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

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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

FILED TO OFFICE OF PUBLIC UTILITY COMMISSION
FILING CLERK

OF

ADMINISTRATIVE HEARINGS

COMMISSION STAFF'S STATEMENT OF POSITION

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Commission Staff's Statement of Position. In support thereof, Staff states the following:

I. BACKGROUND

On April 12, 2016 the City of Celina (Celina) filed a Notice of Intent to Provide Water and Sewer Service to an area decertified from Aqua Texas, Inc. (Aqua) in Denton County, Texas. This area was decertified from Aqua's water certificate of convenience and necessity (CCN) No. 13201 and sewer CCN No. 21059 by the Commission in Docket No. 45329¹, pursuant to Tex. Water Code § 13.254(a-5) (TWC). On April 14, 2016, the Administrative Law Judge (ALJ) issued Order No. 1 regarding the selection of an independent appraiser. On April 22, 2016, Celina filed a Notice of Non-Agreement on a Single Appraiser, and Aqua filed a Motion to Intervene and Notice Regarding Appraiser. On April 25, 2016 the ALJ issued Order No. 2 requiring that each party submit their appraisals by June 13, 2016. Celina and Aqua both timely filed their appraisals. On July 7, 2016, an independent third appraisal was filed.

On July 7, 2016, the Commission referred this matter to the State Office of Administrative Hearings (SOAH). SOAH Order No. 1, issued July 12, 2016 set a prehearing conference and granted Aqua's motion to intervene. On July 20, 2016, the Commission issued a Preliminary Order. SOAH Order No. 2, issued August 1, 2016, memorialized the prehearing conference and

¹ *Petition of CADG Sutton Fields II, LLC to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 45329 (Mar. 22, 2016).

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set a procedural schedule for this matter. On August 16, 2016, Celina and Aqua filed their direct testimony in accordance with SOAH Order No. 2. Staff now timely files its Statement of Position.²

II. STAFF'S STATEMENT OF POSITION

A. Property Rendered Useless and Valueless

In the Preliminary Order, the Commission identified two issues to be addressed in this proceeding. Preliminary Order Issue No. 1 asks “What property, if any, has been rendered useless or valueless to Aqua by the decertification granted in Docket No. 45329?”³

Texas General Land Office v. Crystal Clear Water Supply Corp.,⁴ is a streamlined expedited release case under TWC § 13.254(a-5) that sets forth the standard for “receiving service.” Receiving service is a “fact-based inquiry requiring the Commission to consider whether the retail public utility has facilities or lines committed to providing water *to the particular tract* or has performed acts or supplied anything *to the particular tract* in furtherance of its obligation to provide water to that tract pursuant to its CCN.”⁵ Under *Crystal Clear*, a piece of property is not necessarily receiving service “simply because the retail public utility has performed an act, such as entering into a contract to secure water supply, unless the act was performed in furtherance of providing water to the tract seeking decertification.”⁶

The *Crystal Clear* standard also applies in determining whether any property is rendered useless or valueless to a retail public utility as a result of decertification under TWC § 13.254(a-5). The only property that can be rendered useless or valueless as a result of decertification is property that a retail public utility has committed to providing service to the particular piece of decertified land.

Once property that was committed to the decertified land is identified using the above standard, the inquiry shifts to whether that property is rendered useless or valueless under TWC §

² Pursuant to 16 Tex. Admin. Code § 22.124, a statement of position shall be filed no later than three working days before the start of a hearing. Since the hearing on the merits in this matter is scheduled to begin on September 16, 2016, this statement of position is timely filed.

³ Preliminary Order at 3 (Jul. 22, 2016).

⁴ 449 S.W.3d 130 (Tex. App.-Austin 2014, pet. denied).

⁵ *Id.* at 140.

⁶ *Id.* at 141.

13.254(d) as a result of the decertification. Because the Texas Water Code and Commission rules do not include an express definition of “useless or valueless,” we look to the ordinary or plain meaning of the terms.⁷ “Useless” ordinarily means “having or being of no use”⁸ and valueless means “having no usefulness.”⁹ These ordinary meanings denote that in order for property to be rendered useless or valueless to Aqua as a result of the decertification, that property must have *no use* to Aqua.

There are three main categories of property interests that have been identified by the parties as being at issue in this case: Aqua’s Prosper Point wastewater permit, Aqua’s legal expenses and professional fees, and Aqua’s lost economic opportunity claim. Based on the standard set forth above, Staff takes the following position on whether each of these asserted property interests have been rendered useless or valueless as a result of the decertification:

i. Prosper Point Wastewater Permit

Aqua obtained a wastewater permit (TPDES Permit No. WQ0014234001) on January 9, 2003 from the Texas Commission on Environmental Quality (TCEQ) for the Prosper Point area¹⁰ of its North Texas region (Prosper Point wastewater permit).¹¹ Aqua subsequently renewed the Prosper Point wastewater permit twice: once on May 21, 2007, and again on January 31, 2012.¹² The permit is set to expire on October 1, 2016, and Aqua has notified TCEQ that it does not intend to renew it in light of the decertification in Docket No. 45329.¹³

Aqua contends that the Prosper Point wastewater permit was “obtained specifically to serve the Property under prevailing regulations”¹⁴ and was subsequently renewed because “Property

⁷ Tex. Gov’t Code § 312.002(a) (West); *see Mims v. State*, 3 S.W.3d 923, 924 (Tex. Crim. App. 1999) (“The first rule of statutory construction is that we interpret statutes in accordance with the plain meaning of their language unless the statutory language is ambiguous or the plain meaning leads to absurd results”).

⁸ Merriam Webster.com Dictionary (accessed Aug. 24, 2016).

⁹ Merriam Webster.com Thesaurus (accessed Aug. 24, 2016).

¹⁰ Aqua Texas’ Response to Staff’s First Requests for Information, Staff RFI 1-1 (Sep. 7, 2016) (Aqua’s Response to Staff RFI) (“The ‘Prosper Point’ project name refers to the 127.897 acres of land in Denton County immediately northeast of the intersection of Crutchfield Road and FM Road 1385”).

¹¹ Attachment AT-1.

¹² Attachment AT-1.

¹³ Attachment AT-5.

¹⁴ Direct Testimony of Darryl G. Waldock on Behalf of Aqua Texas, Inc. (Aug. 16, 2016) (Waldock Direct) at 9:18-19; Direct Testimony of Joshua M. Korman on Behalf of Aqua Texas, Inc. (Aug. 16, 2016) (Korman Direct) at 11:12-15.

development by its various owners was always anticipated.”¹⁵ Aqua further contends that the Prosper Point wastewater permit is therefore rendered useless or valueless since the 128-acre tract of land has been removed from Aqua’s CCN service area.¹⁶ Celina argues that a permit is not a vested right.¹⁷ However, it asserts that “stranded capacity,” a term that “generally refers to a utility’s investments in existing regional facilities intended to serve undeveloped portions of its CCN, which will be underutilized as a result of decertification,”¹⁸ is property that might be rendered useless or valueless. Celina states that in the instant case, “the only possible stranded matter is Aqua’s wastewater permit . . .”¹⁹

Aqua’s Prosper Point wastewater permit meets the standard set forth in *Crystal Clear*; namely that the permit was obtained and renewed for the specific purpose of providing service to the particular 128-acre tract of land at issue in this proceeding, and the permit was committed to providing service only to that tract.²⁰ Prior to obtaining the permit, Aqua executed the first developer Letter of Intent in reference to the Prosper Point project in 2000.²¹ Since that time, Aqua has had discussions with many potential developers about that tract of land,²² such that Aqua had a reasonable expectation that it would provide service to that tract, and committed acts in furtherance of providing that service. Aqua acquired and maintained the Prosper Point wastewater permit, which had capacity limited to the anticipated needs for development within the 128-acre tract of land.²³ Aqua asserts that it would not have been able to use that capacity outside the 128-acre tract of land, as it is surrounded by area certificated to other providers.²⁴ Aqua’s decision not to renew the permit after the decertification in Docket No. 45329 is further evidence that once the 128-acre tract was removed from its CCN area, the Prosper Point wastewater permit was no longer

¹⁵ Waldock Direct at 10:2-5.

¹⁶ Korman Direct at 10:20- 11:2; Waldock Direct at 10:9-12.

¹⁷ Direct Testimony of Jason S. Jones, P.E. on Behalf of Petitioner City of Celina (Aug. 16, 2016) (Jones Direct) at 12:25-26.

¹⁸ Jones Direct at 12:3-7.

¹⁹ *Id.* at 12:24-25.

²⁰ *See generally* Aqua’s Response to Staff RFI.

²¹ Aqua’s Response to Staff RFI 1-1.

²² Aqua’s Response to Staff RFI 1-2.

²³ Aqua’s Response to Staff RFI 1-8.

²⁴ *Id.*

of value or use to Aqua. Therefore, it is Staff's position that the Prosper Point wastewater permit is rendered useless and valueless to Aqua as a result of the decertification.

Aqua also identified "planning and design activities"²⁵ that it engaged in as part of making service to the 128-acre tract feasible. Under *Crystal Clear*, these activities are properly considered where they were performed in furtherance of providing service to the particular tract.²⁶ Aqua's activities included engaging and working with consultants on planning efforts related to:

the water distribution system design, wastewater collection system design, water production facility design, compliance with water system construction codes, operations and maintenance plans, capital improvement plans, short-term and long-term water and wastewater facilities ownership issues, and other retail water and wastewater utility service issues all in furtherance of service to the Property.²⁷

These activities were conducted as a direct result of obtaining the Prosper Point wastewater permit and in further of providing service to the tract; and, as a result of the decertification are rendered useless or valueless. Therefore, they should be properly considered during the compensation proceeding under the compensation factor in TWC § 13.254(g) which considers "the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question."

ii. Legal Expenses and Professional Fees

Pursuant to TWC § 13.254(g), "necessary and reasonable legal expenses and professional fees" are recoverable as part of compensation to a decertified retail public utility. However, this recovery is only permitted if the decertified retail public utility is eligible for compensation, which will only occur if it is determined that there is property rendered useless or valueless to the retail public utility as a result of the decertification. Since the discrete issue in this proceeding is determining whether any property was rendered useless or valueless to Aqua, *not* determining the appropriate compensation to be paid to Aqua, legal expenses and professional fees are beyond the limited scope of this proceeding.

²⁵ Attachment AT-1 at 5.

²⁶ 449 S.W.3d at 140.

²⁷ Waldock Direct at 9:6-13.

Aqua acknowledges that legal expenses and professional fees are a “compensation factor,”²⁸ but attempts to address them in this proceeding by characterizing the expenses incurred in connection with both the decertification in Docket No. 45329 and this proceeding as “cash property.”²⁹ Aqua asserts that this “property” is rendered useless or valueless by decertification.³⁰ Even if Aqua’s expenses could be qualified as “cash property,” that property was not committed to service for the 128-acre tract of land, and therefore under *Crystal Clear* could not be deemed to be useless or valueless under TWC § 13.254(d). It was Aqua’s business decision to incur the legal expenses to defend its business interests in the decertification in Docket No. 45329, and in the instant case. Further, whether the legal expenses and professional fees that Aqua seeks to recover are “necessary and reasonable” is an issue that will be further developed during compensation, if that phase is reached.

iii. Aqua’s Lost Economic Opportunity Property Interest Claim

Aqua seeks a determination in this proceeding that it has an intangible property interest in lost economic opportunity for revenues it projects that it would have received as a result of development of the subject 128-acre tract of land, and that intangible property interest is now useless or valueless.³¹ Aqua’s appraisal, Attachment AT-1, states that the subject tract of land was expected to be developed with approximately 575 housing units in a four to six year time period, and that as a result of the decertification, Aqua has “lost the economic opportunity of the reasonably probably 575 connections for both water and waste water.”³²

First, a CCN is not a vested right or property interest. The Commission’s substantive rules provide that “a certificate or order of the commission does not become a vested right and the commission at any time after notice and hearing may revoke or amend any certificate of public convenience and necessity (CCN)” based upon certain findings.³³ Aqua points out that the

²⁸ Direct Testimony of Stephen H. Blackhurst on Behalf of Aqua Texas, Inc. (Aug. 16, 2016) (Blackhurst Direct) at 13:13-15 (Q: How does the compensation factor of “necessary and reasonable legal expenses and professional fees” fit into the analysis of “property rendered useless and valueless”?)

²⁹ Waldock Direct at 10:21.

³⁰ Blackhurst Direct at 13:16-21; *see* Korman Direct at 12:3-13.

³¹ *See* Korman Direct at 12:14- 13:2; Attachment AT-1.

³² Attachment AT-1.

³³ 16 Tex. Admin. Code § 24.113(a) (TAC).

corresponding statute, TWC § 13.254, does not include the same language.³⁴ However, the purpose of the TWC is to “establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the retail public utilities.”³⁵ It grants the Commission the authority to make and enforce rules necessary to protect water services for customers consistent with the public interest.³⁶ Courts have held that “administrative rules have the same force as statutes and are generally construed in the same way.”³⁷ Therefore, even if that the language is not included in TWC § 13.254, it is present in 16 TAC § 24.113(a), and is of full force and effect. Further, Texas courts have specifically held that “. . . a CCN, which confers the exclusive right to serve a designated area, is not a vested property right entitled to due-process protection.”³⁸ A CCN provides its holder the exclusive right and responsibility to provide water or sewer service within defined geographic boundaries,³⁹ but it does not guarantee economic profits or provide a property interest in future profits or development.

Second, lost economic opportunity is not a valid property interest that can be considered in this proceeding. Aqua witness Joshua M. Korman, who developed the appraisal labeled Attachment AT-1, stated that he used the TWC definitions of “facilities” and “service” to inform his determination of Aqua’s types of property interests, which include both tangible and intangible property interests.⁴⁰ The TWC defines facilities as:

all the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnishes, or supplied for, by, or in connection with the business of any retail public utility.⁴¹

³⁴ See Blackhurst Direct at 8:3-12.

³⁵ TWC § 13.001(c).

³⁶ TWC § 13.041(b).

³⁷ *Oncor Elec. Delivery Co. LLC v. Giovanni Homes Corp.*, 438 S.W.3d 644, 652 (Tex. App. -Ft. Worth 2014), reh’g overruled (Aug. 7, 2014), review denied (Jan. 22, 2016).

³⁸ See *Crystal Clear*, 449 S.W. 3d at 145; *Creedmoor-Maha Water Supply Corp. v. Texas Comm’n on Envtl’ Quality*, 307 S.W.3d 505, 525-26 (Tex. App.-Austin 2010), review denied (Jun. 24, 2016).

³⁹ See 16 TAC § 24.3(15).

⁴⁰ See Korman Direct at 10:1-4.

⁴¹ TWC § 13.002(9).

Aqua relies on this definition to support its claim that lost economic opportunity is an intangible property interest tied to facilities. However, “facilities” are a utility’s plant and equipment, *including* tangible and intangible property. Staff agrees with Celina’s interpretation that in order for intangible personal property to be included in the definition of facility, that intangible personal property must be part of or associated with the hard assets of a utility’s plant and equipment.⁴² Since lost economic opportunity for future water and wastewater connections not yet realized is not intangible personal property that can be tied to Aqua’s plant and equipment, it is not appropriately included as a property interest that may be rendered useless or valueless by decertification.

Third, Aqua acknowledges that as a result of the decertification it has lost “*a portion* of their regional economic opportunity allocable to the Property”⁴³ (emphasis added). It is Aqua’s contention that “the lost economic opportunity interest represents a property interest that was broken apart through a partial taking”⁴⁴ and that a property interest may be partially rendered useless or valueless.⁴⁵ The plain language of TWC § 13.254(d) provides that in order to merit compensation, the decertified utility’s property must be entirely without use; not partially without use. Therefore, even if Aqua’s contention that its economic opportunity is in an intangible property interest properly tied to facilities is accepted, that property interest cannot be determined to be useless or valueless because only a portion of Aqua’s regional economic opportunity is affected by the decertification.

B. The Existing Appraisals Are Not Limited to Property Rendered Useless and Valueless

Preliminary Order Issue No. 2 asks “Are the existing appraisals limited to property that has been determined to have been rendered useless or valueless by decertification?”⁴⁶ Aqua asserts that all three filed appraisals include only property that has been rendered useless or valueless by decertification, but improperly exclude Aqua’s lost economic opportunity property interest.⁴⁷ Celina asserts that none of the filed appraisals are limited to property rendered useless and

⁴² Jones Direct at 15:22- 16:7.

⁴³ Korman Direct at 12:16-19.

⁴⁴ Korman Direct at 13: 21- 14:5.

⁴⁵ See Blackhurst 13:3-5.

⁴⁶ Preliminary Order at 3.

⁴⁷ Blackhurst Direct at 17:6-18; Korman Direct at 15:10- 16:6.

valueless, due to the inclusion of the Prosper Point wastewater permit and associated costs, and legal expenses and professional fees.⁴⁸

Staff's evaluation of whether each filed appraisal includes only property rendered useless or valueless sets aside the inclusion of legal expenses and professional fees in each appraisal. Reasonable and necessary legal expenses and professional fees are not property that can be rendered useless or valueless; rather, they are a compensation factor for determining value under TWC § 13.254(g), which is outside the scope of this proceeding. Appraisals that properly include only property rendered useless or valueless will have a determination of compensation, which will contain reasonable and necessary legal expenses and professional fees. Therefore, an appraisal should not be characterized as not limited to only property rendered useless or valueless solely on the basis that it includes legal expenses and professional fees.

i. Aqua's Appraisal (Attachment AT-1)

Aqua's appraisal is not limited to property that has been rendered useless or valueless, as it includes Aqua's claim of "lost economic opportunity" and loss of an "intangible personal property right" as a result of the decertification.⁴⁹ As discussed above, it is Staff's position that a CCN is not a vested right and lost economic opportunity is not property that could be rendered useless or valueless to Aqua as a result of decertification.

ii. Celina's Appraisal (Exhibit CEL102)

Celina's appraisal identifies only Aqua's Prosper Point wastewater permit as property for which compensation should be provided, and is therefore properly limited to property rendered useless or valueless by decertification.

iii. Third Appraisal

The independent third appraisal identifies only Aqua's Prosper Point wastewater permit as property for which compensation should be provided, and is therefore properly limited to property rendered useless or valueless by decertification.

⁴⁸ Jones Direct at 18:7-22.

⁴⁹ Attachment AT-1.

III. CONCLUSION

Under the *Crystal Clear* standard, Aqua's Prosper Point wastewater permit (and associated planning and design activities) is the only property that has been rendered useless or valueless to Aqua as a result of the decertification in Docket No. 45329. Celina's filed appraisal and the independent third appraisal reflect this, and are therefore limited to property rendered useless or valueless. Aqua's appraisal includes an additional claim of lost economic opportunity, and is not limited to property rendered useless or valueless.

Staff reserves the right to further develop its position on the issues discussed herein as well as any additional issues that arise as part of the evidentiary record, whether pre-hearing or during the hearing on the merits.

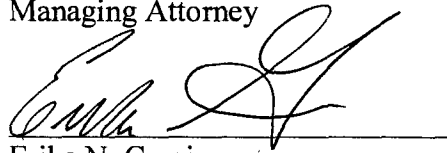
Dated: September 12, 2016

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

Margaret Uhlig Pemberton
Division Director

Karen S. Hubbard
Managing Attorney

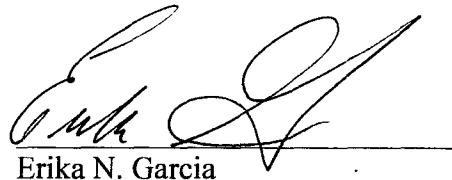


Erika N. Garcia
State Bar No. 24092077
(512) 936-7290
Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326
(512) 936-7268 (facsimile)

**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 September 12, 2016,
in accordance with 16 TAC § 22.74.



Erika N. Garcia