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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 OFFICES

OF

PUBLIC UTILITY COMMISSION  
FILING CLERK

ADMINISTRATIVE HEARINGS

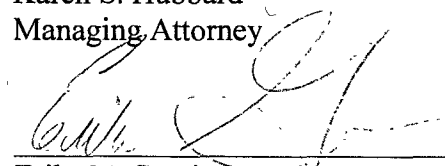
COMMISSION STAFF'S INITIAL BRIEF

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Dated: October 28, 2016

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

<b>CITY OF CELINA'S NOTICE OF INTENT TO PROVIDE WATER AND SEWER SERVICE TO AREA DECERTIFIED FROM AQUA TEXAS, INC. IN DENTON COUNTY</b>	<b>§ § § § §</b>	<b>BEFORE THE STATE OFFICES  OF  ADMINISTRATIVE HEARINGS</b>
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**COMMISSION STAFF'S INITIAL BRIEF**

**COMES NOW** the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Initial Brief. The deadline for initial briefs is October 28, 2016. Therefore, Staff's Initial Brief is timely filed. In support of its Initial Brief, Staff states the following:

**I. INTRODUCTION**

This case involves the compensation phase of a decertification under Texas Water Code § 13.254 (TWC) granted by the Commission in Docket No. 45329. Because the decertified utility, Aqua Texas, Inc. (Aqua), and the utility seeking to provide service, the City of Celina (Celina) could not agree on an appraiser, they each retained their own appraisers, and the Commission selected an independent third appraiser. However, after the appraisals were filed, the Commission determined that it had not yet identified what property, if any, was rendered useless or valueless as a result of the previous decertification.<sup>1</sup> This matter was referred to the State Office of Administrative Hearings (SOAH) on July 7, 2016. In its Preliminary Order, the Commission identified two issues to be addressed in this case: 1) What property, if any, has been rendered useless or valueless to Aqua as a result of the decertification granted in Docket 45329; and 2) Are the existing appraisals limited to property that has been rendered useless or valueless.<sup>2</sup> It is Staff's position that the only property that has been rendered useless or valueless to Aqua as a result of the decertification is TPDES Permit No. WQ0014234001 (Prosper Point wastewater permit), and that Celina and the independent third appraisal are limited to property rendered useless or valueless.

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<sup>1</sup> See Preliminary Order at 2 (July 20, 2016).

<sup>2</sup> *Id.* at 3.

## II. PROCEDURAL BACKGROUND

On March 22, 2016, the Commission issued an order approving the petition of CADG Sutton Fields II, LLC for expedited release of approximately 128 acres from Aqua's water certificate of convenience and necessity (CCN) No. 13201 and sewer CCN No. 21059, in Denton County, Texas.<sup>3</sup>

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 SOAH. On July 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.

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<sup>3</sup> *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).

**III. WHAT PROPERTY, IF ANY, HAS BEEN RENDERED USELESS OR  
VALUELESS TO AQUA BY THE DECERTIFICATION GRANTED IN DOCKET  
NO. 45329? TWC § 13.254(D); 16 TAC § 24.113(H)<sup>4</sup>**

**A. Definition of Property**

The Texas Water Code and the Commission's substantive rules do not provide a definition for property generally or for any specific types of property interests. Similarly, the Texas Property Code does not define property, although it references types of property interests. Within the Texas Tax Code, property is defined as "any matter or thing capable of private ownership."<sup>5</sup> Black's Law Dictionary defines property as:

1. Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a "bundle of rights." These rights include the right to possess and use, the right to exclude, and the right to transfer . . .
2. Any external thing over which the rights of possession, use, and enjoyment are exercised.<sup>6</sup>

Under these general definitions of property, there are many specific types of property, the following of which are most applicable to this proceeding. Real property is "land, an improvement, a mine or quarry, a mineral in place, standing timber, or an estate or interest other than a mortgage or deed of trust creating a lien on property or an interest securing payment or performance of an obligation: . . ."<sup>7</sup>

Personal property is any property that is not real property.<sup>8</sup> The Texas Property Code identifies a few examples of personal property as home furnishings, vehicles, tools, equipment, books, jewelry, and apparel.<sup>9</sup> Furthermore, personal property can either be tangible or intangible. Tangible personal property is defined by the Texas Tax Code as "personal property that can be

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<sup>4</sup> Preliminary Order at 3.

<sup>5</sup> Tex. Tax. Code Ann. § 1.04(1) (West) (TTC).

<sup>6</sup> PROPERTY, Black's Law Dictionary (10<sup>th</sup> ed. 2014).

<sup>7</sup> TTC § 1.04(2); *see also id.* (Real Property- land or anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land).

<sup>8</sup> TTC § 1.04(4); *see also* PROPERTY, Black's Law Dictionary (Personal Property- any movable or intangible thing that is subject to ownership and not classified as real property).

<sup>9</sup> Tex. Prop. Code Ann. § 42.002 (West) (TPC).

seen, weighed, measured, felt, or otherwise perceived by the senses,”<sup>10</sup> excluding perceptible objects such as documents that “constitute evidence of a valuable interest, claim, or right and has negligible or no intrinsic value.”<sup>11</sup> Intangible personal property is:

A claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document. It includes a stock, bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate of deposit, share account, share certificate account, share deposit account, insurance policy, annuity, pension, cause of action, contract, and goodwill.”<sup>12</sup>

During the hearing on the merits, witnesses for Celina and Aqua provided examples for some of the above listed categories. Money and investments were agreed to be property,<sup>13</sup> and water rights were agreed to be intangible property.<sup>14</sup> The classifications of other items as property, such as permits, intangible facilities, lost economic opportunity, and various fees are disputed and are further discussed below:

## **B. What Any Party Has Alleged To Be Property in this Proceeding**

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

Aqua asserts that it has an intangible property interest in the expenditures for planning and design activities allocable to the subject property, specifically the expense of obtaining, transferring, maintaining, and renewing the Prosper Point wastewater permit.<sup>15</sup>

Exhibit CEL-102, the appraisal prepared by Celina witness Jason Jones, addresses the Prosper Point wastewater permit, and awarded a compensation amount for estimated engineering and legal fees associated with obtaining and maintaining that permit.<sup>16</sup> At the hearing on the merits, Mr. Jones testified that in his opinion, the planning and design expenditures for the

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<sup>10</sup> TTC § 1.04(5); PROPERTY, Black’s Law Dictionary.

<sup>11</sup> TTC §1.04(5).

<sup>12</sup> *Id.* at § 1.04(6).

<sup>13</sup> Tr. at 23-24 (Jones); Tr. at 68 (Waldock); Tr. at 131 (Korman).

<sup>14</sup> Tr. at 43 (Jones); Tr. at 75 (Blackhurst).

<sup>15</sup> Direct Testimony of Darryl Waldock, Aqua Ex. AT-A at 8-9; Direct Testimony of Joshua Korman, Aqua Ex. AT-C at 10-11.

<sup>16</sup> Appraisal Prepared by Jones-Heroy & Associates, Inc., Celina Ex. CEL-102 at 4.

Prosper Point wastewater permit were not property,<sup>17</sup> but were properly considered as professional fees.<sup>18</sup>

Staff believes that Aqua's Prosper Point wastewater permit is intangible personal property, but "expenditures for planning, design, or construction of service facilities that are allocable to the service area in question" are a compensation factor under TWC § 13.254(g), as further discussed below in section III(C)(1) and are not property.

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

Each of Aqua's witnesses asserted that necessary and reasonable legal expenses and professional fees could be considered property, but differed in opinion on the situations in which such a classification was appropriate. Darryl Waldock testified that necessary and reasonable legal expenses and professional fees are "cash property," and that Aqua has a property interest in all the money it spends in the course of its business.<sup>19</sup> Stephen Blackhurst testified that legal expenses could be considered property, if the expenses were capitalized into a project.<sup>20</sup> Joshua Korman testified that legal expenses and professional fees could be a property interest, and "in a roundabout way it is an intangible property interest to defend your property" when those expenses and fees are incurred in an action such as this.<sup>21</sup>

Celina witness Mr. Jones testified that he does not believe that necessary and reasonable legal expenses and professional fees are property.<sup>22</sup>

Staff asserts that legal expenses and professional fees are a compensation factor, as further discussed below in section III(C)(2), and are not property.

## **3. Lost economic opportunity**

Aqua asserts that it has an intangible property interest in lost economic opportunity for revenues it projects that it would have received as a result of future development.<sup>23</sup> Mr. Korman testified that lost economic opportunity is net operating income or profits, and that in this

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<sup>17</sup> Tr. at 23.

<sup>18</sup> *Id.* at 29.

<sup>19</sup> *Id.* at 68.

<sup>20</sup> *Id.* at 82-83.

<sup>21</sup> *Id.* at 104.

<sup>22</sup> *Id.* at 31.

<sup>23</sup> See Aqua Ex. AT-C at 12-13; June 13, 2016 Aqua Texas, Inc. Appraisal Report, Aqua Ex. AT-1.



instance future profits are a property interest.<sup>24</sup> Exhibit 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 probable 575 connections for both water and waste water.”<sup>25</sup>

Both Staff and Celina assert that there is no recognizable property interest in lost future profits.<sup>26</sup>

### **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**

Aqua alleges that in addition to the Prosper Point wastewater permit qualifying as intangible property, Aqua’s Prosper Point *project investments* also qualify as intangible property.<sup>27</sup> As stated in above section III(A), the Texas Tax Code provides that “intangible personal property means a claim, interest, right, or other thing that has value but cannot be perceived by the senses, although its existence may be evidenced by a document.”<sup>28</sup> In its definition, the Tax Code explicitly lists “a permit” as an example of intangible property.<sup>29</sup> Celina witness Paul Hornsby, a State Certified General Real Estate Appraiser who has been practicing for over thirty years,<sup>30</sup> testified that the following factors are used by appraisers to identify intangible property: 1) it is legally identified and protected (like a trademark); 2) it is legally transferable, can be sold, and has tangible evidence of its existence; and 3) it has a date of creation, or “birthday.”<sup>31</sup> Therefore, Staff asserts that Aqua’s Prosper Point wastewater permit can be classified as intangible property, but Aqua’s Prosper Point project investments cannot. Instead, “expenditures for planning, design, or construction of service facilities that are allocable

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<sup>24</sup> Tr. at 113.

<sup>25</sup> Aqua Exhibit AT-1.

<sup>26</sup> See Direct Testimony of Jason Jones, Celina Ex. CEL-100 at 9-10; Tr. at 33.

<sup>27</sup> Aqua Ex. AT-C at 10-11.

<sup>28</sup> See TTC §1.04(6).

<sup>29</sup> *Id.*

<sup>30</sup> See Cross-Rebuttal Testimony of Paul Hornsby, Celina Ex. CEL-103; Resume of Paul Hornsby, Celina Ex. CEL-104.

<sup>31</sup> Tr. at 151-52.

to service to the area in question” is a compensation factor for which Aqua may recover compensation.

The Prosper Point wastewater permit is a right, legally identified by the applicable regulatory authority, and protected because the permit grants Aqua the sole right to treat and discharge wastes from the Prosper Point Wastewater Treatment Facility.<sup>32</sup> There is evidence of the permit’s existence, because there is a physical and tangible paper document.<sup>33</sup> The permit itself provides that it is legally transferable, as long as the transfer is processed according to the provisions of 30 TAC § 305.64 (relating to the Transfer of Permits).<sup>34</sup> While the Prosper Point wastewater permit was made non-transferable as a result of an agreement with the Upper Trinity Regional Water District (UTRWD), that restriction is contractual and does not go to the nature of the property.<sup>35</sup> And finally, Aqua’s Prosper Point wastewater permit has a distinct date of creation, or “birthday,” which is its January 9, 2003 issue date.<sup>36</sup>

Conversely, Aqua’s Prosper Point project investments, such as “facilities planning and design activities, water source contract negotiations, analysis of wastewater treatment options, analysis of water distribution, budgeting, and permitting and permit renewal activities”<sup>37</sup> do not meet the factors for intangible property. While activities such as water source contract negotiations and analysis of wastewater treatment options and water distribution may have tangible evidence of existence, such as contracts, plans, or permits, they are not legally identified and protected, not legally transferable, and do not always have a specific date of creation. While “expenditures for planning, design, or construction of service facilities that are allocable to the service area in question” do not meet the factor test for intangible property, those expenditures are a compensation factor under TWC § 13.254(g). For any tangible or intangible interest a decertified utility has in property that was planned, designed, or constructed to serve the decertified area, the related expenditures incurred by the decertified utility may be awarded by the appraiser pursuant to TWC § 13.254(g), which identifies the factors that an appraiser should

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<sup>32</sup> See Aqua Ex. AT-1 at Aqua 000308-000342.

<sup>33</sup> *Id.*

<sup>34</sup> See *id.* at Aqua 000318.

<sup>35</sup> See *id.* at Aqua 000336-342.

<sup>36</sup> See *id.* at Aqua 000308.

<sup>37</sup> Aqua Ex. AT-C at 11.

consider to ensure that the compensation is just and adequate. For example, while Aqua's Prosper Point wastewater permit alone is not compensable because it does not have a distinct value, Aqua can be compensated for the costs expended in obtaining and maintaining that permit.

In testimony that appears inconsistent with Mr. Hornsby's, Celina witness Mr. Jones asserted that Aqua did not have *any* real or personal (tangible or intangible) property connected to the subject 128 acre tract.<sup>38</sup> However, despite his assertion that it was not property, Mr. Jones did acknowledge in his testimony that "the closest potential asset is Aqua's wastewater permit, which, if a right, would be an intangible personal property right."<sup>39</sup> His conclusion regarding the Prosper Point project investments is parallel to Staff's, but he categorizes the expenditures as "professional fees," which are not property, but could be potentially recovered through that compensation factor. These expenditures are allowed, although Staff asserts they would fall under "expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question,"<sup>40</sup> rather than "reasonable and necessary legal expenses and professional fees."<sup>41</sup>

## **2. Necessary and reasonable 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. Necessary and reasonable legal expenses and professional fees are a part of compensation, but are not a property interest, and therefore should not be addressed in this proceeding.

All of Aqua's witnesses testified that necessary and reasonable legal expenses and professional fees could be considered property. Mr. Waldock made the broadest assertion, that Aqua has a property interest in all of the money it spends in the course of its business.<sup>42</sup> Mr. Waldock testified that the basis for his characterization of those expenses as "cash property" was

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<sup>38</sup> Celina Ex. CEL-100 at 9.

<sup>39</sup> *Id.* at 17.

<sup>40</sup> TWC § 13.254(g).

<sup>41</sup> *Id.*

<sup>42</sup> Tr. at 68.

that “all the cash that we’ve [Aqua] outlaid has no return at all.”<sup>43</sup> However, he conceded that he has no experience in identifying tangible or intangible property.<sup>44</sup> Mr. Waldock is partially correct in his assertion that Aqua’s money is its “cash property.” Aqua’s money, when it exists in Aqua’s possession, could be considered its tangible personal property, because it is a valued resource, it is physical, movable, and subject to Aqua’s ownership interest. Celina witness Mr. Jones also testified to the fact that “dollars in your bank account” are your property.<sup>45</sup> However, once Aqua spent its money in legal expenses and professional fees, Aqua relinquished its rights to that money. Aqua received professional and legal services in return for its payment, but did not retain an ownership interest in the money spent, and can no longer claim a property interest in it. Additionally, Aqua did not gain a property interest in its legal expenses and professional fees. As Mr. Jones testified, “legal fees are clearly costs, but they could not be said to be property belonging to the utility . . .”<sup>46</sup>

Aqua witness Mr. Blackhurst took a more limited approach, testifying that these expenses and fees could be a property interest, if they were expended for “hearings and things that go with getting permits and all” and those expenses were capitalized into the project.<sup>47</sup> Mr. Blackhurst’s qualification for when legal expenses and professional fees can be considered property essentially lumped them into the compensation factor of “expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question”, which as discussed above in section III(C)(1), is also a compensation factor and not a property interest.

Aqua witness Mr. Korman testified that Aqua’s legal expenses and professional fees are “additional Prosper Point project costs comprising Aqua’s intangible property interests.”<sup>48</sup> This assertion, like Mr. Blackhurst’s, would effectively characterize legal expenses and professional fees as “expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question,” which is a compensation factor and not a property interest. At the hearing on the merits, Mr. Korman testified that “in a roundabout way it is an intangible

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 22.

<sup>46</sup> Celina Ex. CEL-100 at 19.

<sup>47</sup> Tr. at 83.

<sup>48</sup> Aqua Ex. AT-C at 12.

property interest to defend your property” when those expenses and fees are incurred in an action such as this.<sup>49</sup> Again, expenses and fees incurred in litigating over property are costs; Aqua has no ownership interest or rights in the legal expenses and professional fees that it pays.

### **3. Lost economic opportunity**

Aqua’s asserted lost economic opportunity does not meet the definition of property, because Aqua does not have the right to possess and use future profits that might be realized from serving an undeveloped area within its CCN area, and it cannot transfer that right. Aqua witness Mr. Korman testified that a CCN is a property interest, and a right.<sup>50</sup> However, 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.<sup>51</sup> Aqua witness Mr. Blackhurst testified that the corresponding statute, TWC § 13.254, does not include the same language.<sup>52</sup> The purpose of the Texas Water Code 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.”<sup>53</sup> It grants the Commission the authority to make and enforce rules necessary to protect water services for customers consistent with the public interest.<sup>54</sup> Courts have held that “administrative rules have the same force as statutes and are generally construed in the same way.”<sup>55</sup> 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.”<sup>56</sup> A CCN provides its holder the

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<sup>49</sup> Tr. at 104.

<sup>50</sup> *Id.* at 100-01.

<sup>51</sup> 16 TAC § 24.113(a).

<sup>52</sup> See Aqua Ex. AT-B at 8.

<sup>53</sup> TWC § 13.001(c).

<sup>54</sup> TWC § 13.041(b).

<sup>55</sup> *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).

<sup>56</sup> 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).

exclusive right and responsibility to provide water or sewer service within defined geographic boundaries,<sup>57</sup> but it does not guarantee economic profits or provide a property interest in future profits or development.

Aqua witness Mr. Korman testified that lost economic opportunity is specifically intangible personal property.<sup>58</sup> However, he also testified that he could not answer whether lost economic opportunity enjoys a legal existence or protection.<sup>59</sup> In any case, lost economic opportunity as intangible property fails to meet the factors for identifying intangible property provided by Celina witness Mr. Hornsby at the hearing on the merits.<sup>60</sup> Future profits that may be realized from providing water and sewer service to an area are not legally identified and protected. Until they come into existence, they are speculative and not legally identified or protected, nor are they legally transferable. Mr. Korman's testimony supports this premise."<sup>61</sup> There is no evidence of the existence of future profits, as by their nature they do not yet have an existence. While Aqua asserts that its intangible property interest in lost economic opportunity is tied to its tangible property interest in "facilities,"<sup>62</sup> Aqua's expenditures are not evidence of specific future profits. And finally, though there was some discussion at the hearing on the merits regarding when Aqua may have acquired a lost economic opportunity interest,<sup>63</sup> future profits do not have a date of creation, because they are something that may or may not be created in the future.

Celina witness Mr. Jones testified that under the circumstances presented in this case, Aqua's lost economic opportunity is not a property interest.<sup>64</sup> He further testified that in other appraisals he has determined that where there was property constructed to serve the area, and a

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<sup>57</sup> See 16 TAC § 24.3(15).

<sup>58</sup> Aqua Ex. AT-C at 11; Aqua Ex. AT-1 at Aqua 000007.

<sup>59</sup> Tr. at 118.

<sup>60</sup> See Tr. at 151-152.

<sup>61</sup> *Id.*

<sup>62</sup> See Aqua Ex. AT-1 at Aqua 000006-7; Tr. at 107, 113.

<sup>63</sup> Tr. at 117-18 (Q (by Mr. Tuckfield): Okay, So I understand you don't know the exact date they acquired the CCN and the exact date they spent money on this or that, but at what moment in time did they acquire this lost economic opportunity? A (by Mr. Korman): I haven't looked at it in that way. All I've looked at it as is of the date of value. Q: Do you think there's a date that they acquired it? A: I'm not saying there isn't. I just haven't looked to see when value may have changed over time.)

<sup>64</sup> Tr. at 33.

historical accounting of growth in the utility, it was appropriate to consider lost economic opportunity as a compensable property interest.<sup>65</sup> However, without agreeing with Mr. Jones' position, even in cases where Mr. Jones believes his two factor test is met, the future profits a utility hopes to realize by serving an area would still fail to meet the definition of intangible property.

#### **D. Definition of “Useless” or “Valueless”**

Since the Texas Water Code and the Commission's substantive rules do not contain an express definition of “useless or valueless,” the terms should be given their ordinary or plain meaning.<sup>66</sup> “Useless” ordinarily means “having or being of no use”<sup>67</sup> and valueless means “having no usefulness.”<sup>68</sup> 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.

Celina's witness Mr. Jones testified that in his opinion the definition of “valueless” is when “there's capital investments made that will not be recovered by a utility.”<sup>69</sup> To illustrate this definition, Mr. Jones provided a hypothetical where a utility constructed a 500,000 gallon elevated storage tank, and subsequently had half of the service area for which the tank was constructed removed from its CCN through decertification.<sup>70</sup> Mr. Jones testified that the utility's investment would still have to be recovered through the utility's remaining ratepayers, though only a portion of that size tank was useful to those ratepayers.<sup>71</sup> When asked if the tank would be

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<sup>65</sup> See *id.* at 34-35.

<sup>66</sup> 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”).

<sup>67</sup> Merriam Webster.com Dictionary (accessed Oct. 4, 2016).

<sup>68</sup> Merriam Webster.com Thesaurus (accessed Oct. 4, 2016).

<sup>69</sup> Tr. at 61.

<sup>70</sup> *Id.* at 62.

<sup>71</sup> See *id.*

useless, Mr. Jones testified “Not 100 percent useless, but partially useless.”<sup>72</sup> Aqua witness Mr. Korman similarly testified that personal property can be rendered useless or valueless in part.<sup>73</sup>

This application of “useless or valueless” to a portion of a property interest is contradictory, and incorrect for the purposes of this proceeding. Property, taken as a whole, cannot be *partially* of no use, or *partially* having no usefulness. If only a portion of a property interest is affected by decertification, then the overall property interest may be diminished and may be less useful or less valuable to the utility. However, it is not rendered useless or valueless for purposes of TWC § 13.254(d) unless there is no remaining use or no remaining value associated with the property as a whole. In Mr. Jones’ hypothetical, if after the decertification the utility only requires half of the capacity of the 500,000 gallon elevated storage tank, then the tank as a whole is not useless or valueless. The utility still has ratepayers that are using the remaining half capacity of that tank. Because the utility now only requires a 250,000 gallon tank, the existing tank may be underutilized, but it is nonetheless still being used by the utility and still has value to the utility.

Eminent domain case law supports the plain language definition of useless or valueless. A compensable regulatory taking can occur “when a governmental restriction denies the property owner all economically viable use of the property or renders the property valueless.”<sup>74</sup> Courts have noted that “[w]hile it is impossible to state categorical rules for such cases, important considerations are whether property has been rendered ‘wholly useless,’ or whether its value has been totally destroyed.”<sup>75</sup> Whether or not “all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 124; *see also* Direct Testimony of Stephen Blackhurst, Aqua Ex. AT-B at 13.

<sup>74</sup> *City of Dallas v. Blanton*, 200 S.W.3d 266, 274 (Tex. App- Dallas, 2006); *see Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) (“A compensable regulatory taking can also occur when governmental agencies impose restrictions that either [1] deny landowners of all economically viable use of their property, or [2] unreasonably interfere with landowners’ rights to use and enjoy their property.”).

<sup>75</sup> *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994); *see City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978) (*citing Armstrong v. United States*, 364 U.S. 40, 48 [1960]) (although not every governmental act affecting property constitutes a taking, “total destruction by the Government of all value of [certain] liens” is a taking); *Mayhew*, 964 S.W.2d at 935 (“A restriction denies the landowners all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless.”).



governmental action.”<sup>76</sup> Applying this case law to the water tank hypothetical from above, the tank would not be valueless, because the utility would not be denied all economically viable use of that property. Aqua would not be entitled to any recovery because while the utility would be suffering a decrease in property value, the tank would not be “wholly useless” and its value not “totally destroyed.”

Finally, for property to be rendered useless or valueless in this type of proceeding, it must also meet the standard established in *Texas General Land Office v. Crystal Clear Water Supply Corp. (Crystal Clear)*.<sup>77</sup> *Crystal Clear* is a streamlined expedited release case under TWC § 13.254(a-5), and is the governing case law on the issue of whether a tract of land is “receiving service.” Receiving service is defined by the court as 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.”<sup>78</sup> 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.”<sup>79</sup> This same standard applies for determining whether property is rendered useless or valueless to a retail public utility as a result of decertification under TWC § 13.254(a-5). Therefore, 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, and which is now of no value or without use to that retail public utility.

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<sup>76</sup> *Mayhew* 964 S.W.2d at 935.

<sup>77</sup> 449 S.W.3d 130 (Tex. App.-Austin 2014, pet. denied).

<sup>78</sup> *Id.* at 140.

<sup>79</sup> *Id.* at 141.

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

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

Aqua's Prosper Point wastewater permit, which is Aqua's intangible property, is property that has been rendered useless or valueless as a result of decertification under the plain language of TWC § 13.254(d) and the standard set forth in *Crystal Clear*. The Prosper Point wastewater 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,<sup>80</sup> and the permit was committed to providing service only to that tract.<sup>81</sup>

Aqua executed the first developer Letter of Intent in reference to the Prosper Point project<sup>82</sup> in 2000.<sup>83</sup> Since that time, Aqua had discussions with many potential developers about that tract of land,<sup>84</sup> such that Aqua had a reasonable expectation that it would provide service to that tract, and committed limited acts in furtherance of providing that service. Aqua obtained the Prosper Point wastewater permit on January 9, 2003 from the Texas Commission on Environmental Quality (TCEQ).<sup>85</sup> Aqua subsequently renewed the permit twice: once on May 21, 2007, and again on January 31, 2012.<sup>86</sup> The permit had capacity limited to the anticipated needs for development within the 128-acre tract of land.<sup>87</sup> Aqua asserted 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.<sup>88</sup> After the decertification in Docket No. 45329, Aqua declined to renew the permit, which is further evidence that once the 128-acre tract was removed from its

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<sup>80</sup> Aqua Ex. AT-A at 9; Aqua Ex. AT-C at 11; *see* Staff Ex. 1.

<sup>81</sup> *See generally* Staff Ex. 1.

<sup>82</sup> Staff Ex. 1 at 3 ("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").

<sup>83</sup> Staff. Ex. 1 at 3.

<sup>84</sup> *Id.* at 3-4; Tr. at 68-69.

<sup>85</sup> Aqua Ex. AT-1.

<sup>86</sup> *Id.*

<sup>87</sup> Staff Ex. 1 at 7.

<sup>88</sup> *Id.*

CCN area, the Prosper Point wastewater permit was no longer of any value or use to Aqua.<sup>89</sup> The permit expired on October 1, 2016.<sup>90</sup>

Exhibit CEL-102, Mr. Jones' appraisal, identifies Aqua's Prosper Point wastewater permit as useless and valueless to the remaining Aqua customers because it is "non-transferable due to the terms of the UTRWD agreement mentioned above, and holds no value to the City of Celina as a founding member of UTRWD."<sup>91</sup> At the hearing on the merits, Mr. Jones testified that the permit itself was not property rendered useless and valueless, but the fees expended by Aqua to obtain the permit are useless and valueless. This testimony is inconsistent with the text of Mr. Jones' appraisal, which he still asserts is a true and correct appraisal.<sup>92</sup>

All parties agree that Aqua engaged in planning and design activities related to the subject tract of land, and that all expenditures related to those activities are useless and valueless to Aqua as a result of the decertification.<sup>93</sup> However, the parties differ on whether those expenditures are classified as property or as a factor to be considered to ensure that the compensation is just and adequate. As discussed above in section III(C)(1), Aqua's expenditures for "planning, design, or construction of service facilities that are allocable to service to the area in question" are a factor for determining value under TWC § 13.254(g). These expenditures are not Aqua's property. Because these expenditures fail the threshold inquiry of whether they are property, the fact that they are useless and valueless only goes to the compensation award for the property they are related to, which is the Prosper Point wastewater permit.

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

As discussed above in section III(C)(2), Aqua's necessary and reasonable legal expenses and professional fees are a factor to be considered in ensuring that the compensation to Aqua is just and adequate under TWC § 13.254(g). Again, legal expenses and professional fees are not Aqua's property. Because they fail the threshold inquiry of whether they are property, no evaluation of whether these expenses and fees were rendered to be useless or valueless property as a result of the decertification is necessary. It was Aqua's business decision to incur the costs

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<sup>89</sup> See Aqua Ex. AT-5.

<sup>90</sup> *Id.*

<sup>91</sup> Celina Ex. CEL-102 at CEL 102-005.

<sup>92</sup> Tr. at 60.

<sup>93</sup> See Tr. at 23, 30 (Jones); Aqua Ex. AT-C at 11; Aqua Ex. AT-A at 8-10.

necessary to defend its business interests in the decertification in Docket No. 45329, and in the instant case. These costs were not incurred in the planning, design, or construction of facilities intended to serve the subject property, but to protect those investments. Therefore, even if Aqua's legal expenses and professional fees 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 pursuant to TWC § 13.254(d).

Aqua witness Mr. Blackhurst testified that legal expenses and professional fees are a "substantial expense that utilities must incur to obtain and maintain their CCNs, wastewater permits, or other authorizations required to provide service in terms of planning and operations within a particular CCN service area" and if that CCN area is removed, those "costs are rendered useless and valueless."<sup>94</sup> Mr. Blackhurst uses the word "costs" to describe the legal expenses and professional fees that are useless and valueless to Aqua as a result of decertification. Mr. Blackhurst's testimony supports the contention that legal expenses and professional fees are *not property* owned by a utility, but *are costs* incurred by a utility. While Aqua may suffer the loss of the purpose of those costs upon decertification, it does not make those costs property which could be rendered useless and valueless.

### **3. Lost economic opportunity**

As discussed above in section III(C)(3), Aqua's lost economic opportunity is not property, and therefore no evaluation of whether it was rendered useless or valueless property as a result of the decertification is necessary. Even so, Aqua's lost economic opportunity fails to meet the standard under *Crystal Clear*. As Aqua witness Mr. Korman testified, Aqua ". . . had expended money and time and efforts to go out and, for instance, get things like permits and engage in negotiating contracts and agreements" and lost economic opportunity is the "profit that's associated with all those things that they have done in the past."<sup>95</sup> Future profits are not an act Aqua has performed, or a resource it has supplied, in furtherance of providing service to the specific tract of land in this proceeding. Rather, it is the benefit that Aqua hoped to receive as a result of ultimately providing service to the subject land.

Aqua's asserted lost economic opportunity also fails to meet the standard for useless or valueless under the plain language of TWC § 13.254(d). Aqua acknowledges that as a result of

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<sup>94</sup> Aqua Ex. AT-B at 13.

<sup>95</sup> Tr. at 115-16.

the decertification it has lost “*a portion* of their regional economic opportunity allocable to the Property”<sup>96</sup> (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”<sup>97</sup> and that a property interest may be partially rendered useless or valueless.<sup>98</sup> 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 an intangible property interest 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.

#### **IV. ARE THE EXISTING APPRAISALS LIMITED TO PROPERTY THAT HAS BEEN DETERMINED TO HAVE BEEN RENDERED USELESS OR VALUELESS BY DECERTIFICATION?<sup>99</sup>**

As an initial matter, an evaluation of whether each filed appraisal includes only property rendered useless or valueless must set aside the inclusion of legal expenses or professional fees. As discussed above in section III(C)(2), reasonable and necessary legal expenses and professional fees are not property that can be rendered useless or valueless, but are instead a factor for ensuring that the compensation to Aqua is just and adequate under TWC § 13.254(g). While this proceeding is unique as a case of first impression before SOAH and the Commission, in the future, appraisals filed in such cases should be limited to the valuation of only that property which was rendered useless or valueless by the Commission. Those appraisals will also include a valuation of the reasonable and necessary legal expenses and professional fees that are associated with the property interests rendered useless or valueless to the decertified utility. If no property is determined to be rendered useless or valueless as a result of decertification, then no appraisal would be necessary. Therefore, an appraisal should not be characterized as limited to only property rendered useless or valueless solely on the basis that it includes the compensation factor of legal expenses and professional fees. Staff notes that although Aqua’s legal expenses and professional fees were included in the filed appraisals, there is no evidence in the record to

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<sup>96</sup> Aqua Ex. AT-C at 12.

<sup>97</sup> *Id.* at 13-14.

<sup>98</sup> See Aqua Ex. AT-B at 13; Aqua Ex. AT-C at 13-14.

<sup>99</sup> Preliminary Order at 3.

determine whether the included expenses were only reasonable or necessary expenses related to the expedited release case and the Prosper Point wastewater permit.

The appraisal filed by Aqua is not limited to property that has been rendered useless or valueless due to the inclusion of its asserted lost economic opportunity claim.<sup>100</sup> As discussed above in section III(C)(3), lost economic opportunity is not a property interest that could be rendered useless or valueless to Aqua as a result of decertification.

The appraisal filed by Celina identifies Aqua's Prosper Point wastewater permit as the only property interest for which compensation should be provided.<sup>101</sup> Celina argues that its appraisal is not limited to property rendered useless or valueless, as the appraisal includes the valuation of legal expenses and professional fees.<sup>102</sup> However, as stated above, an appraisal may be limited to only property rendered useless or valueless even if it includes a compensation determination for legal expenses and professional fees. The appraisal filed by Celina recommends that Aqua's permit for a wastewater treatment facility for the decertified area is the only compensable property interest in this proceeding, aside from any award of related expenses and fees. Therefore, this appraisal is properly limited to property rendered useless or valueless to Aqua by decertification.

Likewise, 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.

## V. CONCLUSION

For the reasons discussed above, Staff respectfully requests that the presiding officer issue a proposal for decision that recommends that the only property that has been rendered useless or valueless to Aqua as a result of the decertification is the Prosper Point wastewater permit, and that Celina's appraisal and the independent third appraisal are both limited to property that has been rendered useless or valueless.

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<sup>100</sup> Aqua Ex. AT-1.

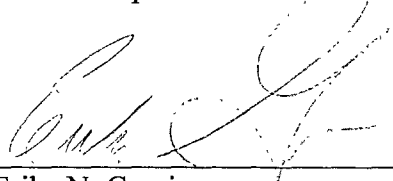
<sup>101</sup> Celina Ex. CEL-102 at 4.

<sup>102</sup> Celina Ex. CEL-100 at 19; Tr. at 20.

**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 October 28, 2016, in accordance with 16 TAC § 22.74.

  
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Erika N. Garcia