



Control Number: 45848



Item Number: 27

Addendum StartPage: 0

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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PUBLIC UTILITY COMMISSION
OF TEXAS

PUBLIC UTILITY COMMISSION
STAFF CLERK

CITY OF CELINA'S RESPONSE TO OBJECTIONS

The City of Celina (the "City") hereby responds to the objections filed by the Staff of the Texas Public Utility Commission ("Staff") and the by Aqua Texas, Inc. ("Aqua"), and in support thereof would respectfully show as follows:

I. RESPONSE TO STAFF OBJECTIONS

A. Use of Independent Third-Party Appraisal

Staff requests that the following statement at Page 13, Line 21 be stricken: "First, I am in agreement with Mr. Fenner's analysis."

Staff asserts that Mr. Fenner's opinion on lost economic opportunity is "outside the limited scope of Preliminary Issue No. 2 of the Preliminary Order" and should, therefore, be struck.

In fact, Mr. Fenner's analysis is not outside the scope of either of the Preliminary Issues. Preliminary Issue No. 1 is: "What property, if any, has been rendered useless or valueless to Aqua by the decertification granted in Docket No. 45329." Preliminary Issue No. 2 is: "Whether the existing appraisals are limited to property that has been determined to have been rendered useless or valueless by decertification?"

Neither Preliminary Issue can be addressed without an inquiry into what constitutes “property.”

Mr. Fenner’s independent third-party analysis was filed after being prepared at the request of the Commission.¹ Mr. Fenner’s analysis specifically states that it was prepared “to determine the total amount of just and adequate compensation to be paid to Aqua Texas for the loss of the decertified tract from its CCN service areas.” In order to make this determination, Mr. Fenner, of necessity, had to make a determination of what he thought constituted property and whether that property was rendered useless or valueless. Mr. Fenner’s analysis, while not determinative, clearly addresses what he thought constituted “property” and is, therefore, clearly relevant to Preliminary Issue No. 1. In addition, it is relevant to Preliminary Issue No. 2 because unless “property” is defined, Preliminary Issue No. 2 cannot be addressed.

Mr. Jones is an expert witness. As such TRE 703 states that he may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.” Mr. Jones testified, as an expert, that he relied on all the appraisals filed in this docket “including the third[-]party appraisal prepared by Bret W. Fenner, P.E. of B & D Environmental, Inc.” Mr. Fenner’s appraisal is filed in this PUC Docket and was prepared at the request of the PUC. That appraisal, therefore, pursuant to TRE 703, is a report that Mr. Jones may use to form his opinion. The portion of testimony sought to be excluded merely recognizes that he evaluated the appraisal and, based on his expertise, he agreed with at least part of the conclusion.

Staff argues that that they do not intend to offer Mr. Fenner as a witness, nor do they intend to introduce the independent third-party appraisal. In addition, it was introduced as evidence by Aqua (AT-3). Regardless of whether the third-party appraisal is introduced as

¹ PUC Preliminary Order at 2.

evidence, it has been filed in this PUC Docket. More importantly, regardless of whether Mr. Fenner's appraisal is admissible, TRE 703 allows Mr. Jones to use it to form his opinions or inferences. Under Texas Rule of Evidence 703, an expert witness may base an opinion on facts or data that are not admissible in evidence, provided that the inadmissible facts or data are of a type reasonably relied upon by experts in the particular field. *Martínez v. State*, 311 S.W.3d 104, 112 (Tex. App. – Amarillo 2010, pet. ref'd).

The City does not assert that the third-party appraisal is determinative. It is, however, something another expert can rely upon to base his opinion. The sentence sought to be struck by Staff merely recognizes what TRE 703 allows – that Mr. Jones reviewed the third-party appraisal to help form his opinions.

To exclude Mr. Fenner's analysis would be to deprive the fact finder of important information. The Supreme Court has stated:

the expert witness paints a powerful image on the litigation canvas. And it is typically the hiring attorney who selects the materials that will provide color and hue. Just as a purveyor of fine art must examine the medium used in order to distinguish masterpiece from fake, a jury must understand the pallet from which the expert paints to accurately assess the testimony's worth. Given the importance that expert testimony can assume, the jury should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion.

In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007):

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.

Staff argues that the cited testimony addresses dockets that were decided "by agreement" and are therefore not precedential. Because the dockets are not precedential, Staff asserts that information from the dockets are not relevant.

Mr. Jones never claims that the information from the cited dockets are “precedential.” The fact that a report or proceeding is not precedential, however, does not make it irrelevant. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TRE 401; *Topletz v. State*, 1994 Tex. App. LEXIS 3925, at *8 (Tex. App. - Dallas 1994, writ denied). The question, therefore, is not whether the cited dockets are “precedent,” but whether there is *any* tendency to make something more or less probable.

It is true that the parties in the compensation portion of those dockets agreed on an independent appraiser. As a result, they were bound by the results of the independent appraisal. The independent appraiser’s work and calculations on compensation, however, was not part of the “agreement”. The amount of compensation that the independent appraiser calculated was not an agreed upon amount. As such, that independent appraiser’s work provides insight into what an independent appraiser might conclude. An unbiased, independent analysis, precedential or not, is precisely the type of information one would look to as relevant material.

Like the appraisal prepared by Mr. Fenner, such a report may not be determinative, but it is certainly has some tendency to show what an independent expert has concluded in similar circumstances. This is the very definition of relevance.

In *Topletz v. State*, 1994 Tex. App. LEXIS 3925, at *8 (Tex. App. -- Dallas 1994, writ denied), the State argued in an eminent domain case that the testimony of four appraisers (Morey, Moore, Moser, and Wallace) offered by appellant (Topletz) should have been excluded as irrelevant because the reports prepared by the appraisers were not dated the same date of the taking. The court made the following observations:

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence. TEX. R. CIV. EVID. 401. All of Topletz's valuation experts, except Morey, inspected the property within eleven months of the date of taking. All of Topletz's valuation experts, except Morey, developed an opinion as to the value of the property as of the date of taking and the diminution in value to the remainder resulting from the taking. Moore, Moser, and Wallace's appraisal reports were not dated the same date as the taking, but each stated that they developed an opinion as to the value of the property as of the date of taking. As experts, they can consider facts and data not necessarily admissible in evidence in forming their opinions if reasonably relied upon by experts in their field. See TEX. R. CIV. EVID. 703. Each of Topletz's valuation experts, as well as the State's valuation expert, relied on pretaking comparable sales in valuing the property as of the date of taking. The testimony of Moore, Moser, and Wallace was relevant in this case because it had a tendency to make the existence of a material fact issue, the compensation due Topletz as a result of the partial-taking by the State, more probable than without the testimony. See TEX. R. CIV. EVID. 401. We conclude that the trial court abused its discretion when it excluded the testimony of Moore, Moser, and Wallace on relevancy grounds.

Topletz, 1994 Tex. App. LEXIS 3925, at *8-9.

Like the reports in *Topletz*, these other dockets have a tendency to make the existence of a material fact issue, namely that when there are no facilities or customers in an area, there is no property that can be rendered valueless or useless.

It is important for the fact finder to know what was reviewed by the expert and how those documents played into the expert's opinion. The Supreme Court has stated:

the expert witness paints a powerful image on the litigation canvas. And it is typically the hiring attorney who selects the materials that will provide color and hue. Just as a purveyor of fine art must examine the medium used in order to distinguish masterpiece from fake, a jury must understand the pallet from which the expert paints to accurately assess the testimony's worth. Given the importance that expert testimony can assume, the jury should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion.

In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007). Mr. Jones reviewed this material. Consequently, the ALJ should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion.

II. RESPONSE TO AQUA’S OBJECTIONS

A. Qualification as Expert (Aqua Objection No. 1)

Aqua objects to Mr. Jones being proffered as an expert because he is an engineer, not a certified appraiser.

TRE 702 states that an expert must be qualified “by knowledge, skill, experience, training, or education.” A certification is not necessary to qualify as an expert. A person can nevertheless be an expert by experience so as to be qualified to give an expert opinion under rule 702. *Gates v. State*, 24 S.W.3d 439, 444 (Tex. App. – Houston [1st Dist.] 2000, pet. ref’d) (police officer who was not an expert in the field of crime scene reconstruction and who admitted that he did not have a certification was qualified as an expert to give his opinion that this shooting was not a suicide based on his knowledge and experience).² The special knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things.³

² See also e.g., *Reece v. State*, 878 S.W.2d 320, 324-25 (Tex. App.—Houston [1st Dist.] 1994, no pet.) (police officer with seven and a half years experience, in which he made numerous narcotics arrests, was allowed to testify as an expert about defendant's actions as a drug seller).

³ *Penry v. State*, 903 S.W.2d 715, 762 (Tex. Crim. App. 1995); accord *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000); *Dixon*, 244 S.W.3d at 479; see, e.g., *Fleming v. Kinney*, 395 S.W.3d 917, 926 (Tex. App.—Houston [14th Dist.] 2013, pet. filed 8-21-13) (trial court did not abuse its discretion in concluding that attorney-witness was qualified by her background and experience to testify as expert about attorneys' fiduciary duties to clients); *Von Hohn v. Von Hohn*, 260 S.W.3d 631, 636-37 (Tex. App.—Tyler 2008, no pet.) (witness with specialized knowledge and experience in valuing a partner's interest in a law firm was qualified to testify as an expert, even though he had never before used information from a patent case to perform such a valuation); *Holmes v. State*, 135 S.W.3d 178, 182-84 (Tex. App.—Waco 2004, no pet.) (police officer with more than six years' experience in special crimes unit and Level 1 training in blood-spatter analysis was qualified to testify as expert in that field); *Am. W. Airlines, Inc. v. Tope*, 935 S.W.2d 908, 918 (Tex. App.—El Paso 1996, no writ) (clinical psychologist with 20 years' experience, two graduate degrees, membership to numerous professional societies and who was licensed to practice in two states was qualified to testify as an expert even though she did not have an M.D. or a Ph.D.); *Thomas v. State*, 915 S.W.2d 597, 600-01 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (crime-prevention officer was qualified to explain how defendant's role was consistent with that of a con artist in a "pigeon drop" scheme); *Agbogun v. State*, 756 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (licensed pharmacist with 36 years' experience was qualified to testify as an expert about procedures commonly followed within the pharmacy profession); *GoldKist, Inc. v. Massey*, 609 S.W.2d 645, 647 (Tex. Civ. App.—Fort Worth 1980, no writ) (peanut farmer was qualified by experience to testify to seed quality and germination); *Ervin v. Gulf States, Inc.*, 594 S.W.2d 134, 137 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (witness who regularly used marijuana for “some 24 years” was competent to express an opinion that a cigarette was marijuana); *McKinney v. Air Venture Corp.*, 578 S.W.2d 849,

In our case, Mr. Jones established his credentials as an expert. Aqua's witness, Mr. Korman, himself explained that "[t]he issues we are dealing with in this case involve an evolving area of the law."⁴ There is no certification for the issues presented. Few people have more experience in this "evolving area of law" than Mr. Jones. Mr. Jones has been preparing appraisals for the CCN decertification process since 2011. His experience is fully set-forth at pages 3 and 4 of his testimony and at CEL-101.

Mr. Jones' experience, combined with the education he has, as set forth at pages 3 and 4 of his testimony and at CEL-101, qualifies him as an expert in this case under TRE 702.⁵ He has extensive education and experience in the fields of engineering and environmental science. Mr. Jones' professional concentration for the past 16 years has been in public water and wastewater utility planning, design, and regulatory support. This experience is fundamental to identifying, evaluating, and quantifying facilities, which are used and useful to providing service to undeveloped service areas.

Notably, the statute implementing eminent domain procedures requires a "certified appraiser" for a bona fide offer. Tex. Prop. Code § Sec. 21.0113(b)(4). In contrast, neither TWC §13.254 nor relevant portions of the Commission's rules require certifications for this

851 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (experienced pilots could testify about the nature and danger of wind shear because flying an airplane is not within an ordinary person's realm of experience); *Harrison v. Humphries*, 567 S.W.2d 884, 887 (Tex. Civ. App.—Amarillo 1978, no writ) (experienced heating inspector could testify to cause of fire); see also *Davis v. State*, 313 S.W.3d 317, 349-50 (Tex. Crim. App. 2010) (police detective's testimony about murder victim's wounds was admitted under Rule 701 because detective personally observed wounds and his observations did not require significant expertise to interpret; trial court would not have abused its discretion if it had admitted the testimony under Rule 702 because officer's training and expertise would have qualified him as an expert).

⁴ Korman Testimony, Page 5, Line 3.

⁵ When the question of adequacy hinges on the expert's qualifications, the court may also consider the four corners of the expert's curriculum vitae. See *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001) (noting that the inclusion of a curriculum vitae is also required by statute); *Woodard v. Fortress Ins. Co.*, No. 01-14-00792-CV, 2015 Tex. App. LEXIS 2131, 2015 WL 1020193, at *1 (Tex. App.—Houston [1st Dist.] Mar. 5, 2015, pet. denied) (mem. op.); *Mangin v. Wendt*, 480 S.W.3d 701, 706 (Tex. App. — Houston [1st Dist.] 2015, no pet). CEL-101 provides ample evidence of Mr. Jones' qualifications.

proceeding.⁶ Further, both the Commission and its jurisdictional predecessor, the TCEQ, have accepted Mr. Jones appraisals in previous matters.

B. Economic Opportunity and the Nature of Property (Aqua Objections 3-7, 12, and 16) and (Aqua Objections 13, 17, and 19)

Aqua asserts that Mr. Jones is not qualified to provide expert opinion on lost economic opportunity or on the nature of property at all. According to Aqua, “[l]ost economic opportunity involves analyzing company financial information, project investment information, and market factors specific to the location where the decertification occurred.” Aqua Objections at 11. More broadly, Aqua complains that Mr. Jones can’t opine on the nature of property of a utility.

First, the preliminary issues to be addressed in this case and the subject of the current testimony address the question of whether property exists that has been rendered useless or valueless. Even Aqua’s expert, Mr. Korman, stated in his testimony that there “are limited issues to be decided by the Commission in this first evidentiary hearing before [any] property valuations are considered in a second evidentiary hearing.”⁷ This hearing does not address the potential value of property that has been rendered valueless, but whether such property even exists.

Second, Mr. Jones’ experience in public water and wastewater utility planning, design, and regulatory support is invaluable to address the inquiries at issue in this proceeding. He has worked with utilities and the regulatory process and can identify property that has or has not been rendered useless or valueless. His experience with utilities is likely more useful than an appraiser who has not had as much experience with utilities because of the specialized nature of

⁶ In fact, in Docket Nos 45450 and 45462, Aqua agreed to use Jack Stowe as an independent third-party appraiser. Mr. Stowe is not a certified appraiser.

⁷ Korman Testimony, Page 6, Lines 7-9. Not even Mr. Korman attempted actual valuation as he limited his testimony “to only identification of property that requires valuation in this proceeding.” Korman Testimony, Page 7, Lines 1-2.

utilities, the inquiries at issue; and as Mr. Korman testified, because this is an "evolving area of the law."⁸

C. Legal Opinion (Objections 2, 4-5, 7-8, 10-12, and 14-22)

Aqua asserts that Mr. Jones provides pure legal opinions that should be stricken. Aqua recognizes, however, in a footnote, that an expert witness may offer an opinion on a mixed question of law and fact, if the opinion is confined to relevant issues and is based on proper legal concepts. *See Birchfield v. Texarkana Mem'l Hosp.* 747 S.W.2d 361, 365 (Tex. 1987).

An issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard. *Mega Child Care, Inc. v. Texas Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex. App.--Houston [14th Dist.] 2000, no pet).

Where, as here, the expert is not a lawyer, the witness must be provided the proper legal concepts with which to analyze the facts.⁹ For example, in *Mega Child Care v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309-10 (Tex. App. 2000), the legal standard against which appellants' actions were analyzed was Chapter 42 of the Human Resources Code. The expert, not a lawyer, was permitted to offer an opinion on a mixed question of law and fact regarding whether appellants' actions violated the code.

Here, the expert has been provided the proper legal concepts with which to analyze the facts. Specifically, the PUC, in its Preliminary Order specified the law which should be applied in this case. Mr. Jones, is merely applying the facts to the law. Just like a safety expert may

⁸ Korman Testimony, Page 5, Lines 3-4.

⁹ *See Lyondell Petrochem v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App.--Houston [1st Dist.] 1994, writ denied) (holding that industrial safety expert was authorized to give opinion as to whether defendant's training program violated specific OSHA regulations); *Keene Corp. v. Rogers*, 863 S.W.2d 168, 176-77 (Tex. App.--Texarkana 1993, no writ) (suggesting that an epidemiologist could, if supplied with the proper legal concepts, offer an opinion as to whether asbestos products are unreasonably dangerous).

opine as to whether a training program violates OSHA standards, Mr. Jones can opine as to what constitutes property under the statute and regulations supplied by the PUC.

Aqua's objections to Mr. Jones' expert analysis are undermined by Mr. Korman's testimony. Mr. Korman stated that "[w]e used the TWC §13.254 and P.U.C SUBST. R. 24.113 compensation factors, together with the Water Code definitions for "facilities" and "service," to inform our determination about what types of property interests we should consider in our report."¹⁰ He then applies statutes and regulations to the facts of this case to provide opinions. This is no different than Mr. Jones' analysis. The City did not assert in its objections that Mr. Korman made legal opinions, because the City properly recognized the role that an expert has in this proceeding to apply the proper legal concepts to the facts – on issues related to the wastewater permit, lost economic opportunity, or the definition of "facility." As an expert, like Mr. Korman, Mr. Jones may offer an opinion on a mixed question of law and fact, if the opinion is confined to relevant issues and is based on proper legal concepts.

The specific objections in this regard are addressed in detail below:

OBJECTIONS CITED AS BEING LEGAL OPINIONS	
Objection	Response
(2) Article.	The citation to the article is not rendering a legal opinion, but merely commenting on an article reviewed by an expert to assist in forming his opinion. TRE 703 states that an expert may base his opinion on facts or data that are "perceived by, reviewed by, or made known to the expert before the hearing."
(4), (5), and (7) Testimony regarding property interests.	The PUC set-forth the legal standard, and Mr. Jones is simply applying facts to that standard. Mr. Jones' testimony is a mixed question of fact and law that is permissible.

¹⁰ Korman Testimony, Page 10, Lines 1-4.

OBJECTIONS CITED AS BEING LEGAL OPINIONS	
Objection	Response
(8) Testimony whether Intervener's arguments have merit.	<p>Mr. Jones is not drawing a legal conclusion here. He is describing his impressions of a report prepared in this very matter and providing his opinion on the conclusions reached in that report. To the extent that he cites statutes and regulations, he does so to support his opinions and consistent with the PUC citation of the Water Code and the Texas Administrative Code be used to address the Preliminary Issues.</p> <p>In addition, TRE 703 states that an expert may base his opinion on facts or data that are "perceived by, reviewed by, or made known to the expert before the hearing." The intervenor's arguments were analyzed and reviewed by this expert.</p>
(10) and (11) Testimony regarding other decertification cases	<p>Mr. Jones is not drawing a legal conclusion here. He is describing facts as they occurred in other dockets, his impressions of those facts, and relating those facts to this proceeding.</p> <p>In addition, TRE 703 states that an expert may base his opinion on facts or data that are "perceived by, reviewed by, or made known to the expert before the hearing." The other decertification cases were analyzed and reviewed by this expert.</p>
(12) and (20) Testimony about wastewater permit	<p>Mr. Jones is not drawing a legal conclusion here. Although Mr. Jones cites statutes and regulations, he does so to support his opinion. An expert witness may offer an opinion on a mixed question of law and fact, if the opinion is confined to relevant issues and is based on proper legal concepts. <i>See Birchfield v. Texarkana Mem. Hosp.</i> 747 S.W.2d 361, 365 (Tex. 1987).</p> <p>In addition, TRE 703 states that an expert may base his opinion on facts or data that are "perceived by, reviewed by, or made known to the expert before the hearing." The permit, and the context in which the permit is issued was analyzed and reviewed by this expert.</p>
(14) Testimony regarding failure to address lost economic opportunity.	<p>The PUC set-forth the legal standard, and Mr. Jones is simply applying facts to that standard. Mr. Jones' testimony is a mixed question of fact and law that is permissible.</p>

OBJECTIONS CITED AS BEING LEGAL OPINIONS

Objection	Response
(15) Testimony regarding TCEQ cases	<p>Mr. Jones is not drawing a legal conclusion here. He is describing facts as they occurred in other dockets, his impressions of those facts, and relating those facts to this proceeding. As he testified, Mr. Jones actually participated in the proceeding cited and is merely explaining his experience, describing the result, and relating those facts to this proceeding.</p> <p>In addition, TRE 703 states that an expert may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.” The TCEQ cases were analyzed and reviewed by this expert.</p>
(16) Testimony regarding public policy and CCNs	<p>Public policy arguments are common sense arguments, not assertions of binding legal authority. It is appropriate for an expert to opine on public policy. With respect to CCNs, Mr. Jones is merely providing his expert opinion on the effects an adverse decision might have on CCNs.</p>
(17) Testimony regarding definition of “facilities.”	<p>Aqua’s expert opened the door to the question how lost economic opportunity is tied to the definition of facilities. Mr. Korman in his testimony notes at page 10, lines 1-4 that he “used the TWC §13.254 and P.U.C SUBST. R. 24.113 compensation factors, together with the Water Code definitions for “facilities” and “service,” to inform [their] determination about what types of property interests we should consider in [their] report.” It is this report that Mr. Jones’ has reviewed and is providing comment on. In addition, Mr. Blackhurst also provides testimony at regarding the definition of “facility” at Page 12, Lines 6-12 and Page 13, Lines 1-3. Finally, Mr. Waldock also addressed the definition of “facility” at Page 7, Lines 13-15 of his testimony. The report relied upon and reviewed by Mr. Jones relies on this definition to reach its conclusion. Mr. Jones may opine on his impressions based on that review.</p> <p>The citation to the article is not rendering a legal opinion, but merely commenting on an article reviewed by an expert to assist in forming his opinion. TRE 703 states that an expert may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.”</p>

OBJECTIONS CITED AS BEING LEGAL OPINIONS	
Objection	Response
(18) Expectations	Mr. Jones is not drawing a legal conclusion here. He is describing facts as they occurred in other dockets, his impressions of those facts, and relating those facts to this proceeding.
(19) Comment on compensation rules	<p>Mr. Jones is not drawing a legal conclusion here. Although Mr. Jones cites statutes and regulations, he does so to support his opinion. An expert witness may offer an opinion on a mixed question of law and fact, if the opinion is confined to relevant issues and is based on proper legal concepts. <i>See Bircheffield v. Texarkana Mem. Hosp.</i> 747 S.W.2d 361, 365 (Tex. 1987).</p> <p>The PUC set-forth the legal standard, and Mr. Jones is simply applying facts to that standard. Mr. Jones' testimony is a mixed question of fact and law that is permissible.</p>
(21) and (22) Alleged legal analysis	<p>Mr. Jones is not drawing a legal conclusion here. Although Mr. Jones cites statutes and regulations, he does so to support his opinion. An expert witness may offer an opinion on a mixed question of law and fact, if the opinion is confined to relevant issues and is based on proper legal concepts. <i>See Bircheffield v. Texarkana Mem. Hosp.</i> 747 S.W.2d 361, 365 (Tex. 1987).</p> <p>The PUC set-forth the legal standard, and Mr. Jones is simply applying facts to that standard. Mr. Jones' testimony is a mixed question of fact and law that is permissible.</p>

D. Other Objections

The discussion above addresses Aqua's objections to (1) Mr. Jones' qualification as an expert and his ability, therefore, to provide opinions, (2) Mr. Jones' ability to provide opinions on lost economic opportunity or on the nature of property at all, and (3) alleged legal arguments.

Below we address other objections to which Aqua does not provide elaboration or legal analysis, but merely cites in its chart.

OTHER OBJECTIONS (NOT ALREADY ADDRESSED)

Objection	Response
(2) Relevance	<p>Relevant evidence is evidence that has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹¹</p> <p>The article cited, while not determinative, addresses the issues in this case. It is a document that Mr. Jones reviewed, and the ALJ should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion. <i>In re Christus Spohn Hosp. Kleberg</i>, 222 S.W.3d 434, 440 (Tex. 2007).</p>
(3) Assumes facts not in evidence & leading and suggestive	The City agrees to strike “When you say there is no tangible property” from its question. The remainder of the question should remain.
(4) Lack of Foundation and Relevance (5) Lack of Foundation	<p>Mr. Jones testified that he reviewed the appraisals prepared by Aqua’s expert and the independent third-party appraiser. He also provided a foundation for this testimony at Page 8, Lines 16-27 for this testimony.</p> <p>Relevant evidence is evidence that has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹² In this case, his opinion as to whether any property interest at all is qualified by “to my knowledge” and provides the ALJ with his opinion on the matter, which makes the existence of the fact more or less probable.</p>
(6) Leading, Suggestive, and Assumes Facts Not in Evidence	The City agrees to strike “What you described is tangible personal property” from its question. The remainder of the question should remain.
(9) Assumes Facts Not in Evidence	CEL-102 includes facts and documents from these dockets. CEL-102 is also a document that has been filed in the PUC docket.
(10) Lack of Foundation	TRE 703 states that he may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.” Mr. Jones testified that he reviewed CEL-102, which includes facts and documents from these dockets.

¹¹ TRE 401.

¹² TRE 401.

OTHER OBJECTIONS (NOT ALREADY ADDRESSED)	
Objection	Response
(11) Lack of Foundation and Relevance	<p>Relevant evidence is evidence that has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹³ In this case, proximity in time and location has a tendency to make facts related wot whether a property interest exists more or less probable. Interestingly, Aqua, in its objections asserts that “market factors specific to the location where the decertification occurred” is important. Aqua Objections at 11.</p> <p>TRE 703 states that he may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.” Mr. Jones testified that he reviewed CEL-102, which includes facts and documents from these dockets.</p>
(13) Lack of Foundation (14) Lack of Foundation and Speculative	<p>All of the testimony leading-up to this point lays a foundation for Mr. Jones’ observations and opinions set-forth in this section.</p> <p>With regard to speculation, it is opinion testimony, which is allowed under TRE 702.</p>
(15) Relevance	<p>Relevant evidence is evidence that has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁴ This testimony goes to the heart of the issue presented. It directly addresses that which the PUC ordered to be addressed.</p>
(16) Speculative and Lack of Foundation	<p>It is appropriate for an expert to opine on public policy. His opinions here are not speculations but opinions. With respect to CCNs, Mr. Jones is merely providing his expert opinion on the effects an adverse decision might have on CCNs.</p> <p>The foundation for his opinion was laid when he qualified as an expert on these matters.</p>

¹³ TRE 401.

¹⁴ TRE 401.

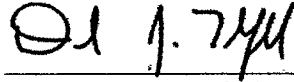
OTHER OBJECTIONS (NOT ALREADY ADDRESSED)	
Objection	Response
(18) Speculative, Lack of Foundation, and Relevance	<p>This is not speculation. Mr. Jones is describing facts as they occurred in other dockets, his impressions of those facts, and relating those facts to this proceeding.</p> <p>TRE 703 states that he may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.” Mr. Jones testified that he reviewed CEL-102, which includes facts and documents from these dockets.</p> <p>Relevant evidence is evidence that has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁵ In this case, what occurred in those other dockets provides the ALJ with Mr. Jones’ opinion on the matter, which makes the existence of the fact more or less probable.</p>
(19) Speculative	This is expert opinion testimony, which is allowed under TRE 702.
(22) Lack of Foundation	TRE 703 states that he may base his opinion on facts or data that are “perceived by, reviewed by, or made known to the expert before the hearing.” Mr. Jones testified that he reviewed the appraisals in this docket. Here, he is addressing what those appraisals address.

III. PRAYER

Except as noted herein, the City respectfully requests that the Judge overrule the objections asserted by the Staff and by Aqua for the reasons set forth above.

¹⁵ TRE 401.

Respectfully submitted,



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ATTORNEYS FOR THE CITY OF CELINA

CERTIFICATE OF SERVICE

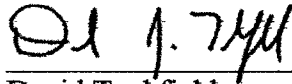
I, David Tuckfield, attorney for the City of Celina, certify that a copy of this document was served on all parties of record in this proceeding on August 26, 2016 in the following manner:

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