainly qualified, with his financial and accounting background to assess intangible property.

As the record evidence demonstrates, Mr. Rudolph Klein, P.E., has decades of experience as an engineer in the wastewater industry, which affords him more than sufficient knowledge to assess GVSUD's property related to wastewater collection and treatment systems.²⁰ That Mr. Klein is not a certified appraiser and does not have experience identifying intangible property (1) is irrelevant because Cibolo does not present Mr. Klein as an appraiser, and (2) simply does not render him incapable of identifying how money spent on fundamentally wastewater-related matters could lose its use or value. In this case, identification of relevant property is fundamentally an engineering exercise (or in the very least, an exercise of someone who is an expert in wastewater utility function, design, and cost). Therefore, Mr. Klein's robust experience with wastewater utilities is more meaningful, reliable, and on-point than a general appraiser, like Mr. Korman, who does not have experience with the very specialized nature of wastewater utilities and thus the property (or, in this case, the lack thereof) that will be rendered useless or valueless by decertification.²¹

¹⁷ Tr. at 219:17-220:12 (Stowe Cross).

¹⁸ Direct Testimony of Joshua Korman, GVSUD Ex. A, at 10:6-11.

¹⁹ Tr. at 116:21-117:3, 118:2-11 (Korman Re-Cross); Tr. at 219:22-220:3 (Stowe Cross) (explaining that an exception to the USPAP standards is applicable in this case).

²⁰ Cibolo Ex. 1 at 4:4-8:5, 9:4-20 (Klein Direct).

²¹ As Cibolo has previously demonstrated, Mr. Korman has no experience or relevant expertise that enables him to identify any property rendered useless or valueless in this highly specialized context. Mr. Korman admits as much; he has clearly relied on GVSUD or Mr. Montgomery to identify what they think GVSUD should be compensated

IV. FACTUAL BACKGROUND

A. Stipulations

Cibola agrees with the ALJ that GVSUD waived its right to claim compensation for increased costs to its nonexistent customers. To clarify what property GVSUD alleged to be rendered useless or valueless, the ALJ urged the parties at the hearing on the merits to stipulate to the list of the specific items GVSUD contends constitute property rendered useless or valueless to GVSUD by the Application.²² In the Agreed Stipulations, which GVSUD helped develop and agreed to, increased costs to nonexistent customers was not specifically included.²³ Contrary to its assertions, GVSUD did not brief this issue; rather, it was only included in the GVSUD Appraisal.²⁴ Moreover, GVSUD was given opportunity after opportunity to claim this property interest, yet failed to do so. Had GVSUD not been so evasive in its oral and written testimony and responses to discovery regarding what it was actually claiming to be property rendered useless or valueless, thus necessitating the ALJ to specifically request clarification, GVSUD might have preserved this alleged interest. GVSUD's oversight for not including this item in its Stipulations or in the final briefs should not be rewarded.

Moreover, that GVSUD is now raising this matter is suspect and contradictory. GVSUD claims that this alleged interest was not stipulated because it is not property, even though GVSUD has maintained throughout this case that the factors in TWC § 13.255(g) identify property interests.²⁵ The idea that this factor was not stipulated to because GVSUD did not assert it as property both contradicts GVSUD's position on § 13.255(g) and is disingenuous.

for GVSUD Exceptions, at 3, fn. 8; Tr. at 73:5-6; 79:2-4; 79:12-19; 80:23-25 (Korman Cross); Ex. GVSUD-1 at 100014-15.

²² Tr. at 9:21-25.

²³ Agreed Stipulations (Feb. 9, 2017).

²⁴ Ex. GVSUD-1 at GVSUD 100005.

²⁵ E.g., Tr. at 134:2-6; 134:24-135:5 (Korman Cross); GVSUD Initial Brief, at 20-21 (Feb. 10, 2017); GVSUD Exceptions, at 6, 9, 11.

B. Other Uncontroverted Facts

The other uncontroverted facts, as presented in the PFD, are acceptable to all parties.

V. LEGAL FRAMEWORK

A. *Celina* Order

Cibolo does not read the PFD as relying on *Celina* for its precedential value so much as it reads the PFD as adopting the sound reasoning and legal bases applied therein for those elements common to TWC § 13.255 (and TWC § 13.254). At this stage, the nature of this reliance is appropriate, despite the fact that *Celina* is not yet final.²⁶ First, through both the hearing at which the *Celina* Order was adopted and in the Order itself, the Commissioners made it abundantly clear how they will be applying these statutes and what would constitute property being rendered useless and valueless.²⁷ The Commissioners unanimously agreed that the very legal positions that GVSUD assert in this proceeding are untenable, and they have not modified that decision. Second, even before the *Celina* Order was issued, Cibolo demonstrated both legally and factually in this case that GVSUD lacks any property rendered useless or valueless in a manner consistent with the legal principles that the Commission ultimately adopted in *Celina*. In other words, irrespective of what happened in *Celina*, Cibolo met its burden of proof to demonstrate that there is no GVSUD property rendered useless or valueless to GVSUD as a result of decertification. With *Celina*, the Commission's decision is consistent with Cibolo's position throughout this first phase. Thus, the ALJ, citing to those portions of the *Celina* order providing the rationalization for conclusions therein is not only a correct restatement of the law, but also ensures consistency among related Commission matters.

²⁶ TEX. GOV'T CODE § 2001.144(a).

²⁷ *Celina* Order, generally; Public Utility Commission of Texas, Open Meeting on April 13, 2017, Agenda Item 18, available at http://www.adminmonitor.com/tx/puct/open_meeting/20170413/ (discussing and adopting the *Celina* order).

B. Burden of Proof

The burden of proof, as presented in the PFD, is acceptable to all parties. For the reasons set forth in this brief, GVSUD's Exception that Cibolo has not met its burden should be rejected.

C. TWC Provisions Regarding Property Rendered Useless or Valueless

GVSUD's Exceptions regarding the PFD's proper and constitutionally sound interpretation of the terms "property", "useless", and "valueless" should be wholly rejected. As explained in greater length in Cibolo's Reply Brief and Order No. 7, the correct application of the Texas Code Construction Act, Tex. Gov't Code, Chapter 311, results in an interpretation of "property", "useless", and "valueless" that precludes a determination that GVSUD has met the statutory prerequisite to obtaining compensation from Cibolo.²⁸ Quite simply, "property" is something that is owned or possessed;²⁹ as GVSUD provided, "useless" means having or being of no use;³⁰ and, also according to GVSUD, "valueless" means without monetary worth.³¹ For purposes of statutory construction, the Code Construction Act requires that all words and phrases be read in context and construed according to common usage.³² In a last-ditch effort, GVSUD's Exceptions absurdly asserts that Cibolo's, Staff's, and the ALJ's plain reading of these terms fails to give plain meaning to § 13.255(c) and (g). This assertion is irreconcilable with basic logic. Moreover, it is yet another far-reaching attempt by GVSUD to encourage its version of "fairness" over constitutionality and sound statutory construction.³³

²⁸ Cibolo Reply Brief, at 8-9, 11-12 (Feb. 28, 2017); SOAH Order No. 7, at 7-9 (Dec. 12, 2016).

²⁹ Cibolo Reply Brief at 8 (Feb. 28, 2017) (citing MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003)).

³⁰ GVSUD Initial Brief, at 23 (Feb. 10, 2017) (citing *Merriam-Webster.com*, Merriam-Webster, 2016, <http://www.merriam-webster.com/dictionary/useless> (October 28, 2016)).

³¹ *Id.* (citing *Merriam-Webster.com*, Merriam-Webster, 2016, <http://www.merriam-webster.com/dictionary/valueless> (October 28, 2016)).

³² TEX. GOV'T CODE § 311.011.

³³ E.g., GVSUD Initial Brief, at 25 (Feb. 10, 2017); Tr. at 211:25-212:2 (Klein Rebuttal Cross).

GVSUD's assertion basically comes down to this: a plain reading of TWC § 13.255, as required by the Code Construction Act, does not result in GVSUD being compensated. GVSUD is correct that § 13.255(c) and (g) require just and adequate compensation, but that compensation is only due if GVSUD actually has something taken away from it. Here, it does not. An unlawful regulatory taking is at stake in this proceeding. If TWC § 13.255 is read in the incorrect manner, as GVSUD proposes, Cibolo would be unjustly required to pay GVSUD for a benefit or interest that Cibolo has not received through this decertification.

D. Definition of "Property"

1. Whether "Property" Includes Intangible Personal Property

GVSUD's Exception to the application of the plain meaning of "property" to include money it has expended is fundamentally and irreparably flawed. No party to this proceeding has ever denied that money can be property.³⁴ However, once that money has been expended, those actual dollars are no longer owned or under the control of GVSUD; which are the hallmarks of a property interest.³⁵ In fact, this is precisely what the Commission determined in *Celina*—not that money is not property, it is no longer the property of the buyer. To be sure, when asked on multiple occasions, GVSUD has never been able to articulate just how it still has control over or an ownership interest in those dollars.³⁶ In essence, GVSUD is claiming that not only does it own the planning documents, attorney work product, land, engineering services, and appraisal

³⁴ Tr. at 233:9-10 (Stowe Cross);

³⁵ Cibolo Initial Brief, at 8-9 (citing BLACK'S LAW DICTIONARY (10th ed. 2014)); see *State v. Pub. Util. Comm'n*, 883 S.W.2d at 200 (citing BLACK'S LAW DICTIONARY 1216 (6th ed. 1991) (explaining that "property" is anything that is the subject of ownership, which provides the owner the exclusive right to possess, use, enjoy, and dispose of the property)). In its closing briefs, Cibolo explained the difference between an expenditure and an actual investment, such as a stock, and how the property interests claimed by GVSUD are not an investment. Cibolo Initial Brief, at 9, 17-18, 28-29; Cibolo Reply Brief, at 9.

³⁶ Cibolo Ex. 5; Tr. at 109:2-5; 110:11-13 (Korman Cross) (reflecting that GVSUD's appraiser is unable to address how attorney's fees are a property interest); Cibolo Initial Brief, at 14-17 (reflecting how money spent on engineering is not a property interest).

expenses, but that it also still owns the money it spent in acquiring those things, if we were to follow GVSUD's logic.

The phrase GVSUD tosses about to justify its money-spent theory—that GVSUD's money spent enters “a sort of purgatory, transformed into non-property until some form of actual property (a physical facility) attaches to and rescues it, at which point the expended money once again becomes property”—is a red herring. No purgatory exists; GVSUD got something in exchange for the money it spent. And even GVSUD does not claim that the underlying benefit that it received has been affected, but rather only a proportion of the money GVSUD no longer owns.³⁷ The *Celina* findings cited by the ALJ support this conclusion. Again, however, we need only to look at the legal principles and facts presented in this case to reach the same result as *Celina*.

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

Again, GVSUD requests that the Commission ignore basic principles of statutory construction and determine that TWC § 13.255(g) lists property interests for which GVSUD should be compensated. This request should be rejected. As Cibolo has maintained throughout this first phase, the compensation factors in TWC § 13.255(g), while considered at the second phase if property exists, are not a menu of property interests from which GVSUD can pick and choose what it owns in the first place. TWC § 13.255 only indicates that the “value of personal property shall be determined according to the factors” listed therein. But what it does not say is just as important: TWC § 13.255(g) does not state that the listed factors are, themselves, property.

³⁷ *Id.*

interests.³⁸ Pursuant to the Code Construction Act, GVSUD's flawed interpretation must be rejected.

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

Not only does GVSUD urge the Commission to ignore the fundamental principles of statutory construction, it also requests—without factual or legal support—that the Commission ignore Texas Supreme Court precedent regarding the applicability of legislative history. While Cibolo agrees that the Code Construction Act authorizes the consideration of the circumstances under which the statute was enacted and its legislative history, the Texas Supreme Court has carved out from that consideration a legislator's—even the bill sponsor's—comments on the meaning, purpose, or intent of the legislation.³⁹ Therefore, GVSUD's Exception to the use of a bill sponsor's statement as an interpretation of the term "property" in TWC § 13.255 should be denied.

Regardless, GVSUD's conclusion about Rep. Hinojosa's statement is incompatible with the statement itself.⁴⁰ GVSUD provides one isolated quote from the entirety of the hearings on TWC § 13.255 and concludes that, because that one statement uses the phrase "any property," that no limitation on "property" was contemplated by the legislature.⁴¹ To the contrary, Rep. Hinojosa's statement is consistent with TWC § 13.255: that a utility should be compensated for any property that it may lose by decertification. To the extent this text is considered in this proceeding, it is important to note that the Representative recognized that property, however

³⁸ TWC § 13.255(g).

³⁹ "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." *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011) (citing *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993)).

⁴⁰ GVSUD Initial Brief, at 19.

⁴¹ *Id.*

defined, must first exist in order for a utility to receive compensation. Here, GVSUD has no such property.

E. Definition of “Useless” or “Valueless”

GVSUD’s proposed exception regarding a determination of what property is useless or valueless purports to apply the plain meaning of those terms, as required. However, when GVSUD’s true position is dissected, it becomes clear that such an interpretation goes against GVSUD’s interests. Particularly, the application of the plain meaning of those terms precludes GVSUD’s position that a partial loss of use or value of GVSUD’s property satisfies TWC § 13.255. Therefore, because GVSUD has not and cannot demonstrate a complete loss of use or value of any of its alleged property, GVSUD is not entitled to compensation. So, we are left with ill-supported arguments and incorrect interpretations to get around the inevitable, legally and factually supported result: GVSUD has no property rendered useless or valueless as a result of the decertification.

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

The plain meaning of the phrases “useless” and “valueless” do not support GVSUD’s assertions that an allocable portion of a property interest satisfy TWC § 13.255. According to GVSUD’s definitions of those phrases, “useless” means having or being of no use⁴² and “valueless” means without monetary worth.⁴³ So, GVSUD’s claim that Cibolo, Staff, or the ALJ are imposing an, “artificial barrier between property identification and quantification,” contradicts GVSUD’s own arguments and definitions about the meaning of those phrases. Moreover, GVSUD again attempts to falsely raise a constitutional taking if the plain language of

⁴² GVSUD Initial Brief, at 23 (Feb. 10, 2017) (citing *Merriam-Webster.com*, Merriam-Webster, 2016, <http://www.merriam-webster.com/dictionary/useless> (October 28, 2016)).

⁴³ *Id.* (citing *Merriam-Webster.com*, Merriam-Webster, 2016, <http://www.merriam-webster.com/dictionary/valueless> (October 28, 2016)).

those terms is used. The eminent domain principles and provisions cited by Mr. Korman are not analogous to TWC § 13.255 and a determination of property rendered useless and valueless by a decertification.⁴⁴ In TWC § 13.255, the consideration is whether property, or a discernible subset thereof, is left without use or value to the decertified entity. The Texas eminent domain statute, Texas Property Code, Chapter 21, on the other hand, is about the assessment of the value of the real property, which under that Code is a process entirely distinct from the consideration of other costs and expenses and does not require a determination about how much use or value something has to the entity from whom property is being taken.⁴⁵

Likewise, GVSUD's bundle of sticks analogy lacks merit.⁴⁶ To claim that an allocable portion of its alleged property interests meet the useless or valueless requirement, GVSUD's analogy must be revised accordingly: each property interest alleged by GVSUD is an individual stick, and a 2.2% portion of that stick is allegedly rendered useless and valueless. Here, however, the record is clear that the alleged, stipulated alleged property interests are not rendered useless or valueless to GVSUD in whole or in part. Rather than using legally-founded arguments or alleging facts to substantiate its allegations, GVSUD just appears to be "splitting the baby" on how GVSUD could be compensated—without a legal basis—which is simply not how legal or factual determinations are made.⁴⁷

Overall, GVSUD continues to promote baseless and contradictory interpretations of the Code Construction Act, and GVSUD's Exceptions should be denied.

⁴⁴ GVSUD Ex. A 14:1-15:2 (Korman Direct); Tr. at 111:1-112:13 (Korman Cross).

⁴⁵ TEX. PROP. CODE §§ 21.042 (Assessment of Damages, relating to the valuation of the condemned property), 21.047 (Assessment of Costs and Fees, relating to additional expenses that may be assessed upon the condemnor, including attorney's fees and other professional fees).

⁴⁶ GVSUD Exceptions, at 12; Tr. at 14:15-15:2.

⁴⁷ Cibolo Reply Brief, at 12.

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

The evidence in the record overwhelmingly demonstrates that GVSUD has failed to attempt to explain *how* any property—even a portion thereof—is rendered useless or valueless by decertification. GVSUD's justification for its exception that the alleged "investments" will not be recovered through customer bills in the Decertification Area is flawed and irrelevant. First, GVSUD can still recover the full value of these alleged "investments" from its customers who are outside of the Decertification Area because not even one or a portion of one "investment" is specifically tied to the Decertification Area. Second, there is no guarantee that GVSUD will ever be able to provide wastewater service in the Decertification Area because it has no authorization to provide wastewater treatment services, and there is no guarantee that GVSUD would ever have customers in the Decertification Area or the remainder of its sewer CCN.⁴⁸

Moreover, GVSUD intentionally misconstrues the PFD with its apparent offense to the phrase "too small."⁴⁹ While it is true that the Decertification Area is a relatively minor percentage of its entire sewer CCN area, GVSUD failed to provide any evidence refuting Cibolo's evidence that the decertification of such Area has no demonstrable impact on GVSUD. The result would be the same even if Cibolo were decertifying 50% of GVSUD's sewer CCN area; there is no impact. Thus, the alleged "death" of GVSUD is not the size of what is being decertified, but rather GVSUD's failure to refute Cibolo's overwhelming evidence that GVSUD will not be impacted by the decertification. Therefore, GVSUD's Exception should be wholly rejected.

⁴⁸ See Tr. at 42:23-43:13 (Klein Cross).

⁴⁹ GVSUD Exceptions, at 14-15.

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

Cibolo maintains that regionalization principles apply in this case and legally preclude GVSUD from having any property that could be rendered useless or valueless to GVSUD by the decertification. Nevertheless, regionalization is an issue that has been referred to SOAH by the Texas Commission on Environmental Quality ("TCEQ") in GVSUD's protested Texas Pollutant Discharge Elimination System ("TPDES") permit application.⁵⁰ In this proceeding, GVSUD is requesting compensation for a wastewater system that is not even permitted, much less constructed, to treat wastewater within the TCEQ-approved service area of the Cibolo Creek Municipal Authority ("CCMA"). The ALJ is correct that we do not yet know whether the TPDES permit will be denied on the basis of regionalization.⁵¹ However, TCEQ regulations explicitly preclude such service.⁵² As such, there is no need to wait for TCEQ's determination in the pending TPDES contested case hearing because TCEQ has already spoken on this matter, and that determination can only be superseded by statute or a rulemaking, neither of which are currently occurring.⁵³ That this issue has been referred to SOAH in the TPDES protest lends merit to Cibolo's assertions regarding the application of regionalization policy in this proceeding. Thus, Cibolo requests that the Commission consider regionalization in issuing the final order as an alternate basis.

⁵⁰ Referred Issues A and B, *An Interim Order concerning the application by Green Valley Special Utility District for new TPDES Permit No. WQ0015360001*; TCEQ Docket No. 2016-18-6-MWD (Dec. 15, 2016).

⁵¹ PFD, at 25.

⁵² 30 Tex. Admin. Code, Chapter 351, Subchapter F.

⁵³ *Id.*

**VI. 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 Management Plan**

The PFD correctly determined that the allocable dollars GVSUD expended on engineering and planning to implement its 2006 Wastewater Master Plan are not property rendered useless or valueless. Here, however, GVSUD goes to great lengths to mischaracterize and overstate any conceivably favorable evidence in the record in an effort to disguise how very little credible evidence GVSUD actually put on. To be sure, a recitation of operable facts is necessary:

- The 2006 Wastewater Master Plan—a document that GVSUD admits is out-of-date⁵⁴ and is merely a high level planning document⁵⁵—only contemplates the design and construction of a wastewater plant and central wastewater lines to transport wastewater to the proposed plant. Nothing in that document has been identified as being particular to the Decertification Area.⁵⁶ GVSUD's own witness admits that such document is out of date and needs to be updated.⁵⁷
- GVSUD's evidence fails to show what engineering or planning activities have occurred and/or to the extent to which such activities have occurred, and how such activities have been rendered useless or valueless by the Application.
- The "extensive testimony" referred to by GVSUD is wholly suspect.⁵⁸ While Mr. Korman is presented as a witness testifying, in part, as to what property is rendered useless or valueless by decertification,⁵⁹ he performed no independent analysis of whether the planning or the land would actually be rendered useless or valueless, and instead relied on the assertions of his client or his client's other consultants.⁶⁰ Further, one of GVSUD's consultants that he relied upon, Mr. Montgomery, independently admitted that he did not provide true and correct copies of certain documents for Mr. Korman to consider, after first testifying

⁵⁴ GVSUD Ex. C at 22:3-4 (Montgomery Direct); Cibolo Ex. 4 at 8 (Response to Cibolo RFI 4-21).

⁵⁵ GVSUD Ex. C at 10:18-21 (Montgomery Direct).

⁵⁶ Tr. at 10:9:13-15, 10:5-8, 10:18-20, 11:4-6 (Klein Rebuttal); GVSUD Ex. C, at 11:9-15 (Montgomery Direct).

⁵⁷ GVSUD Ex. C at 22:3-4 (Montgomery Direct); Cibolo Ex. 4 at 8 (Response to Cibolo RFI 4-21).

⁵⁸ GVSUD Exceptions, at 16-17.

⁵⁹ GVSUD Ex. A at 7:10-21 (Korman Direct); Direct Testimony of David "Pat" Allen, GVSUD Ex. B at 8:13-19 and 10:1-3.

⁶⁰ Tr. at 72:9-73:16; 76:12-77:3; 78:21-79:4 (Korman Cross).

under oath that he had done just that.⁶¹ When pressed on cross-examination, Mr. Montgomery admitted that he had made contradicting statements.⁶²

- The invoices to which GVSUD refers contains items that are unrelated to wastewater, and neither Mr. Montgomery or Mr. Allen provided evidence to substantiate whether the work claimed by those invoices was relevant to the area to be decertified or even relevant to implementing its 2006 Wastewater Master Plan.⁶³

In an effort to conceal just how little GVSUD has actually done and how little record evidence has actually been provided by GVSUD, GVSUD mischaracterizes Mr. Klein's testimony relating to utility planning.⁶⁴ When read in the context of Mr. Klein's written testimony and cross-examination, Mr. Klein's expert opinion is that GVSUD's sewer CCN is statutorily subject to decertification by a municipality to the extent the city's corporate limits overlap with the CCN, per TWC § 13.255.⁶⁵ As such, any money allegedly spent by GVSUD in implementing its 2006 Wastewater Master Plan in that overlapping area, lacked use or value to begin with.

Therefore, the only "total disregard of this substantial record evidence" is by GVSUD, not the PFD.⁶⁶ GVSUD's Exceptions should be denied as contrary to both law and fact.

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

The alleged money spent by GVSUD to obtain a TPDES permit from the TCEQ does not amount to property rendered useless or valueless to GVSUD by the Application under TWC § 13.255(c), and thus, GVSUD's Exceptions hereto should be rejected. Taking the record as a whole, Cibolo has overwhelmingly demonstrated that GVSUD's spent money is not property of

⁶¹ GVSUD Ex: C at 7:16-18 (Montgomery Direct); Tr. at 189:16-18 (Montgomery Cross). The missing pages pertained to regionalization, a key issue in this case.

⁶² Tr. at 193:3-10 (Montgomery Cross).

⁶³ Tr. at 76:21-77:1 and 77:13-81:7 (Korman Cross).

⁶⁴ GVSUD Exceptions, at 17.

⁶⁵ Tr. at 33:21-12; 55:21-58:1 (Klein Cross).

⁶⁶ GVSUD Exceptions, at 17.

GVSUD, and that even if it is property, it is not rendered useless or valueless because GVSUD still intends to pursue the permit and would still need to expend those dollars in order to obtain its TPDES permit. More specifically, there is evidence in the record that:

- Mr. Montgomery admitted to not providing full documentation for GVSUD's TPDES permit application to Mr. Korman, then provided conflicting testimony about the incomplete document⁶⁷; the missing portion of the TPDES permit application contained relevant regionalization information.⁶⁸
- Providing retail sewer service does not require an entity to construct a wastewater treatment facility⁶⁹ or obtain a TPDES permit, and constructing a treatment facility is often an option of last resort;⁷⁰ instead, GVSUD can obtain wastewater service from a wholesale wastewater provider, like CCMA;⁷¹
- For GVSUD to treat and discharge wastewater to any customer, inside or outside the Decertified Area, it must obtain a TPDES permit;⁷²
- GVSUD contends that the full build-out of GVSUD's wastewater service area, not including the Decertified Area, would necessitate the final phase of the proposed TPDES permit, if it is approved.⁷³

Simply put, GVSUD has failed to provide any evidence that the spent money to obtain a TPDES permit is rendered useless or valueless in whole or in part. GVSUD, on the other hand, even when specifically asked, has never articulated just how it would have expended that money any differently or how it will have to revise any existing plans upon decertification.⁷⁴ Therefore, GVSUD's Exceptions relating to allocable dollars GVSUD expended on obtaining a TPDES permit from TCEQ should be rejected.

⁶⁷ Tr. at 187:16-189:18; 190:6-12 (Montgomery Cross); 191:9-21 (Montgomery Redirect); 192:9-193:10 (Montgomery Recross).

⁶⁸ Tr. at 189:1-18 (Montgomery Cross).

⁶⁹ Cibolo Ex. 2 at 27:7-11 (Klein Rebuttal).

⁷⁰ *Id.* at 27:11.

⁷¹ Tr. at 53:17-22 (Klein ReDirect); Tr. at 39:3-6 (Klein Cross); Tr. at 40:6-13 (Klein Cross); and Tr. at 162:11-164:1 (Montgomery Cross).

⁷² Cibolo Ex. 2 at 6:2-10 (Klein Rebuttal); Tr. at 155: 20-25 (Allen Cross); Tr. at 164:19-165:2 (Allen Redirect).

⁷³ Tr. at 158:12-159:18 (Allen Cross).

⁷⁴ Cibolo Ex. 5.

C. Allocable Dollars Green Valley Expended to Purchase the Land

With respect to the real property purchased by GVSUD for a wastewater treatment plant, if the TPDES is approved, the GVSUD has wholly failed to demonstrate how the money expended for such property constitutes an intangible property interest that is rendered useless or valueless. In essence, GVSUD oxymoronically asserts not that the real property that Cibolo actually agrees is a property interest is property rendered useless or valueless, but rather that its real property investment constitute intangible property.⁷⁵ Regardless, this legally untenable position is undermined by the following facts in the record:

- There is no evidence in the record as to how the land is rendered useless or valueless by the decertification, in whole or in part;
- To the contrary, GVSUD admits in Cibolo RFA 2-10 that the land will not be rendered useless or valueless, in whole or in part;⁷⁶
- Despite GVSUD's assertion that the land will be used in part to hold a wastewater treatment plant, in actuality, Mr. Klein testified that the land is merely an undeveloped piece of land⁷⁷ that has no permits attached to it (and it is uncertain whether GVSUD will ever obtain a TPDES permit);⁷⁸
- GVSUD has admitted that it has not constructed a wastewater treatment plant or wastewater infrastructure on the land;⁷⁹ and
- The land is likely more valuable now than when GVSUD purchased it—assuming GVSUD paid fair market value for the land.⁸⁰

GVSUD has never refuted these facts. Thus, the PFD is correct that this item is not property or property that the decertification will render useless or valueless to GVSUD. GVSUD's Exceptions should thus be denied.

⁷⁵ GVSUD Exceptions, at 18.

⁷⁶ Cibolo Ex. 2, Ex. Klein R-A at 34 (Response to Cibolo Request for Admission ("RFA") 2-10).

⁷⁷ Cibolo Ex. 1 at 28:19-21 (Klein Direct).

⁷⁸ *Id.* at 28:18-29:6.

⁷⁹ Tr. at 140:1-3, 169:17-170:4 (Allen Cross); Tr. at 179:12-14 (Montgomery Cross); Cibolo Ex. 1, Ex. G (Response to Cibolo RFAs 1-2, 1-4, 1-10, 2-4, 2-5, 2-6, 2-7, 2-8, and 2-9).

⁸⁰ Cibolo Ex. 1 at 28:23-29:1.

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

GVSUD's Exceptions for this item are incorrectly premised on the fact that GVSUD would not have spent its money on legal expenses or professional fees but for this decertification.⁸¹ GVSUD still skips over the fact that spent money does not constitute property or property rendered useless or valueless, and it still fails to provide a legal justification for this position. Pursuant to TWC § 13.255(g), such fees are potentially recoverable as part of compensation to a decertified utility, to the extent that there is property rendered useless in valueless under this law.⁸² Here, GVSUD mistakenly alleges that its legal expenses and appraisal expenses (or the money spent) in "defending the decertification" are property interests.⁸³ However, recovery of those fees and expenses is contingent upon reaching the compensation phase of this proceeding, which is premised on a prior determination that property will be rendered useless or valueless by decertification. When asked, not even GVSUD's appraiser could provide an explanation for how such expenses are property. Instead, Mr. Korman testified, without explanation, that "they have become that."⁸⁴ But, when asked about appraisal fees, Mr. Korman did not directly address whether such a fee was a property interest.⁸⁵ GVSUD's unsubstantiated assertion that such fees are property is typical throughout GVSUD's case and fails to adequately rebut that GVSUD does not have a property interest in such fees.

Regardless, such fees and expenses are not rendered useless and valueless to GVSUD by this decertification. Practically speaking, GVSUD must expend those fees regardless of the outcome of this proceeding, which, per TWC § 13.255, inevitably will result in decertification.

⁸¹ GVSUD Exceptions, at 19.

⁸² TWC § 13.255(g).

⁸³ GVSUD Ex. 1 at GVSUD 100007; Tr. at 109:2-13 (Korman, Cross).

⁸⁴ Tr. at 109:2-5 (Korman Cross).

⁸⁵ *Id.* at 110:11-13.

GVSUD got what it paid for—*i.e.* legal representation and professional services. If we followed GVSUD's logic, an absurd result would occur: the failure of any one of GVSUD's attorney's arguments would result in GVSUD getting money from Cibolo. However, the use and value of the expenditure of such fees is not measured by the performance of GVSUD's attorney or its consultants, or the end result they achieve for GVSUD.

The PFD is correct, irrespective of the consistent result reached in the *Celina* decision, that neither the law nor the facts support GVSUD's conclusion that attorney's fees and appraiser expenses are properly rendered useless or valueless. GVSUD's Exceptions should thus be denied.

E. Allocable Lost Expected Net Revenues from Future Customers

GVSUD's Exception to consider lost expected net revenues (*i.e.* profit) from non-existent future customers as a property interest should likewise be rejected. Here, GVSUD urges the Commission to ignore basic principles of statutory construction to include lost profits from future customers. Fatal to this Exception, GVSUD's own witness, Mr. Blackhurst, admits that the Legislature had explicitly removed future customers from TWC § 13.255(g), instead including only lost revenues from *existing* customers, testifying that "the impact on future revenues and expenses of the retail public utility" in TWC § 13.255(g) was replaced with "the impact on future revenues lost from existing customers."⁸⁶ Cibolo has extensively briefed how the Code Construction Act and common law principles of statutory construction clearly preclude GVSUD's position in its Closing Briefs, and it reasserts these arguments here.⁸⁷ In fact, the Legislature revised § 13.255 to address this precise situation: a utility abusively claiming it is due

⁸⁶ GVSUD Ex. D at 14:14-16 (Blackhurst Direct).

⁸⁷ Cibolo Initial Brief, at 19-26; Cibolo Reply Brief, at 8-9.

and owed money when it has no relevant assets to speak of and is not providing, and cannot provide, any service to any customers.

Again, GVSUD tries to make an argument about fairness to attempt to get around the unfavorable law and facts that control this case. But the fact remains that Cibolo's decertification of portions of GVSUD's sewer CCN will not result in "checkerboarding" of GVSUD's service, and such a claim is contrary to TWC § 13.255.⁸⁸ First, checkerboarding only occurs if there is infrastructure already in place and there is no flexibility to expand the system to efficiently serve customers. Here, however, GVSUD has no infrastructure, has no specific plans for such infrastructure, and does not even have customers in the Decertification Area.⁸⁹ Therefore, at this point, GVSUD has 100% flexibility to efficiently design its system to avoid checkerboarding altogether, and as a practical matter, should make an effort to mitigate the adverse impacts it alleges will result. Additionally, and more importantly, the Legislature has granted the Commission with the authority to decertify more land than was requested by Cibolo in the Application to avoid any such perceived checkerboarding.⁹⁰ Regardless, to the extent that "checkerboarding" does occur, it is limited to that portion of the sewer CCN that overlaps a municipal boundary. Also, Cibolo is not opposed to the Commission transferring certain other portions of GVSUD's sewer CCN to Cibolo.

Therefore, even without reliance on *Celina*, the facts and law as presented in this docket support the PFD's ultimate determination that GVSUD's allocable lost expected net revenues from non-existent future customers is not property rendered useless or valueless to GVSUD as a result of decertification. Therefore, GVSUD's Exceptions to this item should be denied outright.

⁸⁸ Cibolo Reply Brief, at 19-20.

⁸⁹ Cibolo Ex. 1, Ex. G at 558 (Response to Cibolo Request RFI 1-4, RFAs 1-2, 1-4, 1-10, 2-4, 2-5, 2-6, 2-7, 2-8, and 2-9); Tr. at 140:1-19; 164:22-165:2; 169:17-170:4 (Allen Cross-Examination); Tr. at 179: 12-14 (Montgomery Cross).

⁹⁰ TWC § 13.255(c).

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

For the reasons explained hereinabove, GVSUD's Exception to the PFD's conclusions that (1) Cibolo's appraisal was limited to identification of property rendered useless or valueless; and (2) GVSUD's appraisal was not so limited, should be rejected. Again, GVSUD has failed to refute the record evidence promulgated by GVSUD demonstrating that GVSUD has no property that will be rendered useless or valueless to GVSUD by decertification, regardless of the finality of *Celina*. As such, GVSUD need not be made whole because nothing was taken from it.

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

Regardless of the date that the Commission could possibly determine is the relevant date—either of the dates asserted by Cibolo or some other date—the fact remains that GVSUD has never had nor does it currently have any property that will be rendered useless or valueless. GVSUD's Exceptions to the PFD do not provide any foundation to except the conclusion of the PFD, and instead speaks in terms of the likelihood of decertification scenarios, while completely ignoring the fact that GVSUD's acquisition of and development within a municipality's boundaries is a risk that GVSUD took given the statutory authority for municipality's to decertify those areas. Ultimately, the statute is meant to protect CCN holders who have property, not those, like GVSUD, who will only lose undeveloped CCN areas.

IX. FINDINGS OF FACT

All of GVSUD's remaining proposed changes to the FOFs of the PFD should be rejected as not supported by the FOFs or applicable law, as discussed in this Reply.

X. CONCLUSIONS OF LAW

All of GVSUD's proposed changes to the COLs of the PFD should be rejected as not supported by the FOFs or applicable law, as discussed in this Reply.

XI. PROPOSED ORDERING PROVISIONS

All of GVSUD's proposed changes to the Ordering Provisions of the PFD should be rejected as not supported by the FOFs or COL, as discussed in this Reply.

XII. CONCLUSION AND PRAYER

The City of Cibolo respectfully requests that the Commission make only the requested edits to the Findings of Fact, Conclusions of Law, and Ordering Provisions of the Proposal for Decision proposed by the City of Cibolo, reject the changes to the Findings of Fact, Conclusions of Law, and Ordering Provisions of the Proposal for Decision requested by Green Valley Special Utility District, and grant any other relief to the City of Cibolo to which it may be entitled.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF CIBOLO

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, hand-delivery and/or regular, first class mail on this 22nd day of May, 2017 to the parties of record in accordance with 16 Tex. Admin. Code § 22.74.



David J. Klein