



Control Number 45848



Item Number 22

Addendum StartPage 0

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CITY OF CELINA'S NOTICE OF
INTENT TO PROVIDE WATER AND
SEWER SERVICE TO AREA
DECERTIFIED FROM AQUA TEXAS,
INC. IN DENTON COUNTY

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BEFORE THE STATE OFFICE
PUBLIC UTILITY COMMISSION
FILING CLERK
OF
ADMINISTRATIVE HEARINGS

**COMMISSION STAFF'S OBJECTIONS TO AND MOTION TO STRIKE
PORTIONS OF CITY OF CELINA AND AQUA TEXAS, INC.'S DIRECT TESTIMONY**

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Objections and Motion to Strike Portions of City of Celina (Celina) and Aqua Texas, Inc.'s (Aqua) Direct Testimony. Staff objects to and requests that portions of Celina and Aqua's direct testimony be struck on the ground that such portions are not relevant. In support of its Objection and Motion to Strike, Staff states the following:

I. BACKGROUND

On August 16, 2016, Celina and Aqua filed direct testimony in this matter. Pursuant to SOAH Order No. 2, objections to direct testimony are due August 22, 2016. Therefore, this pleading is timely filed.

II. STAFF'S OBJECTIONS

A. Use of Independent Third Appraisal

Staff objects to and moves to strike Celina's witness Jason S. Jones' statement on Page 13, Line 21 that 'First, I am in agreement with Mr. Fenner's analysis.'¹ This statement addresses Bret Fenner's opinion on Aqua's lost economic opportunity claim, as contained in the independent third party appraisal. As such it is outside the limited scope of Preliminary Issue No. 2 of the Preliminary Order, and should be struck.

Although Staff objects to the use of the Commission's independent third appraisal in Celina and Aqua's direct testimony, and as Aqua's Exhibit AT-3 if the use is for the appraisal's substance,

¹ Direct Testimony of Jason S. Jones, P.E. on Behalf of Petitioner City of Celina (Aug. 22, 2016) at Page 13, Line 21.

Staff agrees that the use of the independent third appraisal is appropriate for the limited purpose of answering Preliminary Issue No. 2 of the Preliminary Order: ‘Are the existing appraisals limited to property that has been determined to have been rendered useless and valueless by decertification?’²

This case is one of the first of its type to be referred to SOAH,³ and is the first one in which direct testimony has been filed. The bifurcated process set out in the Preliminary Order for determining what property has been rendered useless or valueless as a result of decertification and then determining appropriate compensation, if any, in a separate proceeding, is being applied for the first time in this case. In cases that follow, the Commission will make a determination as to what property has been rendered useless or valueless as a result of decertification *before* appraisals are filed. Because of the unique circumstances of this particular case, appraisals were ordered and completed before the means by which they would be processed was determined. Therefore, there are already existing appraisals in the docket. While Celina and Aqua have chosen to attach their respective appraisals to their direct testimony as exhibits, Staff does not intend to offer Bret Fenner as a witness and does not intend to introduce the independent third appraisal in this proceeding. Mr. Fenner’s appraisal was completed using Celina and Aqua’s appraisals, and therefore may not reflect only property rendered useless and valueless. It is appropriate for Celina and Aqua to be able to use the independent third appraisal for the limited purpose of answering Preliminary Order Issue No. 2, but not for the substance of Mr. Fenner’s analysis.

B. Docket Nos. 45450 and 45462

Staff objects to and moves to strike the portion of Celina’s witness Jason S. Jones’ direct testimony from Page 10, Line 20 to Page 11, Line 25, in which he asserts that Aqua put forward inconsistent arguments in other Commission dockets, Docket Nos. 45450 and 45462. In both of the dockets Mr. Jones references, the parties involved agreed to an independent appraiser and were bound by that appraiser’s determination. These dockets were resolved by agreement, and as such are not precedential.⁴ As it relates to relevance, evidence is relevant if it has ‘any tendency

² Preliminary Order at 3.

³ *Id.* at 2.

⁴ See Notice of Approval, Docket No. 45450 (Mar. 14, 2016) at 3 (“Entry of this Notice does not indicate the Commission’s endorsement or approval of any principle or methodology that may underlie the determination of compensation. Entry of this Notice consistent with the determination of compensation shall

to make a fact more or less probable than it would be without the evidence’ and ‘the fact is of consequence in determining the action.’⁵ This ensures that parties are able ‘to obtain the fullest knowledge of the facts and issues prior to trial.’⁶ ‘To determine relevancy, the court must look at the purpose for offering the evidence. There must be some logical connection either directly or by inference between the fact offered and the fact to be proved.’⁷ Because the dockets referenced in Mr. Jones’ testimony were resolved by agreement and not precedential, the position of the parties to those dockets and the results of those dockets are not relevant to this matter, and that portion of Mr. Jones’ testimony should be struck.

C. Statutory History

Staff objects to and moves to strike the portion of Aqua’s witness Stephen H. Blackhurst’s direct testimony from Page 8, Line 14 to Page 12, Line 15 and from Page 14, Line 10 to Page 16, Line 9. The above referenced sections of testimony reference changes to the statutory language of Tex. Water Code § 13.254 (TWC) in 1979 and 2005, as well as rulemaking projects that took place at the TNRCC and the TCEQ. This testimony is not relevant, as the parties are tasked with interpreting TWC § 13.254 as it is currently written, not as it was prior to legislative changes. Specifically, Mr. Blackhurst’s opinion that the 2005 legislative changes to TWC § 13.254 did not fulfill the directive of TWC § 13.001(c) ‘establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operation, and services that are just and reasonable to the consumers and to the retail public utilities’⁸ is not relevant to any of the issues in this case. The discrete issue in this case is whether any property was rendered useless or valueless to Aqua as a result of the decertification of the subject property: not whether there is a need for legislative change.

Mr. Blackhurst also states that the Commission should write implementing rules for TWC § 13.254(d) and (g) ‘which has not been done since 2005 despite the added directive to undertake

not be regarded as binding holding or precedent as to the appropriateness of any principle or methodology underlying the determination of compensation.’); Notice of Approval, Docket No. 45642 (Mar 14, 2016) at 3.

⁵ Tex. R. Civ. Evid. 401(a)-(b).

⁶ *Axelson, Inc. v. McIlhenny*, 798 S.W.2d 550, 553 (Tex. 1990).

⁷ *Rhey v. Redic*, 408 S.W.3d 440, 460 (Tex. App.—El Paso 2013, no pet.).

⁸ Direct Testimony of Stephen H. Blackhurst (Aug. 22, 2016) at Page 15, Lines 16-20.

that task, or use a reasonable interpretation of the factors provided such as 'other relevant factors' to make utilities like Aqua whole when their CCN areas are removed.⁹ Whether or not the Commission should write implementing rules is far outside the scope of this particular case,¹⁰ and does not meet the relevance standard. Therefore, the portions of Mr. Blackhurst's testimony that relate to the statutory changes to TWC § 13.254, the history of rulemaking projects by TNRCC or TCEQ, or the need for rulemaking projects at the Commission are not relevant and should be struck.

III. CONCLUSION

Staff requests that its Objections and Motion to Strike be sustained and granted, and that the identified portions of Celina and Aqua's testimony be struck. In the alternative, if the ALJ declines to strike them, Staff requests that the ALJ accord such testimony the appropriate weight.

⁹ *Id.* at Page 15, Line 20- Page 16, Line 3.

¹⁰ The Commission has opened Project No. 46151 to amend 16 Tex. Admin. Code § 24.113 and § 24.120, which interpret TWC § 13.254.

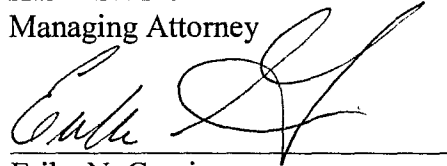
Dated: August 22, 2016

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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Managing Attorney

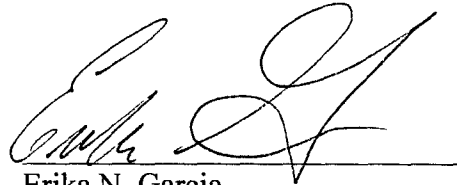


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**SOAH DOCKET NO. 473-16-5011.WS
PUC DOCKET NO. 45848**

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record on August 18, 2016, in accordance with 16 TAC § 22.74.



Erika N. Garcia