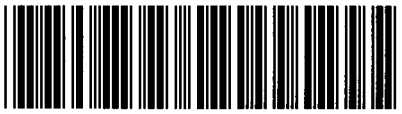

Control Number: 45848

Item Number: 49

Addendum StartPage: 0

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

RECEIVED
2016 OCT 28 PM 1:00
PUBLIC UTILITY COMMISSION
FILING CLERK

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

CITY OF CELINA'S

CLOSING ARGUMENT

The City of Celina (the "City") files this, its Closing Argument, in the above-styled matter. The primary issue in this case is whether Aqua Texas, Inc. ("Aqua") had any property that was rendered "useless or valueless" by having a portion of its Certificate of Convenience and Necessity ("CCN") decertificated in Docket No. 45329. The City asserts that the answer is "No." The City further asserts that this issue is primarily, if not exclusively, a question of law and not a question fact. In support thereof the City would respectfully show as follows:

I. INTRODUCTION

The Public Utility Commission ("PUC" or "Commission") referred this matter to the State Office of Administrative Hearings ("SOAH") by order dated July 20, 2016. In that order, the PUC identified the following issues for SOAH to address:[1]

1. What property, if any, has been rendered useless or valueless to Aqua by the decertification granted in Docket No. 45329? TWC §13.254(d) and 16 TAC §24.113(h).

[1] PUC Preliminary Order at 3 (July 20, 2016) (Docket No 45848) (hereafter "Preliminary Order").

2. Are the existing appraisals limited to property that has been determined to have been rendered useless or valueless by decertification?[2]

SOAH conducted the hearing on the merits on September 16, 2016. While the PUC left the door open to additional issues, no other issues were argued, heard or considered at the contested case hearing.

This docket is one of first impression in the State of Texas on this subject matter.[3] For that reason, it has been somewhat unclear on how to proceed. One reason for this, in the City's opinion, is that no party seems to dispute the basic fact pattern. Instead, the arguments are of a legal nature and the witnesses, primarily expert witnesses, provided testimony that was primarily thoughts of a legal nature. The first question to answer is whether Aqua had any "property" impacted by the previous CCN decertification. The facts seem largely uncontested. For instance, it is undisputed that Aqua had received a wastewater discharge permit from the TCEQ and/or its predecessor agency. The question of whether that wastewater permit amounts to "property" can only be answered through a legal conclusion and statutory interpretation.

Similarly, the hottest contested issue is whether the decertificated utility has a right to be compensated based on speculative revenue from customers that do not exist at the time of the decertification. In order to answer that question in the affirmative, the PUC would first have to find that an entity's expectation of future revenue is "property".

Here, predictably, the decertificated entity argues for a very broad interpretation of property that would have the PUC rule that wastewater discharge permit is property and that its expectation of receiving revenue, at some point in the future, from customers unknown but served by a different utility, is "property".

---

[2] The PUC specifically did not include any valuation in this docket. Preliminary Order.
[3] *See* Preliminary Order at 2 ("This is the one of the first cases of this type to be referred to SOAH").

Equally predictable is that the utility that intends to serve the previously decertificated area believes that Aqua has no property impacted by the decertification. The City asserts that a plain reading of the relevant statutes, a review of legislative history and the testimony of the witnesses each support the City's position.

II. PROCEDURAL BACKGROUND

On March 22, 2016, the Public Utility Commission of Texas (Commission) issued an order approving the petition of CADG Sutton Fields II, LLC for expedited release of approximately 128 acres from Aqua Texas, Inc.'s (Aqua's) water certificate of convenience and necessity (CCN) No. 13201 and sewer CCN No. 21059, in Denton County, Texas.[4] On April 12, 2016, the City of Celina (Celina) filed a Notice of Intent to provide retail water and sewer service to the area decertified in Docket No. 45329, pursuant to Texas Water Code § 13.254(e) (TWC) and 16 Tex. Admin. Code § 24.113(i) (TAC).

On April 14, 2016, The Administrative Law Judge (ALJ) issued Order No. 1, requiring parties to notify the Commission whether they agreed on an independent appraiser by April 22, 2016. Notice of Celina's Notice of Intent to Serve was published in the *Texas Register* on April 14, 2016. On April 22, 2016, Celina filed a Notice of Non-Agreement on Single Appraiser. Aqua filed a motion to intervene on April 22, 2016.

On April 25, 2016, the ALJ issued Order No. 2 requiring Aqua and Celina to each file an appraisal by June 13, 2016. Aqua and Celina timely filed these appraisals. On July 7, 2016, an independent third appraisal was filed. On July 7, 2016, the Commission issued an Order of Referral, referring this matter to the State Office of Administrative Hearings (SOAH). On July

[4] *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).

13, 2016, the SOAH ALJ issued Order No. 1, setting a prehearing conference and granting Aqua's motion to intervene.

On July 20, 2016, the Commission issued a Preliminary Order. On July 26, 2016, Aqua, Celina, and Staff attended an initial prehearing conference in this matter and adopted a procedural schedule, which was memorialized in SOAH Order No. 2, issued July 29, 2016. On August 23, 2016, the SOAH ALJ issued SOAH Order No. 3, Requiring Statement on Request for Transcript of Hearing on the Merits. On September 2, 2016, Celina filed a letter regarding a transcript in response to SOAH Order No. 3.

On September 14, 2016, the parties attended a final prehearing conference regarding procedures for the hearing on the merits and objections to prefiled testimony, which was memorialized in SOAH Order No. 4, issued on September 14, 2016. The hearing on the merits was held on September 16, 2016. On September 23, 2016, Celina, Aqua, and Staff filed an Agreed Schedule and Briefing Outline, which was adopted by the SOAH ALJs in SOAH Order No. 5, issued on October 6, 2016.

III. WHAT PROPERTY, IF ANY HAS BEEN RENDERED USELESS OR VALUELESS TO AQUA BY THE DECERTIFICATION GRANTED IN DOCKET NO. 45239? TWC § 13.254(d); 16 TAC § 24.113(h)

A. Definition of Property

Neither the relevant portions of the Texas Water Code nor the Texas Administrative Code defines the term "property." While not offering a specific definition of property, the Texas Water Code and the Rules of the PUC provide guidance of what is *not* property.[5] The PUC rules specifically state that a CCN does not become a vested right and, in 16 TAC §24.116, the rule

[5] *See,* TWC §26.029(c), holding a discharge permit does not create vested right; *See, also,* 16 TAC §§24.113(a) and 24.116.

states that "Any certificate granted under this subchapter shall not be construed to vest exclusive service or property rights in and the area certificated".[6]

In Texas Water Code § 13.254(g), the Legislature directed as follows:

> (g) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain and the value of personal property shall be determined according to the factors in this subsection.

Texas Water Code § 13.254(g). The statute is clear that real property is to be valued according to the eminent domain provisions of the property code. There is, however, no assertion that any real property is at issue or should be valued in this proceeding.

Personal property, on the other hand, is at issue in this case. Although the Legislature did not define "personal property," it set-forth the factors that should be used in valuing personal property. Aqua conflates the term "personal property" with the factors that are used to value such property. In other words, Aqua asserts each factor is itself property.[7] An example is in Mr. Korman's pre-filed testimony, he listed that Aqua had three categories of property interests. The first being expenses spent in the decertificated area, the second being legal expenses and professional fees and the third was lost economic opportunity. This is neither what the statute and rules of the PUC state, nor is it a workable approach.[8]

---

[6] *Id.*

[7] AT-C, 10:17 to 13:2.

[8] Another example, Mr. Waldock asserted that Aqua has a property interest in all the money that it spends in the course of its business. Tr. at 68:16-19. Just because a Company spends money, regardless of whether it was money well spent or money spent to actually provide service or enhance value, does not mean that a vested property interest arises.

The plain terms of the statute requires application of the factors to valuing personal property.[9] According to the statute, one must first identify a property interest, and then use the factors to value that property interest.

Because neither the statute nor implementing regulations defines the term "personal property," rules of statutory construction demand that the provision be construed in light of the entire act, its nature, its object, and its consequences.[10] As the Amarillo Court of Appeals has stated: ". . . we are prohibited from plucking words from the statute and reading them in a vacuum. Rather, authority obligates us to read and interpret the statute as a whole."[11] The original decertification petition in this case was submitted pursuant to Texas Water Code § 13.254(a-5).[12] As the PUC staff pointed-out in its Statement of Position, consistent with the standard set-forth in *Texas General Land Office v. Crystal Clear Water Supply Corp.*,[13] the only property that should be considered property for purposes of this proceeding is "property that a retail public utility has committed to providing service to the particular piece of decertified land."[14] In other words, the property for which compensation is available under this provision of the Water Code is property that would have served the decertificated area.

This approach is consistent with the testimony of Mr. Jones, who testified that Compensation to a utility turns on the existence of physical assets dedicated to serving the

---

[9] Texas Water Code § 13.254(g).
[10] *HC Beck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009); *Jones v. Fowler*, 969 S.W.2d 429, 432–33 (Tex. 1998); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 248–49 (Tex. 1991).
[11] *Tenorio v. State*, 299 S.W.3d 461, 463 (Tex. App.—Amarillo 2009, pet. denied); *see also Ramos v. State*, 264 S.W.3d 743, 750 (Tex. App.—Houston [1st Dist.] 2008), *aff'd*, 303 S.W.3d 302 (Tex. Crim. App. 2009).
[12] *See* Order, *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) (hereafter "Docket 45329 Final Order"); *see also* PUC Staff "Statement of Position" at note 1 (September 12, 2016) (hereafter "PUC Statement of Position").
[13] 449 S.W.3d 130, 140-141 (Tex. App.-Austin 2014, pet. denied).
[14] PUC Statement of Position at 2.

decertified area.[15] It is also consistent with testimony provided by Mr. Hornsby, who stated that he had "never seen a case in all [his] years of experience where lost economic opportunity was awarded for property that did not actually have existing facilities or an ongoing business on the property that was taken."[16]

In sum, property in this case means property that was or could have actually been used to provide service to the decertificated area.

Although there are disagreements about what constitutes property subject to compensation as a legal matter, the City believes that there were no issues of material fact in this proceeding. All sides agree that Aqua does not own any real property or personal property on the subject tract.[17] All sides agree that Aqua had no physical improvements on the property on the property, such as water and or sewer lines, other pipes or tanks, etc.[18] All sides agree that Aqua has been certificated to the 128-acre tract since approximately 2004. All sides agree that there has been no development on the 128 acres—either currently or during the approximate 12 years that Aqua has held the water and sewer CCNs.[19] All sides agree that the Texas Commission on Environmental Quality ("TCEQ"), or its predecessor agency, issued a wastewater discharge permit, Permit No. WQ0014234001, to Aqua.[20] All sides agree that a wastewater treatment plant and any attendant structures have not been constructed.[21] All sides agree that although there was a letter of intent with the previous owners of the 128-acre tract to receive service from Aqua, actual water and/or sewer service was not received on that tract.[22]

---

[15] CEL100, 16:9-12.
[16] CEL103, 8:5-7.
[17] CEL100, 9:5-9.
[18] CEL100, 6:1-13.
[19] *Id.*
[20] TR. 123:7-15.
[21] CEL100, 6:1-13; Docket 45329 Final Order at Finding of Fact 28.
[22] Docket 45329 Final Order at Finding of Fact 31.

All sides agree that the current landowner did not request service from Aqua.[23] All sides agree that Aqua serves a residential subdivision located approximately 1.5 miles from the 128-acre tract called the Willow Wood Addition Meadow Vista with retail water service but not with sewer service.[24]

Of significance, all three appraisals[25] agree that Aqua has no debt allocable to the subject tract;[26] that Aqua has no service facilities in the subject tract;[27] that Aqua has no existing customers in the subject tract[28]; that Aqua has no contractual obligations allocable to the subject tract;[29] that there is no demonstrated impairment of Aqua's service to other customers or increase of cost to other customers of Aqua as a result of the decertification.[30]

Because there are no material facts in dispute, the issues to be decided are questions of law. As discussed below, legal principles dictate that there is no property for which compensation is available.

B. What Any Party Has Alleged to be Property in this Proceeding?

The following identifies the City's understanding of the positions taken by the three parties regarding any assertions of property:

---

[23] Docket 45329 Final Order at Findings of Fact 24 and 32.
[24] CEL 100, 13:2-5.
[25] Aqua and the City each provided an appraisal (AT-1 and CEL102, respectively). Pursuant to Texas Water Code § 13.254(g-1), the PUC appointed Bret W. Fenner, P.E., as a third appraiser to make a "determination of . . . compensation."
[26] CEL102-004; AT-3 at Aqua 000616; AT-1 at Aqua 000005.
[27] CEL102-005; AT-3 at Aqua 000616; AT-1 at Aqua 000005.
[28] CEL102-006; AT-3 at Aqua 000617; AT-1 at Aqua 000006. It should be noted that in Mr. Korman's testimony, he testified that, in his opinion, the developer is a customer of Aqua. Tr. 157:4-22. Such testimony is clearly incorrect and at odds with the definition of customer in PUC rules. 16 TAC §24.3(23) defines "customer" as a "person, firm...provided with services by any retail public utility". The PUC found in Docket No. 45329 that there is no service to the subject tract. In fact, Mr. Korman himself admitted that the developer was not receiving any services. Tr. 157:4-22. As such, the developer cannot be a customer of Aqua.
[29] CEL102-006; AT-3 at Aqua 000617; AT-1 at Aqua 000006.
[30] CEL102-006; AT-3 at Aqua 000617; AT-1 at Aqua 000006.

1. **Expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question**

   Aqua: TPDES Permit WQ0014234001 and "project" monies expended such as water source negotiations are "property" pursuant to Texas Water Code § 13.254(g).[31]

   The City: A wastewater permit (and therefore TPDES Permit WQ0014234001) is **not** "property" pursuant to Texas Water Code § 13.254(g).[32]

   PUC Staff: TPDES Permit WQ0014234001 is "property" pursuant to Texas Water Code § 13.254(g).[33]

2. **Necessary and reasonable legal expenses and professional fees**

   Aqua: Legal expenses and professional fees is "property" pursuant to Texas Water Code § 13.254(g).[34]

   The City: Legal expenses and professional fees is **not** "property" pursuant to Texas Water Code § 13.254(g).[35]

   PUC Staff: In Statement of Position, filed on September 12, 2016, PUC Staff opined that legal expenses and professional fees are not property but should be considered as a factor in valuing property.[36]

3. **Lost Economic Opportunity**

   Aqua: Lost Economic Opportunity is "property" pursuant to Texas Water Code § 13.254(g).[37]

---

[31] AT-C, 11:8-18.
[32] CEL100, 9:26 to 10:19, and 17:5-7.
[33] PUC Statement of Position at 5.
[34] AT-C, 11:2-5.
[35] CEL100, 19:5-6.
[36] PUC Statement of Position at 5-6.

The City: Lost Economic Opportunity is **not** "property" pursuant to Texas Water Code § 13.254(g).[38]

PUC Staff: Lost Economic Opportunity is **not** "property" pursuant to Texas Water Code § 13.254(g).[39]

C. Arguments as to Whether Alleged Property, is in fact, Property

1. Expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question

TWC §26.029(c) holds that "a permit does not become a vested right in a permittee." Also, as previously mentioned, 16 TAC §§24.113(a) and 24.116 prohibit a CCN from being considered property. This language is clear that a mere permit and/or a CCN are not property. This creates a conundrum. Appraisers in this, and other dockets, have generally included compensation to a decertificated utility that has a wastewater permit based on Factor 3 of TWC §13.254(g). This was done without any determination whether any planning or design expenditures (Factor 3) were, in fact, property. In this matter, the PUC specifically required the ALJs to determine what property, if any, was rendered useless or valueless by the decertification.[40] This comports with TWC §13.254(d) & (g), which seem to predicate compensation on *property* (emphasis added) being rendered useless and valueless.

Aqua may have expended funds on design and planning to obtain and maintain Permit No. WQ0014234001, but they cannot be compensated since wastewater permits, by themselves, do not become property of the permittee.[41] Instead, a wastewater permit authorizes a utility to construct facilities, such as a treatment plant, force mains, etc. (*See,* TWC §26.027(c),

---

[37] AT-C, 11:5.
[38] CEL100, 9:18-25, 13:11 to 17:9.
[39] PUC Statement of Position at 6-8.
[40] PUC Preliminary Order at 3.
[41] Texas Water Code §26.029(c) ("a permit does not become a vested right in a permittee").

prohibiting construction of wastewater facilities until the TCEQ issues a permit). Likewise, a CCN does not create property rights for the holder.[42] Like a wastewater permit, a CCN allows a utility to construct improvements. These improvements are property and Factor No. 3 allows the PUC to include expenditures for the design and planning of such improvement, if any, as part of compensation to the decertificated utility. However, expending monies in planning efforts, without any actual construction or assets, does not create property.

To allow Aqua to be compensated for expenditures on planning and design, the ALJs and the PUC would have to ignore TWC §26.029(c) and 16 TAC §§24.113(a) and 24.116 or somehow distinguish the fact that the State of Texas prohibits a wastewater permit from being property or a property right. The PUC staff provided one possible distinction in their "Statement of Position" filed on September 12, 2016. The Staff seemed to term the permit and its attendant expenditures Stranded Costs and argued that Permit No. WQ0014234001 was rendered valueless and useless due to the decertification.[43]

However, the Staff did not discuss TWC §26.029(c) or whether wastewater permit is property. In testifying for the City, Mr. Jones asserted that before Stranded Costs can be compensated, those costs must be property or related to property.[44] Again, Permit No. WQ0014234001, by itself without any plants, lines or other wastewater related improvements, is, by law, not property.

2. Necessary and reasonable legal expenses and professional fees

In his pre-filed direct testimony, Mr. Jones opined that Aqua had no property that has been rendered valueless or useless as a result of the decertification in Docket No. 45329.[45] He

[42] 16 TAC §24.113(a) and 16 TAC §24.116.
[43] PUC Statement of Position at 3-5.
[44] CEL100, 12:19-28.
[45] CEL100, 8:1-3.

explained that legal fees are clearly costs, but they could not be said to be property belonging to the utility that is rendered useless or valueless.[46]

Even Mr. Korman would not directly say that legal fees are actually a property interest.[47] When asked whether the City obtained a property interest in the proceeding by paying lawyers to attend the hearing, he asserted that the property interest obtained was not the legal fees themselves, but the property that the legal fees paid for to obtain (the decertified property).[48]

Because there is no property involved, Aqua cannot be compensated for Necessary and Reasonable Legal Expenses and Professional Fees (Factor 7, TWC §13.254(g)).

3. Lost Economic Opportunity

Aqua has the burden of showing that "lost economic opportunity" is property and then that the Texas Water Code authorizes compensation for that property. Aqua fails in both respects to show any precedent or support for its position. Furthermore, to accept Aqua's position would be to ignore basic principles of statutory construction.

(i) Aqua's Position is Without Precedent and Contrary to Established Legal Principles.

Aqua does not provide the ALJs with any legal precedents defining "lost economic opportunity" as property. Instead, their witnesses, primarily Mr. Korman, simply opined that "lost economic opportunity" is property and that Factor No. 8, "other relevant factors" authorizes the PUC to put a value on lost economic opportunity.[49] The closest any Aqua witness came to providing the ALJ with any authority was a footnote reference on Page 7 of its appraisal. There, Mr. Korman tried to tie the term "intangible property rights" to the definition of "facilities" found in TWC §13.002(9). This is an improper and incorrect reading of that definition. Mr.

[46] CEL100, 19:1-6.
[47] He asserted that legal and professional fees were "soft costs" used to defend property. TR. 104:3-8.
[48] TR. 102:19 to 104:21.
[49] AT-C, 11:5; AT-D, 1:10-14.

Jones, on behalf of the City, provided a more reasonable and accurate reading of that provision when he testified, "Aqua's reliance on "intangible property rights" in the definition of "facilities" is misplaced. The phrasing in the definition of facilities "...including all tangible and intangible real and personal property without limitation..." refers to plant and equipment of a retail public utility. Here, Aqua has no plant or equipment either within nor dedicated to serve the 128-acre tract. To have future customers, there would first have to be plant and equipment constructed to serve those customers. It is that property, i.e., the plant and equipment, that is rendered useless or valueless—not an expectation that there might someday be customers that would generate revenue." In other words, the term "intangible personal property" in TWC §13.254.002(9) must be tied to the actual asset that is in the ground.[50]

In addition, Mr. Hornsby, an experienced appraiser, testified as follows:

> "While I am aware that this is not an eminent domain case, lost economic opportunity is not recoverable under traditional notions of eminent domain. In Texas, profitability can be considered in the market value of property taken under eminent domain, but I have never seen a case in all my years of experience where lost economic opportunity was awarded for property that did not actually have existing facilities or an ongoing business on that property that was taken."

At the hearing on the merits, Aqua attempted to compare the right to provide utility service to a certificated service area to money and to investments.[51] The various matters are not related. First, "money" and "investments" are broad concepts and can take a myriad of forms. However, each is regulated by various governmental regulations. For example, if money were meant to be United States currency, that is legal tender and held by the bearer, yet governed by the federal government. Similarly, the term investments is an exceptionally broad category, but, for sake of convenience, we will narrow to stocks, then these stock investments are governed by still yet a

[50] *See* Statement of Position at 6-8; CEL100, 15:22 to 16:15; CEL103, 8:1-7.
[51] TR. 131:2-19.

separate form of regulation. These regulatory programs provide that United States currency and publically traded stocks are property but that classification is dependent on the regulatory program. This regulatory program has created a market that, simplistically speaking, creates the value in the stock. Interestingly, while both United States currency and publically traded stocks are property, there is no concomitant property right of lost economic opportunity merely by holding or possessing those matters. Currency can be lost; stocks can go down or the company that issued the stock can go out of business or be shut down by a governmental entity.

On the other hand, utility service in Texas and the attendant service area are both regulated by the Texas Water Code the Rules of the PUC. A CCN both grants permission and instills an obligation to provide retail public utility service. Holding a CCN does not create a property interest in revenues that may come in the future. Nothing in the TWC suggests such a thing. Moreover, as Mr. Hornsby testified, absent and actual facilities on the ground, lost profits are not considered in eminent domain cases.[52] Mr. Korman, in describing a concept of the entrepreneurial profit, was clear that the profit was based on money invested and value added.[53] In the question and answer with Mr. Tuckfield, Mr. Korman described the scenario where a landowner entitled property, planned to build a store but was frustrated by a governmental taking. In that scenario, Mr. Korman testified that the valuation could include something called entrepreneurial profit but that this concept did not include planned/desired future revenues from future customers.[54]

(ii) A CCN is not a Vested Property Right.

16 TAC §§24.113(a) and 24.116 provide that a CCN is not a vested interest nor does it create a property interest. A CCN holder has no right to, reasonable expectation of or guarantee

[52] CEL103, 8:1-7.
[53] TR. 119:5 to 122:2.
[54] TR. 121:23 to 122:2.

of profit or future revenue from that CCN. Since the CCN itself is not property, then Aqua, or any other decertificated utility, should not be compensated for lost economic opportunity. The utility was never assured of that opportunity and has no legal to claim such a right. The TWC allows a retail public utility to receive a rate of return on invested capital but to receive that rate of return, the retail public utility must have invested the capital in the system. Thus, the value is in the investment, not the certificate of convenience and necessity.[55]

(iii) Statutory Construction/Legislative Intent

In addition to the arguments presented above related to lost economic opportunity, rules of statutory construction dictate that Texas Water Code §13.254(g) prevents the recovery of lost future revenue from customers that do not exist in an area decertificated from a retail public utility. Because statutory construction "involves a question of law, not a question of fact",[56] this question can be addressed regardless of the specific facts at issue. As a matter of law, future revenue from future customers is simply not available.

Aqua's argument for allowing "lost economic opportunity", which is simply future revenues from customers that do not exist at the time of decertification depends on a very broad interpretation of the words "other relevant factors".[57] Aqua attempts to buttress this argument by claiming that "lost economic opportunity" is a property right. Such an interpretation would require the ALJ, and then the PUC, to ignore the plain language of the Texas Water Code and would violate several principles of statutory construction.

---

[55] TWC §13.183(a)(1)

[56] *In re Heavy Equip. Appraisal Litig.*, No. 12-0185, 2013 Tex. LEXIS 1079, at *5 (Feb. 14, 2013) (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (noting statutory construction is question of law); *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 254-55 (Tex. App.—Austin 2011, pet. denied) (holding application of statutory definition of "project" was question of statutory construction).

[57] Whether the notion is termed as being compensated for "lost economic opportunity" or being compensated for future revenues lost from the decertification, the argument is the same—the decertificated utility argues that it should be compensated for revenue generated by customers who were not served by the decertificated utility.

Applying principles of statutory construction to TWC §13.254(g) can only result in the determination that there is no compensation available to a decertified utility for future revenues from customers who are not receiving service at the time of decertification.

The Texas Water Code §13.254(g) provides that the value of personal property shall be determined according to specified factors. The statute provides:

> The factors ensuring that the compensation to a retail public utility is just and adequate shall include: the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; ***the impact on future revenues lost from existing customers***; necessary and reasonable legal expenses and professional fees; and other relevant factors.

Texas Water Code §13.254(g) (emphasis added). Clearly, the Texas Legislature dealt with the issue of future revenues, or "lost economic opportunity" and limited compensation based on future revenues to revenue generated by those customers that existed at the time of the decertification.

In construing statutes, the goal is to give effect to the drafter's intent. *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). This determination begins with the wording of the statutes or regulations involved. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998). In construing a statute, courts presume that the Legislature intended the entire statute to be effective. *See* Tex. Gov't Code Ann § 311.021(2) (West 1993). Accordingly, a court must interpret the statute as written. *See In re Doe*, 19 S.W.3d 346, 351 (Tex. 2000).

Every word in a statute is presumed to have been used for a purpose and every word excluded is presumed to have been excluded for a purpose. *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995). Thus, "a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible." *Texas Workers' Compensation Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (citing Perkins v. State, 367 S.W.2d 140, 146 (Tex. 1963).

In other words, when construing a statute the entire statute is presumed to be effective and the court should not read a portion of the statute to be useless or a nullity.[58] A court must give effect to all words of a statute and not treat any language as surplusage.[59] The Texas Supreme Court has held, "It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose."[60]

Aqua's attempt to recoup for "lost economic opportunity" is merely an attempt to recoup for future revenues lost from future customers. Specifically Mr. Korman asserts in his appraisal that "Aqua Texas lost the economic opportunity of the reasonably probable 575 connections for

---

[58] *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); *see also* Tex. Gov't Code Ann. § 311.021(2); *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 (Tex. 2010); *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010); *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *Phillips v. Bramlett*, 288 S.W.3d 876, 880–81 (Tex. 2009); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006); *Cities of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442–43 (Tex. 2002).

[59] *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89–90 (Tex. 2001); *Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); *Abrams v. Jones*, 35 S.W.3d 620, 625 (Tex. 2000); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000); *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

[60] *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002); *see also Kappus v. Kappus*, 284 S.W.3d 831, 835 (Tex. 2009); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008); *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006); *Old Am. Cnty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

both water and waste water."[61] In other words, Aqua asserts that it should be compensated for the loss of 575 possible *future* customers.

Aqua's reading of the Water Code renders the following words "from existing customers," found at Texas Water Code §13.254(g) a nullity and, therefore, violates basic principles of statutory construction.

A simple review of the history of TWC §13.254 is helpful. In the Omnibus water bill in the 75th Legislative Session, commonly called "SB 1", the legislature amended TWC §13.254 to add subsection (g) that included factors to consider in determining the monetary amount, if any, for a retail public utility that had part or all of its CCN decertificated. In SB 1, the goal of the compensation factors was as follows: "The factors ensuring that the compensation to a retail public utility for the *taking, damaging, or loss of personal property, including the retail public utility's business,* is just and adequate *shall at a minimum include....*"[62] The most relevant of the factors that SB 1 included in §13.254(g) was "the impact on future revenues and expenses of the retail public utility".[63] Equally important is the language that SB 1 included in new subsection (h).[64] New §13.254(h), added by SB 1, read as follows:

> (h) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time. If there were no current customers in the area decertified and no immediate loss of revenues or if there are other valid reasons determined by the commission, installment payments as new customers are added in the decertified area may be an acceptable method of payment.[65]

Reading TWC §13.254(g) and (h), as they were passed in 1997 pursuant to SB 1, it is clear that the Legislature contemplated a retail public utility that had its CCN, either totally or partially,

---

[61] AT-1 at Aqua 000007.
[62] CEL110-002 (emphasis added).
[63] *Id.*
[64] CEL110-003.
[65] *Id.*

decertificated, would be compensated, at least at some level, for lost revenues from customers that did not exist at the time of the decertification.

It is just as clear that in 2005, the 79th Legislature changed its mind and specifically did not intend for a retail public utility, when an area was decertificated, to be compensated for lost revenue for customers not in existence at the time of the decertification. The legislative vehicle for this was HB 2876.[66] First, the Legislature amended the goal of the compensation by removing any reference to compensating for the loss of a retail public utility's business, which is exactly what Aqua is claiming.[67] HB 2876 also removed from the compensation factors the term "at a minimum".[68] So, after HB 2876, only the eight factors that are listed were to be considered in determining adequate compensation. Second, the Legislature amended the relevant language of TWC §13.254(g) relating to compensation factors as follows: "the impact on future revenues lost from existing customers." Equally important, HB 2876 fully repealed TWC §13.254(h), which, prior to 2005 provided for payments for future customers.[69]

If the legislature had intended that lost economic opportunity, or future revenues from future customers, be compensable to the decertificated utility, it would not have amended TWC §13.254(g) and/or repealed TWC §13.254(h). Instead, the legislature specifically limited the impact on "future revenues lost" to those lost "from existing customers." Aqua would have the ALJ render "from existing customers" a nullity and would have the ALJ nullify the legislature's specific action.

---

[66] CEL111.
[67] CEL111-015 to 016.
[68] CEL111-015.
[69] CEL111-022:9.

By limiting future revenue only to that revenue that existing customers generate, the Legislature focused compensation largely to be limited to actual stranded assets that have been built in the area and are to serve the area.[70]

If every word of a statute must be presumed to have been used for a purpose, then there must be a reason the legislature included "from existing customers." Likewise, if every word excluded from a statute must also be presumed to have been excluded for a purpose, there must be a reason why the legislature did not include "from future customers." Aqua's own witness, Mr. Blackhurst, who testified that in 2005 the legislature changed "the impact on future revenues and expenses of the retail public utility" with "the impact on future revenues lost from existing customers" adds support to the City's argument.[71]

In enacting an amendment to an existing statute, the legislature is presumed to have changed the law and a construction should be adopted that gives effect to the intended change rather than one that renders the amendment useless.[72] The general presumption is very persuasive, and a court should be particularly unwilling to revisit language that the legislature has elected to delete.[73] In 2005, the legislature elected to limit "future revenues."[74] This limitation was to the impact the decertification would have on "future revenues lost from existing customers".[75] The ALJ should not allow Aqua to revisit the Legislature's language and intent through a contorted reading of the statute and regulations.

---

[70] *See* CEL112-007.
[71] AT-B, 14:15-17.
[72] *Ex parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979) (en banc); *Pub. Util. Comm'n v. City of Harlingen*, 311 S.W.3d 610, 620 n.7 (Tex. App.—Austin 2010, no pet.); *Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 473–74 (Tex. App.—Fort Worth 2007, no pet.); *Walker v. City of Georgetown*, 86 S.W.3d 249, 259 (Tex. App.—Austin 2002, pet. denied); *Am. Honda Motor Co. v. Tex. Dep't of Transp.—Motor Vehicle Div.*, 47 S.W.3d 614, 621 (Tex. App.—Austin 2001, pet. denied); *see also Jones v. Fowler*, 969 S.W.2d 429, 431–33 (Tex. 1998) (per curiam).
[73] *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009).
[74] CEL111.
[75] CEL111-016 at lines 7-8.

As previously mentioned, Aqua offered no precedent or legal authority to support its claim. Instead, Aqua's justification for ignoring these principles of statutory construction is that its witness "determined this intangible property interest was compensable under the 'other relevant factors' category set forth in Texas Water Code §13.254(g) and P.U.C SUBST. R. 24.113(k)."[76] This position, however, ignores another basic canon of statutory construction – that the express mention or enumeration of one person, thing, consequence, or class is the equivalent to an express exclusion of all others.[77] The legislature identified a factor – "future revenues." It expressly included "future revenues lost from existing customers." Therefore, it expressly excluded other types of "future revenues" – including future revenues from future customers. "Other relevant factors" are other factors – not other "future revenues." The legislature's amendment makes it clear that the "future revenues" factor is limited. The fact that in the same bill the legislature fully repealed TWC §13.254(h), which specifically included timing of payments when new customers are added, makes it abundantly clear that the legislature abandoned the notion of compensation for future customers.

This prohibition on compensation for future customers holds regardless of whether "lost economic opportunity" is a property right. The City disputes Aqua's argument that lost economic opportunity is property but, even if it is, TWC §13.254(g) does not provide for any compensation for lost economic opportunity in a matter involving water/sewer decertification compensation.

D. Definition of "Useless or "Valueless"

Because the Texas Water Code and Commission rules do not include an express definition of "useless or valueless," it is appropriate to look to the ordinary or plain meaning of

[76] AT-C 12:19-21.
[77] *Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108–09 (Tex. 1985).

the terms.[78] "Useless" ordinarily means "having or being of no use"[79] and valueless means "having no usefulness."[80] 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.

E. Whether any of the Identified Property has been Rendered "Useless" or "Valueless"

The City, as expressed in Mr. Jason Jones' testimony, asserts that Aqua has no property that was rendered valueless or useless as a result of the decertification.[81] However, Aqua asserts its impacted property includes Permit No. WQ0014234001, including the planning and design necessary for the permit and for potential water service, necessary and reasonable legal costs and professional fees. Finally, the big ticket under "other relevant factors", is Aqua's claim that "lost economic opportunity" is property and has been rendered valueless and useless.

1. Expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question

As discussed above, it is the City's position that TPDES Permit WQ0014234001 is not property.[82] Therefore, there is no need to undertake an analysis as to whether it was rendered useless or valueless as a result of the decertification.

To the extent that TPDES Permit WQ0014234001 is determined to be property subject to compensation, then the City is in agreement that the property was, in fact, rendered useless and valueless.[83]

---

[78] 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").
[79] Merriam Webster.com Dictionary (accessed by PUC Staff Aug. 24, 2016). *See* PUC Statement of Position.
[80] Merriam Webster.com Thesaurus (accessed by PUC Staff Aug. 24, 2016). *See* PUC Statement of Position.
[81] CEL100.
[82] *See* Section III.C.1 of this Closing Argument.

2. Necessary and reasonable legal expenses and professional fees

As discussed above, it is the City's position that legal expenses and professional fees in and of itself is not property.[84] Therefore, there is no need to undertake an analysis as to whether legal expenses and professional fees were rendered useless or valueless as a result of the decertification.

3. Lost Economic Opportunity

Aqua has not proven that "lost economic opportunity" is property. Therefore, there is no need to undertake an analysis as to whether they were rendered useless or valueless as a result of the decertification.

To the extent that "lost economic opportunity" is shown to be a compensable property interest, it has not been rendered useless and valueless because Aqua only a portion of the economic opportunity has been removed.[85] Therefore, some value remains and it is not, therefore, rendered useless or valueless.

IV. ARE THE EXISTING APPRAISALS LIMITED TO PROPERTY THAT HAS BEEN DETERMINED TO HAVE BEEN RENDERED USELESS OR VALUELESS BY DECERTIFICATION?

The answer to this question is completely dependent upon the answer to the question of what constitutes property. Once property is defined, it is an easy matter to determine whether the existing appraisals are limited to property that has been rendered useless or valueless.

The City notes that no party spent much time on this issue during the live testimony portion of the hearing.

---

[83] *See* CEL100, 61:4-9.
[84] *See* Section III.C.2 of this Closing Argument.
[85] See PUC Statement of Position at 8.

The City asserts that Mr. Jones was correct when he testified that, in his expert opinion, the three appraisals were not limited to property that has been determined to have been rendered useless or valueless by the decertification.[86]

As previously discussed, the City's appraisal contained compensation for Aqua's planning, design and permitting costs for Permit No. WQ0014234001, as did Aqua and the Independent Appraiser. However, none of those three appraisals had a discussion on whether these costs were based on property being rendered valueless or useless. The City believes that Aqua's permit is not a property right and, therefore, any planning and design costs are not compensable.

Aqua also claimed a property right in lost economic opportunity. The City and the Independent Appraiser did not include lost economic opportunity as property. Each of the appraisals contained compensation for legal and professional fees. As a result, the appraisals were not limited to property that has been rendered valueless or useless as a result of the decertification.

[86] CEL100, 18:23-28.

Respectfully submitted,

ANDY BARRETT & ASSOCIATES, PLLC
ANDREW N. BARRETT
State Bar Number: 01808900
3300 Bee Cave Road
Suite 650 # 189
Austin, Texas 78746
Telephone: 512-600-3800
Facsimile: 512-330-0499

THE AL LAW GROUP, PLLC
David Tuckfield
State Bar Number: 00795996
12400 West Hwy 71
Suite 350-150
Austin, TX 78738
Telephone: (512) 576-2481
Facsimile: (512) 366-9949

ATTORNEYS FOR THE CITY OF CELINA

CERTIFICATE OF SERVCE

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 October 28, 2016 in the following manner:

Erika Garcia
Public Utility Commission of Texas
1701 N Congress
PO Box 13326
Austin, Texas 78711-3326
(512) 936-7268 (fax)
ATTORNEY FOR COMMISSION STAFF

Fax: (512) 936-7268

Paul Terrill
Geoffrey P. Kirshbaum
Scott R. Shoemaker
TERRILL & WALDROP
810 W. 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
ATTORNEYS FOR AQUA TEXAS, INC. D/B/A AQUA TEXAS

Fax: (512) 474-9888

David Tuckfield