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CITY OF CELINA'S NOTICE OF § BEFORE THE STATE OFFICE
INTENT TO PROVIDE WATER AND §
SEWER SERVICE TO AREA § OF
DECERTIFIED FROM AQUA TEXAS, §
INC. IN DENTON COUNTY § ADMINISTRATIVE HEARINGS

AQUA TEXAS, INC.'S INITIAL POST-HEARING BRIEF

October 28, 2016

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INTENT TO PROVIDE WATER AND
SEWER SERVICE TO AREA
DECERTIFIED FROM AQUA TEXAS,
INC. IN DENTON COUNTY**

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**BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS**

AQUA TEXAS, INC.’S INITIAL POST-HEARING BRIEF

Aqua Texas, Inc. d/b/a Aqua Texas (Aqua) files this Initial Post-Hearing Brief in this docket involving the City of Celina’s (Celina) Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. (Application), and in support would show as follows.

I. INTRODUCTION AND SUMMARY

Since September 1, 2014, the Public Utility Commission of Texas (Commission) has been tasked with administering “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*.”¹ The Commission possesses broad regulatory powers to effect this goal.² Those powers must be administered within constitutional constraints.³

¹ TWC §13.001(3) (emphasis added).

² TWC §13.041(a) (stating, “The utility commission and the commission may do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction.”)

³ U.S. CONST. AMEND. V (“ . . . nor shall private property be taken for public use, without just compensation.”); TEX. CONST. Art. I, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .”).

Part of the reason this comprehensive regulatory system exists is that retail public utilities “are by definition monopolies in the areas they serve.”⁴ Nevertheless, the Legislature has enacted a CCN expedited release process that threatens that system by allowing property owners of sufficient acreage to opt out of CCNs without cause.⁵ The Commission has administered that process in a manner that requires active water or sewer service to prevent CCN releases even though many planning and TCEQ permitting steps are required before such service may be provided.⁶ That planning costs real monetary investment. Aqua was willing to undertake that planning with the expectation it would eventually make its money back and more. The decertifications in Docket No. 45329 under TWC §13.254(a-5) despite Aqua’s objections have eliminated that opportunity and rendered Aqua’s investments useless or valueless.⁷ Further, the City of Celina now has the right to make that money in Aqua’s place. Aqua now deserves just and adequate compensation under the Federal and State constitutions.

Here, in this now bifurcated, first of its kind, compensation contested case hearing, Aqua requests the Commission make it whole for its property losses which include: (1) project investments in planning, design, or construction of service facilities that are allocable to service to the area in question; (2) necessary and reasonable legal expenses and

⁴ TWC §13.001(1).

⁵ TWC §13.254(a-5)-(a-6).

⁶ *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) (Final Order).

⁷ *Id.*

professional fees; and (3) lost economic opportunity. The manner in which the language in TWC §§ 13.254(d) and (g) was adopted and revised over the years is important to understanding Aqua's position. Aqua has strived to make this complicated matter as simple as possible. Yet, the statute itself makes this difficult. Ideally, these issues would be clarified through legislative revisions to TWC §13.254 or Commission changes to 16 TAC § 24.113. In the absence of same, some clarification may result from this hearing. But the Commission must be cognizant that while the fact pattern here will not be identical in other retail public utility situations, they could be affected by this decision just the same.

Aqua respectfully requests that the ALJs and Commission find Aqua's position correctly justifies compensation for all the property items identified in its appraiser's report as rendered useless or valueless to Aqua as a result of the decertifications in Docket No. 45329. Further, Aqua respectfully requests the Commission direct a second phase hearing to establish the value of that compensation owed to Aqua.

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 Texas, Inc.'s (Aqua's) water certificate of convenience and necessity (CCN) No. 13201 and sewer CCN No. 21059, in Denton County, Texas.⁸

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

⁸ *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).

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 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. 45329?
TWC §13.254(d); 16 TAC §24.113(h)**

The issue of what property, if any, has been rendered useless or valueless to Aqua by the decertification granted in the prior docket is the crux of this hearing. Conducting a hearing on this issue in the manner described in the Commission's referral order is novel. However, applying a broad definition of "property" to the term where used without further elaboration in Texas statutes is required by well-established applicable law. Neither the Legislature nor the Commission has articulated precisely what "property" or other key terms, such as "useless" or "valueless," mean in the context of TWC §13.254(d) and 16 TAC §24.113. Regardless, constitutional concerns are paramount.

Here, Aqua will present what is the required view of these terms in order to ensure that the Commission fulfills the overriding purpose of the TWC § 13.254 compensation provisions: making sure decertified retail public utilities like Aqua are provided just and adequate compensation for lost property resulting from either a partial or whole CCN decertification to prevent an unlawful regulatory taking, damaging, or destruction of property for public use.⁹ Aqua properly relied on its CCN rights for the subject 128 acres (Property) before those rights were taken away. Aqua made investments and had a reasonable

⁹ *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.—Fort Worth 2014, no pet.) (discussing *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799, 799-806 (Tex. 1936) and its application in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996) and *Texas Building Owners and Managers Association, Inc. v. Public Utility Commission of Texas*, 110 S.W.3d 524 (Tex. App.—Austin 2003, pet. denied).

expectation of receiving income from same. The State of Texas has, for public reasons not specified in the TWC, decided that another retail public utility should have those rights instead. Thus, Aqua property rights were taken, damaged, or destroyed for public use. Preventing a regulatory taking of these property rights is the only reason to have compensation provisions in the TWC. To fulfill this purpose, the statutory terms at issue must be applied in a manner that serves to make decertified retail public utilities whole.

A. Definition of Property

The Texas Supreme Court has held that the term “property” must be applied in its broadest sense where no further definition is provided in the statute where used. The following is an excerpt from *State v. Public Utility Commission of Texas*:

In construing a statute, if the legislature does not define a term, its ordinary meaning will be applied. By its ordinary meaning, the term “property” extends to “every species of valuable right and interest.” It is “commonly used to denote everything to which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal.”¹⁰

The Federal and Texas Constitutions require just compensation when the government takes, damages, or destroys property of any variety for public use whether that property is real or personal and they too provide no limitation on the term “property.”¹¹

Various sections of TWC Chapter 13 further demonstrate a broad view of “property” is required:

¹⁰ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

¹¹ U.S. CONST. AMEND. V (“... nor shall private property be taken for public use, without just compensation.”); TEX. CONST. Art. I, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .”); *see also Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980) (holding in pertinent part that destruction of personal property by police required compensation).

1. TWC Chapter 13 broadly defines “facilities” to mean “all the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.”¹²
2. “Service” broadly “means any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public . . .”¹³ meaning that intangible assets may be used in furtherance of “service.”
3. The non-exclusive list of compensation factors used to value personal property per TWC § 13.254(g) include multiple items that are not necessarily tied to constructed or physical facilities, such as planning and design expenditures.¹⁴
4. The TWC permits the sale of “a [CCN] or any right obtained under a certificate” with Commission approval after it determines “the purchaser, assignee, or lessee is capable of rendering adequate and continuous service.”¹⁵ While there may be conditions placed on such sale, there is no requirement that physical assets accompany such a sale, such as in a TWC §13.301 sale, transfer, or merger transaction. Similarly, the TCEQ rules generally permit transfers of wastewater water quality permits with TCEQ approval.¹⁶

¹² TWC §13.002(9); *see also* 16 TAC §24.3(26). Plant may not be construed as only physical plant because “intangibles are ordinarily included in a utility’s rate base” and included in “plant in service.” *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); *see also* TWC § 13.185(a) (“original cost of *property* used by and useful to the utility in providing service”) (emphasis added); 16 TAC §24.31(c)(2)(A)-(B) (referring to “plant, *property* and equipment” in original cost rules) (indicating that plant schedules used for rate base may include all three interchangeably) (emphasis added); *Class A Water-Sewer Utility Rate Filing Package*, Instructions, at 13-14 (9/17/2015) (available at www.puc.texas.gov/industry/water/Forms/Forms.aspx); and *Class B Rate-Tariff Change Application Instructions*, at 10 (9/17/2015) (available at www.puc.texas.gov/industry/water/Forms/Forms.aspx).

¹³ TWC §13.002(21); *see also* 16 TAC §24.3(62).

¹⁴ TWC §13.254(g); *see also* 16 TAC §24.113(k).

¹⁵ TWC §13.251.

¹⁶ 30 TAC §305.64; Ex. AT-1, at Aqua 000095. Aqua notes that even though it is possible to transfer a permit in exchange for compensation, it would have been difficult to sell Aqua’s specific permit with the special condition it included for the benefit of Upper Trinity Regional Water District tailored specifically for the Property. *See* Ex. AT-1, at Aqua 000116-000112. Regardless, Aqua held certain intangible property rights that were generally transferable while it held the permit.

5. The “property” language in TWC §13.254(d) has not changed since it was first added to TWC §13.254(d) through S.B. 1 in 1997 despite other changes to TWC §13.254 through H.B. 2876 in 2005.¹⁷ However, the language actually first originated in TWC §13.255 through H.B. 2035 in 1987 before its incorporation into the TWC §13.254 decertification provisions.¹⁸ Unlike TWC §13.254, TWC §13.255 applies to limited municipal annexation situations and is restricted to certain types of retail public utilities, such as water supply corporations. The House Sponsor of H.B. 2035, Representative Hinojosa, specifically stated in a Senate Committee Meeting discussing H.B. 2035 that affected water supply corporations would be compensated for “any bonded indebtedness that it may have or *for any other property that it may lose because the City is going into the certified area and providing water.*”¹⁹ Thus, no “property” limitation was contemplated.
6. Aqua’s expert witness on the legislative history and implementation of TWC § 13.254 testified that, in his capacity as Manager of the Texas Natural Resource Conservation Commission (“TNRCC”) Executive Director’s Staff charged with implementing the 1997 S.B. 1 decertification procedure additions to TWC § 13.254, TNRCC Staff found that a broad collection of property interests, both tangible and intangible, required compensation if rendered useless or valueless.²⁰

Other considerations relevant to the legal definition of “property” are:

1. One of the exhibits admitted in this case is Standards 1-10 of the *Uniform Standards of Professional Appraisal Practice*, 2016-2017. (“USPAP”).²¹ Those standards show that there are methods of valuing all types of property

¹⁷ Tex. S.B. 1, 75th Leg., R.S. (1997); Tex. H.B. 2876, 79th Leg., R.S. (2005).

¹⁸ Tex. H.B. 2035, 70th Leg., R.S. (1987).

¹⁹ See **Attachment A** (Partial transcript of the Senate Committee on Intergovernmental Relations hearing on May, 28, 1987, 70th Leg. R. S. The audio of the full hearing is available at <https://www.tsl.texas.gov/ref/senaterecordings/70th-R.S./700795a/index.html>.) This Senate Committee Meeting discussion also reveals that the primary purpose for adding this process to TWC §13.255 was to permit cities to extend service to colonia areas in South Texas where CCN holders could not serve them, not harm responsible retail public utilities.

²⁰ Ex. AT-B, at 12 (Blackhurst Direct).

²¹ Ex. AT-14 (2016-2017 *Uniform Standards of Professional Appraisal Practice* (“USPAP”), Standards 1-10).

whether tangible, intangible, real, or personal.²² These standards are generally used by licensed appraisers to value property in Texas.²³

2. Testifying experts in this case agreed that money or investments may be considered “property.”²⁴
3. Texas criminal law provides an example where there was a specific finding that money/investments are owned and viewed as property that can be stolen.²⁵

Taken as a whole, all this information shows that attempts to limit the term “property” to physical or tangible property interests without such a limitation in the TWC flies in the face of all applicable law. If “property” under TWC §13.254 is construed too narrowly, compensation to a decertified retail public utility under TWC § 13.254 could be improperly limited and result in a regulatory taking.

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

Aqua and the City were ordered to file appraisals per TWC §13.254(g-1) in this docket on or before June 13, 2016.²⁶ Aqua filed an appraisal report for its decertified CCN areas prepared by KOR Group and licensed appraiser Mr. Joshua M. Korman on June 13, 2016 (Aqua Appraisal Report).²⁷ The City filed what its report calls an “independent

²² *Id.*

²³ Ex. AT-C, at 9 (Korman Direct); Tr. at 91 (Korman Testimony). Upon inquiry from the Honorable ALJ, Mr. Korman also mentioned a treatise relied upon by licensed appraisers in eminent domain cases, *The Appraisal of Real Estate* (14th Edition). Tr. at 124-25 (Korman Testimony)

²⁴ Ex. AT-C, at 10-11 (Korman Direct); Tr. at 131 (Korman Testimony); Tr. at 68 (Waldock Testimony); Tr. at 22, 24 (Jones Testimony).

²⁵ See, e.g., *Merryman v. State*, 391 S.W.3d 261, 276 (Tex. App.— San Antonio 2012, pet ref’d) (involving misapplication of fiduciary property and theft by deception where the property in question was money).

²⁶ Order No. 2 Requiring Filing of Appraisals (April 25, 2016) (Docket Item No. 6).

²⁷ Ex. AT-1.

appraisal of a portion” of Aqua’s CCNs decertified in Docket No. 45329 on June 13, 2016 (dated June 9, 2016) prepared by Jason S. Jones, P.E. (Celina Report).²⁸ The Commission’s Executive Director filed what purports to be a “third party engineering appraisal” for the decertified areas prepared by Bret W. Fenner, P.E.²⁹ The filed reports are all very different.

Aqua identified the “property” it contends should be valued in this docket through the Aqua Appraisal Report and its experts’ testimonies.³⁰ Aqua is not in position to represent what the other Parties now allege are property in this proceeding. There are three main reasons why this is not possible.

First, Aqua is the only Party that filed a true “appraisal” report in this docket prepared by a licensed “appraiser.”³¹ The other two reports in this docket were prepared by professional engineers.³² Aqua agrees that technical consultants such as engineers may be properly used to assist licensed appraisers, but Aqua disagrees that sole reliance on engineers is permitted given TWC §13.254(g-1) specifically uses the terms “appraiser” and “appraisals” when discussing compensation determinations.³³ TWC §13.254 does not

²⁸ Ex. AT-2; Ex. CEL-102.

²⁹ Ex. AT-3.

³⁰ Ex. AT-1, AT-A, AT-B, AT-C, and AT-D.

³¹ Ex. AT-1; TWC §13.254(g-1).

³² Ex. AT-2 and AT-12.

³³ TWC §13.254(g-1); 16 TAC §24.113(j)(1)-(2); *see also* TWC §13.254(f) (where “appraiser” is agreed upon); 16 TAC §24.113(j). Indeed, Mr. Korman relied on much information provided by Aqua as discussed by both Mr. Korman and Mr. Waldock in their testimonies. Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-C, at 8 (Korman Direct); *see also* Ex. AT-1 (Aqua Appraisal Report).

mention “engineering appraisals” or other types of valuations.³⁴ Failure to engage licensed appraisers for this task could result in an incomplete property compensation determination and produce a regulatory taking. Aqua’s expert Joshua M. Korman is a licensed appraiser who prepared the Aqua Appraisal Report in accordance with USPAP, the standards licensed appraisers typically use for appraisals, while also utilizing the TWC §13.254 compensation factors in place of USPAP where applicable.³⁵ The two licensed appraisers who testified at hearing both agree that “appraisal” and “appraiser” have certain professional meanings and Mr. Korman testified that appraisals necessitate a licensed appraiser.³⁶ In contrast, engineers are not trained in USPAP, and do not claim to be certified “appraisers.”³⁷ Celina’s expert, Jason S. Jones, P.E., conceded his report was not prepared using USPAP, and he is not a certified “appraiser.”³⁸ Celina’s attempt to rebut Aqua’s appraisal with a licensed appraiser who did not prepare the Celina Report was a concession that a licensed appraiser is required.³⁹ Mr. Paul Hornsby’s testimony for Celina critiquing Mr. Korman’s work applying USPAP and the TWC §13.254 compensation factors are perplexing given: (1) the Celina Report does not even attempt to apply USPAP; and (2) Mr. Hornsby’s testimony critique does not follow USPAP Standard 3 as required of appraisers offering such reviews of other

³⁴ TWC §13.254(g-1).

³⁵ Ex. AT-C, at 8-9 (Korman Direct); Tr. at 91-94, 128-129 (Korman Testimony); Ex. AT-1, at Aqua 000002.

³⁶ Tr. at 88 (Korman Testimony); Tr. at 134-135 (Hornsby Testimony).

³⁷ Tr. at 18-19 (Jones Testimony).

³⁸ *Id.*

³⁹ Ex. CEL-103 (Hornsby Rebuttal).

appraiser's work.⁴⁰ Thus, the Aqua Appraisal Report is uncontroverted by competent evidence, and the sole source of proper property identification in the manner required by TWC §13.254(g-1), applicable Commission rules, and Commission Order No. 2.⁴¹

Second, Aqua is not clear as to whether Celina still supports its filed report.⁴² Previously, Celina filed the Celina Report purporting to be its "appraisal" that recommends finding certain property was rendered useless or valueless to Aqua by the decertifications and that certain compensation is warranted.⁴³ At the hearing, Celina's expert, Mr. Jones, who prepared the Celina Report indicated he no longer finds any Aqua property was rendered useless or valueless by the decertifications and no compensation is warranted.⁴⁴ But Mr. Jones simultaneously stands by and does not seek to withdraw his report that contains opposite findings.⁴⁵ Thus, Aqua is compelled to leave Celina to the task of explaining its peculiar position in its initial post-hearing brief.

Finally, Commission Staff has submitted no evidence on property at all for the record. Despite the filed third party "appraisal" prepared and filed for the Commission Executive

⁴⁰ Tr. at 136-139 (Hornsby Testimony). Apparently, Mr. Hornsby contends he provided an off-the-record Standard 3 review orally to Celina without providing any of the required documentation for such a review on the record. *Id.* Thus, Commission consideration of such a review would be improper.

⁴¹ TWC §13.254(g-1); 16 TAC §24.113(j)(1)-(2); Order No. 2 Requiring Filing of Appraisals (April 25, 2016) (Docket Item No. 6). Aqua also contends it was misleading in violation of USPAP Standard 3 for Mr. Hornsby to omit USPAP Standards 9 and 10 referenced within his testimony from Ex. CEL-106. Tr. at 140 (Hornsby Testimony).

⁴² Compare Ex. CEL-102, with Tr. at 19-21 (Jones Testimony).

⁴³ Ex. CEL-102. Specifically, Mr. Jones recommended compensation for: (1) The amount of any expenditures for planning, design, or construction of service facilities that are allocable to the area in question; and (2) Necessary and reasonable legal expenses and professional fees. *Id.* at 4-5; *see also* Ex. CEL-100, at 5 (Jones Direct).

⁴⁴ Ex. CEL-100, at 6 (Jones Direct); Tr. at 19-21 (Jones Testimony).

⁴⁵ *Id.*

Director, which aligned with Celina in terms of lost compensable Aqua property, Commission Staff has distanced itself from that filing and did not offer its author as a testifying expert witness.⁴⁶ Commission Staff only filed a Statement of Position containing legal argument and no evidence.⁴⁷ That position statement was subject to change.⁴⁸ Thus, as with Celina, Aqua will refrain from trying to articulate Staff's current position.

In sum, Aqua will proceed to describe only what Aqua's experts have alleged to be property in this proceeding. Aqua's is the only competent record evidence on the topic and the "property" positions of the other parties is not clear without their initial post-hearing briefs.

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

The Property decertified in Docket No. 45329 was known to Aqua as "Prosper Point."⁴⁹ The Property is located within the region managed by Darryl Waldock, Aqua's North Texas Area Manager, and he was the primary point of contact with Aqua's appraiser in his efforts to identify property rendered useless or valueless requiring compensation.⁵⁰ Stephen H. Blackhurst, a former Aqua employee, also testified that he is familiar with the factual information contained in Mr. Waldock's testimony.⁵¹ Aqua's appraiser incorporated

⁴⁶ Ex. AT-3.

⁴⁷ Commission Staff's Statement of Position (September 12, 2016) (Docket Item No. 42).

⁴⁸ *Id.* at 10.

⁴⁹ Ex. AT-A, at 7 (Waldock Direct).

⁵⁰ *Id.*

⁵¹ Ex. AT-B, at 7 (Blackhurst Direct).

a substantial amount of information obtained from Aqua into the Aqua Appraisal Report addenda and discussion of value recommendations.⁵²

Mr. Waldock's testimony discusses the history of Aqua's involvement with the Property development project which was anticipated to result in Aqua providing both retail water and sewer utility service to the Property.⁵³ The detail concerning Aqua's monetary/time investments, permitting, planning, and design activities are well documented in the record within Mr. Waldock's testimony,⁵⁴ Mr. Korman's testimony,⁵⁵ the Aqua Appraisal Report,⁵⁶ and in Aqua's responses to Commission Staff's 1st Requests for Information.⁵⁷ Aqua obtained and maintained its wastewater permit for the Property because it is an essential planning step in designing physical wastewater treatment facilities and Property development completion was consistently anticipated.⁵⁸ However, after the decertification, Aqua was compelled to cease its 2016 permit renewal activities as the permit was applied for and obtained with only service to the Property in mind in terms of capacity and location of the planned wastewater treatment plant.⁵⁹ All Aqua's investments in planning

⁵² Ex. AT-1.

⁵³ Ex. AT-A, at 7-12 (Waldock Direct); Tr. at 68-70.

⁵⁴ *Id.*

⁵⁵ Ex. AT-C, at 8-13 (Korman Direct).

⁵⁶ Ex. AT-1.

⁵⁷ Ex. PUC Staff No. 1.

⁵⁸ Ex. AT-A, at 8-11 (Waldock Direct); Tr. at 26-28 (Jones Testimony).

⁵⁹ Ex. AT-A, at 10 (Waldock Direct); Ex. AT-5. The permit was renewed more than once over the years and is now expired as of October 1, 2016. Ex. AT-1, at Aqua 000260 (Aqua's Renewed TCEQ TPDES WQ Permit issued January 31, 2012).

and design for the Property project, including its permitting activities, constituted intangible property assets belonging to Aqua prior to the decertification in Docket No. 45329 that are now stranded.⁶⁰

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

Aqua has incurred legal expenses and professional fees in response to Docket No. 45329 and this docket which continue to increase as this proceeding moves forward.⁶¹ While legal expenses and professional fees were spent as part of Aqua's Property project planning activities, Aqua is not seeking to recoup those specific costs. The decertification and notice of intent dockets have caused Aqua to spend additional money, which is property, on the Prosper Point project.

3. *Lost Economic Opportunity.*

Aqua has lost the economic opportunity to operate within the Property and utilize its investments to make money through retail water and sewer utility service to customers.⁶² That was the goal of Aqua's Property investments. Those investments created an intangible property right that was eliminated by the CCN decertifications in Docket No. 45329.⁶³

⁶⁰ Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-C, at 8-13 (Korman Direct); and Ex. AT-1, at Aqua 000005-00000; *see also* Tr. at 30 (Jones Testimony)..

⁶¹ Ex. AT-A, at 10-11 (Waldock Direct); Ex. AT-C, at 12 (Korman Direct); and Ex. AT-1, at Aqua 000006; *see also* Ex. AT-B, at 13-14 (Blackhurst Direct).

⁶² Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-C, at 10-14 (Korman Direct); and Ex. AT-1, at Aqua 000006-000008.

⁶³ Ex. AT-C, at 12-14 (Korman Direct); Ex. AT-1, at Aqua 000006-000008.

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.*

The reference to “property” in TWC §13.254(d) must be construed to include intangible property investments in planning, design, or construction of service facilities, including permitting activities, that are allocable to service to the area in question.⁶⁴ Aqua’s investments in its wastewater permit and permitting activities were intangible service facility property assets “allocable to the service area in question” and, here, were not undertaken as part of efforts to serve any other tract of land besides the Property.⁶⁵ Active service to particular tracts of land cannot occur without investing in permitting and other planning within or outside subject tracts.⁶⁶ While it held the CCN, relying on same, Aqua obtained and maintained a wastewater permit to enable design and construction of physical facilities when the Property owner was ready.⁶⁷ Investments leading up to physical construction are intangible property assets of a CCN holder.⁶⁸ If physical construction was complete and active service commenced, decertification under TWC §13.254(a-5) would not have

⁶⁴ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted); Ex. AT-B, at 12 (Blackhurst Direct); Ex. AT-C, at 10-12 (Korman Direct); Ex. AT-1, at Aqua 000005-000006; *see also* Section III.A. discussion of “Definition of Property” and authorities cited therein, *supra.*; TWC §13.254(g); 16 TAC §24.113(k); Tr. at 43-44 (Jones Testimony).

⁶⁵ Ex. AT-A, at 10 (Waldock Direct); PUC Staff Ex. 1; TWC §13.254(g); 16 TAC §24.113(k).

⁶⁶ Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-B, at 12-14 (Blackhurst Direct); Tr. at 75 (Blackhurst Testimony); Tr. at 26-28, 43-44 (Jones Testimony).

⁶⁷ Ex. AT-A, at 7-11 (Waldock Direct); PUC Staff Ex. 1.

⁶⁸ Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-B, at 12-14 (Blackhurst Direct); Tr. at 75 (Blackhurst Testimony); Ex. AT-C, at 10-12 (Korman Direct); Ex. AT-1, at Aqua 000005-000006; Tr. at 26-28, 43-44 (Jones Testimony).

occurred.⁶⁹ Thus, these stranded property investments must be recognized as compensable property under TWC §13.254(d) guided by the compensation factors in TWC §13.254(g) and other applicable law.⁷⁰

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

Aqua reiterates that the reference to “property” in TWC §13.254(d) must be construed to include intangible property investments and these properly include necessary and reasonable legal expenses and professional fees.⁷¹ While prior legal and professional fees incurred for things such as permitting as part of the Property project should certainly be compensable in these matters, Aqua would not have incurred legal expenses or professional fees in this docket or Docket No. 45329 without a need to respond to the expedited release petition that effected a termination of the Property project over Aqua’s objections and this docket.⁷² Testifying experts in this case agreed that money or investments may be considered “property.”⁷³ These costs are an expansion of Aqua’s Property project investment property

⁶⁹ See Docket No. 45329, Final Order (March 22, 2016). Aqua notes it disagrees with the Commission’s interpretation of “receiving service” in TWC §13.254(a-5) for reasons stated in its pleadings in Docket No. 45329, including the broad definition of “service” in TWC §13.002(21).

⁷⁰ TWC §13.254(g); 16 TAC §24.113(k).

⁷¹ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted); Ex. AT-B, at 12 (Blackhurst Direct); Ex. AT-C, at 12 (Korman Direct); Ex. AT-1, at Aqua 000006; see also Section III.A. discussion of “Definition of Property” and authorities cited therein, *supra.*; TWC §13.254(g); 16 TAC §24.113(k).

⁷² Ex. AT-A, at 10-11 (Waldock Direct); Ex. AT-C, at 12 (Korman Direct); Ex. AT-1, at Aqua 000006.

⁷³ Ex. AT-C, at 10-11 (Korman Direct); Tr. at 131 (Korman Testimony); Tr. at 68 (Waldock Testimony); Tr. at 22, 24 (Jones Testimony).

that will be stranded without just and adequate compensation under TWC §13.254(g) and are specifically mentioned within the compensation factors.⁷⁴

3. *Lost Economic Opportunity.*

Aqua reiterates that the reference to “property” in TWC §13.254(d) must be construed to include intangible property acquired through its investments while it held the CCN.⁷⁵ Thus, lost economic opportunity warrants consideration as TWC §13.254(d) property under the “other relevant factors” prong of TWC §13.254(g) and other applicable law.⁷⁶ Given the “other relevant factors” language in TWC §13.254(g) and the absence of a “property” limit by definition in TWC §13.254(d) or otherwise, the Commission is free to consider any issue relevant to just and adequate compensation for property rendered useless or valueless by the decertifications.⁷⁷ Aqua does not read TWC §13.254(g) to place a limit on what is considered “property” under TWC §13.254(d) or what the full range of relevant considerations might be.⁷⁸ Rather, the TWC §13.254(g) factors serve as a non-exclusive guide in an effort to ensure that all “property” and relevant issues are considered to make the

⁷⁴ Ex. AT-A, at 10-11 (Waldock Direct); Ex. AT-B, at 13-14 (Blackhurst Direct); Ex. AT-C, at 12 (Korman Direct); Ex. AT-1, at Aqua 000006; TWC §13.254(g); 16 TAC §24.113(k).

⁷⁵ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted); Ex. AT-B, at 12 (Blackhurst Direct); Ex. AT-C, at 12-14 (Korman Direct); Ex. AT-1, at Aqua 000006-000008; see also Section III.A. discussion of “Definition of Property” and authorities cited therein, *supra.*; TWC §13.254(g); 16 TAC §24.113(k).

⁷⁶ *Id.*

⁷⁷ TWC §13.254(d), (g); 16 TAC §24.113(h), (k).

⁷⁸ *Id.*

decertified utility whole.⁷⁹ TWC §13.254(d) has not changed since adoption and revisions to TWC §13.254(g) in 2005 did not provide any such limits.⁸⁰

Aqua's lost economic opportunity is an intangible property interest Aqua acquired through its investments in the Property project within a high growth corridor in Denton County.⁸¹ This was not a speculative venture given all the developer negotiations and agreements over the years and market activity in the area.⁸² This property interest existed separate and apart from the CCN itself which may be revoked under certain conditions according to legal provisions that existed prior to inclusion of the property compensation language in TWC §13.254 and 16 TAC §24.113 (previously 30 TAC §291.113).⁸³ Aqua's investments bought it the reasonable expectation to make money from its project within the Property that is now lost due to the decertifications. Obtaining the CCN was simply a necessary piece of the project.

⁷⁹ *Id.*; see also Ex. AT-B, at 10-12 (Blackhurst Direct) (discussing how TNRCC Staff viewed the statute when writing implementation rules at 30 TAC §291.113 (now found at 16 TAC §24.113) following Tex. S.B. 1, 75th Leg., R.S. (1997)).

⁸⁰ Ex. AT-B, at 10-14 (Blackhurst Direct); Tex. H.B. 2035, 70th Leg., R.S. (1987); Tex. S.B. 1, 75th Leg., R.S. (1997); Tex. H.B. 2876, 79th Leg., R.S. (2005). The Commission rules provide no such limits either. 16 TAC §24.113(h) and (k).

⁸¹ Ex. AT- A, at 6-11 (Waldock Direct); Ex. AT-C, at 12-14 (Korman Direct); Ex. AT-D, at 1-2 (Korman Rebuttal); Ex. AT-1, at Aqua 000006-000008.

⁸² *Id.*

⁸³ *Id.*; see also Ex. AT-B, at 8-14 (Blackhurst Direct); Tex. S.B. 1, 75th Leg., R.S. (1997). Language in the applicable CCN rules stating that a certificate is not a "vested right" pre-dates the compensation provisions which were added later. Compare 20 Tex. Reg. 6080, at 6104 (August 11, 1995) (proposed 30 TAC §291.113) and 21 Tex. Reg. 114 (January 2, 1996) (adopting proposed 30 TAC §291.113 without changes to be effective January 10, 1996); with 23 Tex. Reg. 10818, at 10836-10837 (October 23, 1998) (proposed amendments to 30 TAC §291.113) and 24 Tex. Reg. 738 (February 5, 1999) (adopting proposed amendments to 30 TAC §291.113 without changes to be effective February 4, 1999).

During the hearing, Aqua's expert discussed his reasoning for viewing a lost economic opportunity interest as property and commented on the fact that sometimes this type of property interest may be part of a compensation award in eminent domain cases.⁸⁴ Mr. Korman mentioned a concept called "entrepreneurial profit" which is sometimes applied to income producing properties⁸⁵ Mr. Korman did not state that lost profits are universally permitted in eminent domain cases. In *State v. Central Expressway Sign Associates* ("CESA"),⁸⁶ the Texas Supreme Court explained the rule as follows:

Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property; and (2) when only a part of the land has been taken, so that lost profits may demonstrate the effect on the market value of the remaining land and improvements. Absent one of these two situations, income from a business operated on the property is not recoverable and should not be included in the condemnation award. Courts have applied this rule for two reasons: first, because profits from a business are speculative and often depend more on the capital invested, general market conditions, and the business skill of the person conducting it than it does on the business's location; and second, because only the real estate and not the business has been taken and the owner can presumably continue to operate the business at another location.⁸⁷

In *CESA*, the court ultimately held that in that billboard property case, evidence of valuation based on advertising income should not be allowed on remand, but "[g]eneral estimates of what the property would sell for considering its possible use as a billboard site are

⁸⁴ Ex. AT-C, at 12-14 (Korman Direct); Tr. at 104-107, 115-127, 130-131 (Korman Testimony).

⁸⁵ Tr. at 119-121 (Korman Testimony).

⁸⁶ *State v. Central Expressway Sign Associates*, 302 S.W.3d 866 (Tex. 2009).

⁸⁷ *Id.* at 871 (citations omitted).

acceptable.”⁸⁸ This is how the issue would be handled in a Chapter 21 eminent domain case involving real property.

Some of the condemnation law exceptions to the general rule could be viewed as comparable to the situation here. Aqua finds this situation akin to a partial taking of real property in which the impact on the remainder is valued and may include lost profits or business income.⁸⁹ But Aqua also finds the situation the Legislature has dealt, permitting property owners to opt out of a CCN to gain service from a nearby municipality, like a condemnation action to take-over a utility business as a going concern.⁹⁰ When a governmental entity condemns an entire utility system for the purpose of taking it over and continuing its operation by the governmental entity, then the United States Supreme Court has recognized that the utility owner is entitled to be compensated for loss of the going-concern value of the utility system despite the general rule against including such value in a condemnation award.⁹¹ Unlike other businesses, utility systems cannot simply re-locate their business since “a utility cannot ordinarily be operated profitably except as a monopoly” and “[i]f, in such case, the taker acquires going-concern value, it must pay for it” as “the taker fully occupies the owner’s shoes.”⁹² Aqua continues to operate in other portions of

⁸⁸ *Id.* at 874.

⁸⁹ *Id.* at 871.

⁹⁰ *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 683-685 (Tex. App.–Fort Worth 2014, no pet.) (discussing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12-15, 69 S. Ct. 1434, 1440-42, 93 L.Ed. 1765 (1949) and *Omaha v. Omaha Water Co.*, 218 U.S. 180, 203, 30 S. Ct. 615, 620, 54 L. Ed. 991 (1910)).

⁹¹ *Id.*

⁹² *Id.* (quoting *Kimball Laundry Co.*, 338 U.S. at 12-13, 69 S. Ct. at 1441-42).

its CCN service areas, but cannot relocate its specific business endeavors undertaken within the Prosper Point Property because they were specific to that location.

Nevertheless, this matter is not a real property condemnation proceeding.⁹³ Thus, the aforementioned rules do not specifically apply here. Aqua's lost economic opportunity property interest is personal in nature and Aqua does not claim real property was rendered useless or valueless by the decertifications. If that were the case, TWC §13.254(g) would require valuation of real property according to Texas Property Code, Chapter 21.⁹⁴

The Legislature has placed Aqua in a peculiar position. It has permitted the regulatory authority to grant Aqua CCN areas which Aqua reasonably relied upon in making its investments to make money and in furtherance of its CCN obligations. But the Legislature later revised the law to permit CCNs to be taken away with ease so that another retail public utility may step into Aqua's shoes as the service provider.⁹⁵ Under the Commission's application of "receiving service" for TWC §13.254(a-5) purposes, the possibility exists for decertification after an entire system is planned, permitted, designed, or even built if not yet active.⁹⁶ The fact that the ability to take away CCNs is now tied to non-utility real property ownership means the taking will be partial in most instances and rarely involve physical

⁹³ *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 683 Tex. App.—Fort Worth 2014, no pet.)

⁹⁴ TWC §13.254(g).

⁹⁵ Tex. H.B. 2876, 79th Leg., R.S. (2005).

⁹⁶ *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) (Final Order).

property within the decertified area since active service would preclude such actions.⁹⁷ Thus, a unique area of the law now exists. What should the Commission do with Aqua’s lost economic opportunity property interest?

*City of Blue Mound v. Southwest Water Co.*⁹⁸ provides an answer. That court held “the Texas constitution requires that a taking for public use must be compensated, and if what is taken is not compensable under Texas’s general condemnation statutes, then some specific statute or mechanism must exist authorizing compensation for that taking.”⁹⁹ The Texas condemnation statutes do not generally permit compensation for personal property separate from realty.¹⁰⁰ Thus, TWC §13.254(d) and (g) and the Commission’s implementing rules comprise the mechanism that prevents TWC §13.254(a-5) from taking, damaging, or destroying private property without just and adequate compensation in violation of the Texas constitution.¹⁰¹ Plainly, when this process was first adopted, there was concern about compensating “a retail public utility for the taking, damaging, or loss of personal property, including the retail public utility’s business.”¹⁰² The fact that this language is no longer in

⁹⁷ Ex. AT-B, at 12-13 (Blackhurst Direct); Tr. at 36-37 (Jones Testimony).

⁹⁸ *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.—Fort Worth 2014, no pet.) (discussing *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799, 799-806 (Tex. 1936) and its application in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996) and *Texas Building Owners and Managers Association, Inc. v. Public Utility Commission of Texas*, 110 S.W.3d 524 (Tex. App.—Austin 2003, pet. denied)).

⁹⁹ *Id.* at 689.

¹⁰⁰ *Id.* at 683.

¹⁰¹ TWC §13.254(a-5), (d), and (g); 16 TAC §24.113(h), (k), and (r).

¹⁰² Tex. S.B. 1, 75th Leg., R.S. (1997) (adopting first version of what is now TWC §13.254(g)); Ex. AT-B, at 8-12 (Blackhurst Direct). The statute also previously specifically required consideration of “the impact on future revenues and expenses of the retail public utility”. *Id.*

TWC §13.254(g) does not eliminate lost business or lost economic opportunity as an intangible property interest for which compensation is required. Aqua finds these lost property rights to be a highly “relevant factor” that requires consideration under TWC §13.254(d) per current TWC §13.254(g).¹⁰³ Aqua possessed that property and now it does not due to the decertifications.¹⁰⁴ The implementing Commission rules do not limit such considerations in terms of either the definition of “property” or determining compensation.¹⁰⁵ Just and adequate compensation to Aqua must be provided for this property to prevent an unconstitutional taking, damaging, or destruction of same. The first step is Commission recognition that these rights comprise “property.”

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

As with the term “property,” the Legislature has left the terms “useless” and “valueless” undefined and their plain meaning must be applied.¹⁰⁶ “Useless” means “having or being of no use.”¹⁰⁷ “Value” in relevant context means “the monetary worth of something” and “valueless” would mean without same.¹⁰⁸ Importantly, however, this

¹⁰³ The Commission is required to consider “other relevant factors” in determining just and adequate compensation for property rendered useless or valueless by a decertification. TWC §13.254(g); 16 TAC §24.113(k).

¹⁰⁴ Ex. AT-C, at 12-13 (Korman Direct); Tr. at 55 (Jones Testimony).

¹⁰⁵ 16 TAC §24.113(h), (k).

¹⁰⁶ See *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994).

¹⁰⁷ “Useless.” *Merriam-Webster.com*. Merriam-Webster, 2016. <http://www.merriam-webster.com/dictionary/useless> (October 28, 2016).

¹⁰⁸ “Valueless.” *Merriam-Webster.com*. Merriam-Webster, 2016. <http://www.merriam-webster.com/dictionary/valueless> (October 28, 2016).

language was derived from takings jurisprudence which allows *part* of a property to be rendered useless or valueless and taken.¹⁰⁹

Indeed, partial takings in eminent domain cases are common where damages to the remainder are awarded.¹¹⁰ But compensation is also required for personal property taken, damaged, or destroyed by the government for public use and these terms are often used synonymously.¹¹¹ Absent a taking, dependent on a transfer of property rights, the Texas Supreme Court has held that “one could recover damages by proof that [property] was inflicted with special injury such as will ‘practically deprive him of the ordinary use and enjoyment of it’” and that a damage means “every loss or diminution of what is a man’s own, occasioned by the fault of another.”¹¹² This is the proverbial “bundle of sticks” often used to describe property rights.¹¹³ As the “useless” or “valueless” terms are used in TWC §13.254(d), they must be read in conjunction with TWC §13.254(g) and the decertification procedures found elsewhere in TWC §13.254.¹¹⁴

¹⁰⁹ *Chicago, R.I. & G.R. Co. v. Tarrant County Water Control & Improvement Dist.*, 123 Tex. 432; 73 S.W.2d 55, at 60-61 (Tex. 1934) (holding that submerged portion of property warranted compensation for damages).

¹¹⁰ TEX. PROP. CODE §21.042(c)-(d) (addressing damage assessments in an eminent domain proceeding where a portion of a tract or parcel of real property is condemned); *see also* Ex. AT-C, at 13-14 (Korman Direct); Tr. at 124 (Korman Testimony).

¹¹¹ *Steele v. Houston*, 603 S.W.2d 786, 788-793 (Tex. 1980); *see also* Tex. S.B. 1, 75th Leg., R.S. (1997) (adopting first version of what is now TWC §13.254(g) that included similar language); Ex. AT-B, at 8-12 (Blackhurst Direct).

¹¹² *Steele v. Houston*, 603 S.W.2d 786, 789-790 (Tex. 1980).

¹¹³ Ex. AT-C, at 12-14 (Korman Direct); Tr. at 22 (Jones Testimony).

¹¹⁴ TWC §13.254.

TWC §13.254 sets up a process whereby partial CCN areas may be taken from retail public utilities.¹¹⁵ Consequently, even if not specifically transferred to the new retail public utility, corresponding property interests are damaged in varying degrees necessitating compensation under the constitution.¹¹⁶ Partial CCN area transfers will be the general rule and not the exception as demonstrated by the allocable compensation factors in TWC §13.254(g).¹¹⁷ Property owners seeking expedited release from CCNs will not ordinarily own property matching a utility's entire CCN.¹¹⁸ But such owners can potentially own enough land to cause significant stranded investments to go to waste or be underutilized to the detriment of a decertified CCN holder and its remaining customers.¹¹⁹ Thus, the “useless” or “valueless” terms should not be interpreted in such a way as to preclude compensation for taking, damaging, or destruction of apportioned personal property rights from CCN holders

¹¹⁵ See, e.g., TWC §13.254 (a-5); .

¹¹⁶ TWC §13.254(g); Ex. AT-B, at 12-13 (Blackhurst Direct); Ex. AT-1, at Aqua 000005-000008.

¹¹⁷ *Id.* For example, “the amount of any expenditures for planning, design, or construction of service facilities that are *allocable* to service to the area in question.” TWC §13.254(g) (emphasis added).

¹¹⁸ See, e.g., Ex. AT-1, at Aqua 000348-000352 (Aqua's Water Utility Tariff for North Region) and 000391 (Aqua's Sewer Utility Tariff for North Region) (collectively listing multiple Aqua water and sewer systems in various North Texas counties).

¹¹⁹ This may be why one of the compensation considerations is “any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification.” TWC §13.254(g).

as required by the Federal and State constitutions.¹²⁰ This is a “relevant factor” to consider in determining compensation.¹²¹

In sum, the application of these terms from a constitutional perspective is more important than their plain meaning for assessing what has happened to a decertified CCN holder’s property interests. Thus, apportioned property rights may properly be viewed as rendered useless or valueless under TWC §13.254(d).

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

Aqua contends that all the items identified or described in the Aqua Appraisal Report as property were rendered useless or valueless to Aqua as a result of the decertifications in Docket No. 45329.¹²² As previously discussed, the three items include: (1) Aqua’s Property planning, design, and permitting investments; (2) Aqua’s money spent on necessary and reasonable legal expenses and professional fees incurred in Docket No. 45329 and this docket; and (3) Aqua’s lost economic opportunity property interest it had prior to the Property decertifications.

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

All the investments Aqua made in planning, design, and permitting for the Property are now stranded costs.¹²³ In particular, Aqua did not obtain and maintain its wastewater

¹²⁰ U.S. CONST. AMEND. V (“ . . . nor shall private property be taken for public use, without just compensation.”); TEX. CONST. Art. I, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .”); *see also Steele v. Houston*, 603 S.W.2d 786, 788-93 (Tex. 1980).

¹²¹ TWC §13.254(g).

¹²² *Id.*

¹²³ Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-C, at 8-13 (Korman Direct); and Ex. AT-1, at Aqua 000005-000006.

permit for any other purpose but to serve the Property.¹²⁴ After the CCN decertifications in Docket No. 45329, Aqua determined it would not pursue renewal of its wastewater water quality permit with the TCEQ in 2016 as it was rendered useless to Aqua.¹²⁵ The permit officially expired on October 1, 2016.¹²⁶

This matter was not in dispute when Celina filed the Celina Report earlier in this docket recommending providing compensation to Aqua for this item.¹²⁷ The Commission's third-party report also recommended compensation for this item.¹²⁸ Thus, Aqua initially thought all parties were on the same page with respect to this issue. Regardless, Aqua should receive just and adequate compensation for the previously described lost planning, design, and permitting property rendered useless or valueless by the decertifications in Docket No. 45329.

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

All Aqua's money spent on necessary and reasonable legal expenses and professional fees represent property rendered useless or valueless to Aqua as a result of the decertifications in Docket No. 45329.¹²⁹ They also represent continuation of its Prosper Point

¹²⁴ Ex. AT-A, at 7-11 (Waldock Direct); PUC Staff Ex. 1.

¹²⁵ Ex. AT-A, at 10 (Waldock Direct); Ex. AT-5.

¹²⁶ Ex. AT-1, at Aqua 000260 (Aqua's Renewed TCEQ TPDES WQ Permit issued January 31, 2012).

¹²⁷ Ex. AT-2; Ex. CEL-102.

¹²⁸ Ex. AT-3.

¹²⁹ Ex. AT-A, at 10-11 (Waldock Direct); Ex. AT-B, at 13-14 (Blackhurst Direct); Ex. AT-C, at 12 (Korman Direct); Ex. AT-1, at Aqua 000006; TWC §13.254(g); 16 TAC §24.113(k); *see also* Tr. at 47-48, 55 (Jones Testimony).

project costs now stranded.¹³⁰ Aqua did not initiate this proceeding, but was compelled to defend itself against and be made whole for the decertifications given the time and expense it put into the Property project over the years.¹³¹

This is another issue that was not disputed initially when Celina filed the Celina Report earlier in this docket recommending providing compensation to Aqua for this item.¹³² The Commission's third-party report also recommended compensation for this item.¹³³ Regardless, Aqua should receive just and adequate compensation for this monetary lost property interest related to legal expenses and professional fees rendered useless or valueless by the decertifications in Docket No. 45329.¹³⁴

3. *Lost Economic Opportunity.*

There is no dispute that Aqua can no longer operate within or gain income from retail water or sewer utility service within the Prosper Point tract.¹³⁵ Thus, to the extent the Commission agrees with Aqua about the existence of its lost economic property interest, it must find it was rendered useless or valueless to Aqua by the decertifications in Docket No.

¹³⁰ *Id.*

¹³¹ *Id.*; see also Ex. AT-3. Aqua has lost significantly more money from the decertifications than the other parties have identified. Compare Ex. AT-1, with Ex. AT-2 and Ex. AT-3.

¹³² Ex. AT-2; Ex. CEL-102.

¹³³ Ex. AT-3.

¹³⁴ Aqua notes that the value for this item will be much more than previously reported in Ex. AT-1 due to the new hearing procedures adopted after Aqua filed its report and which are ongoing.

¹³⁵ Ex. AT- A, at 6-11 (Waldock Direct); Ex. AT-C, at 12-14 (Korman Direct); Ex. AT-D, at 1-2 (Korman Rebuttal); Ex. AT-1, at Aqua 000006-000008.

45329. This interest was unique to the Property and did not exist with respect to any other Aqua CCN areas that it continues to serve. Aqua should receive just and adequate compensation for this lost property interest rendered useless or valueless by the decertifications in Docket No. 45329.

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

The Aqua Appraisal Report is the only filed report that contains a complete assessment by a licensed appraiser of all the property rendered useless or valueless by the decertifications in Docket No. 45329.¹³⁶ The other two filed reports were not prepared by licensed appraisers and are incomplete in terms of their identification of property rendered useless or valueless to Aqua as a result of the decertifications in Docket No. 45329.¹³⁷ However, no report identifies non-property items.¹³⁸

V. CONCLUSION

Aqua respectfully requests the Honorable Administrative Law Judges find and recommend that the Commission determine: (1) all property items described in the Aqua Appraisal Report are in fact property and was rendered useless or valueless to Aqua Texas, Inc. by the CCN decertifications in Docket No. 45329; (2) City of Celina must provide just and adequate compensation to Aqua for these property items before commencing service

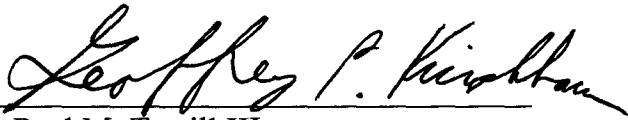
¹³⁶ Ex. AT-1.

¹³⁷ Ex. AT-2; Ex. CEL-102; Ex. AT-3.

¹³⁸ Ex. AT-1; Ex. AT-2; Ex. CEL-102; Ex. AT-3.

within the decertified areas; and (3) a second hearing must be held to determine the just and adequate compensation owed to Aqua by Celina.

Respectfully submitted,

By: 

Paul M. Terrill III
State Bar No. 00785094
Geoffrey P. Kirshbaum
State Bar No. 24029665
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**

CERTIFICATE OF SERVICE

I hereby CERTIFY that on October 28, 2016, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

Andrew Barrett
BARRETT & ASSOCIATES, PLLC
3300 Bee Cave Road, Suite 650 #189
Austin, Texas 78746

via email

David Tuckfield
THE AL LAW GROUP, PLLC
12400 West Highway 71
Suite 350-150
Austin, Texas 78738

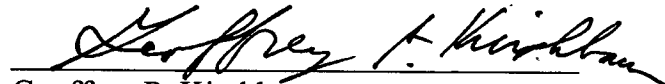
via fax to: (512) 366-9949

ATTORNEYS FOR CITY OF CELINA

Erika Garcia
Public Utility Commission of Texas
1701 N Congress PO Box 13326
Austin, Texas 78711-3326

via fax to: (512) 936-7268

ATTORNEY FOR COMMISSION STAFF


Geoffrey P. Kirshbaum



Senate Committee Meeting on HB 2035 (70th Leg., R.S. 1987)

28:50

Parmer: Now I am going to go back to the start of the order of business, members, and lay out HB 2035 and recognize its House Sponsor, Representative Hinojosa.

Hinojosa: Thank you Mr. Chairman and Committee Members. HB 2035 deals with a problem that is not only unique to South Texas, but is probably in many municipalities throughout the State where they continue to grow they run into a problem of a water supply corporations have been given a certification over a certain area to provide water services. Unfortunately as the city grows, many times the water supply corporations are unable to provide the necessary services, necessary water to the new residents as the territory that is being annexed by the city. And many times they cannot work out their differences, and they end up in court. What this bill does, it allows for the city to provide water in those areas, and provides a procedure where the water supply corporation and the city can work out their differences and at the same time have the water supply corporation compensated for any bond indebtedness that it may have or for any other property that it may lose because the City going into the certified area and provided water.

That is basically what this bill does Mr. Chairman and Committee Members. And I have an amendment basically to exempt your retail public utilities. I would be glad to answer any questions that anyone might have.

Parmer: Are there any questions for Mr. Hinojosa? Senator Barrientos?

Barrientos: Um, I want to point out the amendment. I want to ask you to go over that again.

Hinojosa: Let me be more specific, Senator Barrientos. The City of McAllen, for example, is one of the fastest growing cities in the State of Texas, and as we continues to grow, we run into problems in that where a certain water supply corporation has been given a certification in large area to provide water services. However, they do not have the capability to

provide those water services. So that we have many people who have homes without water. And some of those homes, when they catch fire, there's no water to put out the fire. Because of the inability of the water supply corporation to provide that water. And the City of McAllen has the ability, has the capital to provide those water services, but because that area has been certified to the water supply corporation, City of McAllen cannot go in there and lay the water lines and provide the water services. Consequently, usually you have to file a lawsuit and end up with the Court through long proceedings that can take 3 or 4 or 5 years. I'll give you an example, it took me 5 years to get water in an area that was certified to the water, to Sharlett Water Supply Corporation.

Barrientos: Why?

Hinojosa: Because that area was certified to the Sharlett Water Supply Corporation.

Barrientos: And the City had the ability to provide that water?

Hinojosa: That is correct.

Barrientos: But did not do it.

Hinojosa: They couldn't. Because by law that area is certified to the water supply corporation and not the City of McAllen.

Barrientos: Only by law. . .

Hinojosa: And the water supply corporation refused to allow the City of McAllen to go in there and provide those services. So the City of McAllen had to file a lawsuit. And, what this bill does, it has been worked out, it is an agreement. It's an agreed bill between the municipalities and the water supply corporation association to put in place a procedures to work out this type of problem. And now in those areas where the City is certified to provide water to the same areas as the water supply corporation it provides for proper, proper compensation to the water supply corporation for any amount of indebtedness that they might have.

Barrientos: Do you foresee, in any way shape or form any more amendments coming to this bill?

Hinojosa: I hope not, but you know it is kind of hard to predict what is going to happen up here.

Barrientos: I understand things go bonkers in the last week, but in your considered opinion will there be any coming?

Hinojosa: No sir.

Barrientos: Alright, do you want to lay this out?

Hinojosa: Please.

Parmer: Senator, you have an amendment? Senator Barrientos sends up committee amendment number one. He will explain the amendment.

Barrientos: What he just said Mr. Chairman, you want to do it again?

Parmer: No

Barrientos: Section only applies in case where the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is not a public water supply.

Parmer: Is there objection to adoption of the amendment? The Chair hears none. The amendment is adopted. Members are there any other questions for Representative Hinojosa? Senator Armbrister?

Armbrister: Representative Hinojosa, isn't there now, or hasn't there recently been a 5th Circuit Federal Court Opinion on the cities' authority to annex rural water corporations as you are proposing to do, and they ruled against this?

Hinojosa: I am not aware of that, Senator Armbrister. I do know that most of the rural water supply corporations are non-profit and receive federal funds to expand their capabilities. So that may have been a factor. So what

happens is they have to be compensated for bond indebtedness to any debt that they might have to the federal government. I would imagine that if the cities could annex the water supply corporation it would be the main reason, and the federal monies that are involved in the investment of the water supply corporation.

Armbrister: As I understand, I am trying to get the whole gist of your bill. If you've got a rural water supply corporation out there, and the City annexes that area, what happens in effect to that rural water supply corporation?

Hinojosa: Well, the problem is that many times the area that is annexed even though it is certified to the water supply corporation, it's not being supplied with water because the water supply corporation does not have the capability of doing so. So that area that is annexed goes without water, and basically stops the growth of that particular city. And then the city goes to try and negotiate with the water supply corporation, and quite frankly, you have a lot of rural water supply corporations who do not wish to negotiate or cooperate with the municipality in trying to resolve this problem. And they end up in court. And what this bill does it tries to provide for an orderly, logical procedure for them to work out their differences and for the water supply corporation to get compensated for any of its debt or any of its property through a neutral party, and that is the Water Commission.

Parmer: Mr. Hinojosa, I think, as I understand it, this is a bill that you and Senator Uribe have been working on to try and deal with, in part, the Colonias problem down in your part of the State. Is that, is that correct?

Hinojosa: That's correct, Senator Parmer.

Parmer: These are the areas, I don't know how many of the Committee members have been to South Texas and have visited some of these developments where there is no water, there are no streets, there is no sewage, and people are trying to bring their kids up in probably the most abject conditions that exist in the State of Texas today, and I have had opportunity to, opportunity, if that is the right word, to make that trip, and I commend you for your effort in trying to deal with what is really a serious problem in the Texas.

?????? Senator, the Natural Resources Committee did have a hearing on this.
We did not go down there, but we did go over, very thoroughly, and it
is certainly a problem.

Parmer: Are there um, any other questions set for Representative Hinojosa?

End 37:00