Control Number: 45848

Item Number: 52

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

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2016 NOV 14 PM 12:48
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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	§ § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

CITY OF CELINA'S

REPLY BRIEF

The City of Celina (the "City") files this, its Reply Brief, in the above-styled matter. Nothing provided in the Briefs filed by the other parties should result in a finding that there was any property that was rendered useless of valueless in this proceeding. In support thereof the City would respectfully show as follows:

I. INTRODUCTION

Aqua's asserts that it deserves "just and adequate compensation." It fails to acknowledge, however, that in this case the legislature defined the compensation to which it might be entitled. Although "legilslative revisions" might change that determination, the legislation that is currently before the Public Utility Agency simply does not provide the relief Aqua seeks. Under the current statute applicable to this case, spending money on planning costs simply does not give rise to a constitutionally-protected right to profits.[1]

II. PROCEDURAL BACKGROUND

No Reply is warranted for this section.

[1] Even Mr. Korman acknowledged that in a condemnation case involving a store such as Wal-Mart, that "you wouldn't consider the sales that occurred at Wal-Mart." TR. 121:24-25.

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

A. Definition of Property

The State of Texas granted Aqua a right and obligation to serve water and wastewater in a defined area. The State of Texas found that Aqua did not provide service to part of that area. The State of Texas revoked that right and obligation for Aqua to serve the un-served area. Aqua had and has no rights other than what the State of Texas provided and what the State of Texas revoked.

Taking a strained and contorted approach to attempt to define property in such a way that there are no limits, Aqua ignores some basic issues. Aqua sums its argument on the bottom of P. 5 and top of P. 6 of its Initial Post Hearing Brief and seems to claim that holding a CCN and thinking that they were going to make money off the CCN somehow equates to a property right. Yes, Aqua spent some time and money planning but made no improvements to serve the 128 acres.

However broadly "property" might be defined, Aqua ignores that the Legislature and the Public Utility Commission has specifically identified certain things that are not property and do not create property rights– namely wastewater permits and CCNs.[2]

Further, Aqua continues to conflate factors that are to be used to "value" personal property with the question of what constitutes personal property. The plain terms of the statute

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

require application of the factors to valuing personal property.[3] According to the statute, one must first identify property, and then use the factors to value that property.[4]

Next, just because property may include "intangible property" such as money or investments does not mean that lost profits or a wastewater permit is, in fact, property. The City agrees that intangible property associated with facilities that actually served the property might warrant compensation, but as Mr. Jones, testified that compensation turns on the existence of physical assets dedicated to serving the decertified area.[5]

Although Texas Water Code § 13.254(d) may not have changed, Section 13.254(g) has changed, and was discussed in the City's Closing Arguments.[6] Further, Texas Water §13.254(e) clarifies that monetary compensation is not to be paid unless there has been property rendered valueless or useless. Finally, Aqua seems to ignore that Texas Water Code §13.254(d) states "property" and not "property interest".

Finally, even Mr. Korman admitted that the Uniform Standards of professional Appraisal practice may be a useful tool to value property, but it does nothing to identify property.[7]

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

Aqua asserts in its legal argument that only a licensed appraiser may render an opinion on the identity and value of personal property.[8] Mr. Hornsby, however, made clear that in the state of Texas a person need not be a licensed appraiser to conduct an appraisal of personal property.[9]

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[3] Texas Water Code § 13.254(g).
[4] It should be noted that both Mr. Blackhurst and Mr. Waldock admitted not being experts on determining what is or isn't property. Tr. 68:13-15 and 76:22-23.
[5] CEL100, 16:9-12.
[6] City of Celina's Closing Arguments at 15-21. The City also notes that Aqua, in its Initial Post-Hearing Brief asserts that Mr. Blackhurst was an expert "on the legislative history and implementation of TWC § 13.254. . . . " Mr. Blackhurst, however was never qualified as or even proffered as such an expert.
[7] TR. 97: 15-25.
[8] Aqua's Initial Post-Hearing Brief at 10-12. Real property is not at issue in this case.
[9] TR. 149:23 to 150:8.

Even Mr. Korman stated that he would "not necessarily" discount an appraisal that was prepared in this case that was not prepared by a licensed appraiser.[10] This reading is consistent with Texas Water Code Section 13.254(g), which would require the appraisal to follow the Property Code Eminent Domain procedures if real property were involved. Finally, the appraisals that were prepared by engineers were properly admitted into evidence and were not excluded or even objected to.

Aqua's assertion, therefore, that Mr. Korman's appraisal is the "sole source of proper property identification" is simply wrong.

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

Both Aqua and Staff ignore in their briefs the most salient point on whether expenditures for the wastewater permit constitute property subject to recovery: The Legislature has clearly stated at TWC §26.029(c) that "a permit does not become a vested right in a permittee." When the Legislature speaks so directly and unambiguously, the matter is resolved.[11] Permit No. WQ0014234001, by itself without any plants, lines or other wastewater related improvements, is, by law, not property.

2. Necessary and reasonable legal expenses and professional fees

As discussed in it Closing Arguments, legal fees are clearly costs, but they could not be said to be property belonging to the utility that is rendered useless or valueless.[12] Aqua

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[10] TR. 88:20-24.

[11] *See e.g. City of Friendswood v. Horn*, 489 S.W.3d 515, 523 (Tex. App. – Houston [1st Dist.] 2016, no pet.) (when attempting to determine whether an activity was a governmental or proprietary function, the court stated "because the Legislature has designated these activities to be governmental functions, their character as governmental functions is conclusively established").

[12] CEL100, 8:1-3 and 19:1-6.

continues to confuse the question of what constitutes property with the § 13.254(g) factors that are used to value property once it is identified.

3. Lost Economic Opportunity

Aqua states that the "Legislature has placed Aqua in a peculiar position."[13] Regardless of whether Aqua's position in peculiar, it is true that the legislature has placed Aqua in the position in which it finds itself. Aqua utterly failed to address the position in which Aqua was clearly placed by the Legislature. First, there is simply no support for Aqua's position that dashed hopes of future revenue somehow equates to property. As stated, Aqua's sole claim is based on the State of Texas granting them the right and obligation to serve the area. This right to serve is not a property right and it can be revoked.[14] The only property is what Aqua may have installed and any intangible matters related to those improvements. Second, Aqua's position is defined by statutory construction principles that the City raised in its Closing Argument but ignored by Aqua in its closing brief.[15] The City will not repeat these arguments here, but reminds the ALJs that the Legislature specifically limited the impact on "future revenues lost" to those lost "from existing customers."[16] The Legislature has already decided that Aqua does not receive future revenues from future customers. To accept Aqua's position would be to ignore basic principles of statutory construction.

Aqua cites *State v. Central Expressway Sign Associates*, 302 S.W.2d 866, 874 (Tex. 2009) as support for the proposition that "[g]eneral estimates of what the property would sell for considering its possible use as a billboard site are acceptable." In that case, however, there was

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[13] Aqua's Initial Post-Hearing Brief at 22.
[14] See, 16 TAC §§24.113(a) and 24.116.
[15] These arguments were well known prior to the Closing Arguments because the City had earlier filed these arguments in its Motion for Summary Decision.
[16] See The City of Celina's Closing Argument at 15-21.

an actual facility (a billboard) on the property.[17] There are no actual physical facilities on the property at issue here. The Court did not consider the value of an empty plot of land upon which a speculator someday hoped to build a billboard – the billboard had been built. Further, the court did not say that lost profits were available, but simply that the value could consider the use to which the property was actually put.[18] The fact that there were no facilities serving any customers is a critical distinction between the situation at issue here and any of the cases cited by Aqua.

Aqua's discussion on the bottom of page 23 and on page 24 of its Initial Post Hearing Brief is simply, in a word, incorrect. The fact that the Legislature removed all language related to compensating a decertificated utility for future revenues, the process for compensating for future customers, for the impact on the utility's business, etc. is a clear manifestation of the Legislature's intent not to include lost business or lost economic opportunity as part of compensation. To hold otherwise would be to ignore clear and specific legislative actions. Further, PUC rules do not have to prohibit considering lost business or lost economic opportunity. Instead, the focus should be that neither the Texas Water Code nor PUC Rules authorize considering lost business or lost economic opportunity. To the contrary, the Texas Legislature removed all mention of compensating a utility for lost business or lost revenues from future customers. Thus, even if lost economic opportunity is considered property, which it is

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[17] Id. at 869-870.

[18] At page 871 of the opinion, the Court noted that Texas courts have refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success. *See, e.g., State v. Rogers*, 772 S.W.2d 559, 561-62 (Tex. App.--Amarillo 1989, writ denied) (refusing consideration of "going concern" and "goodwill" values of auto parts store that caters to and depends upon nearby businesses); *City of Austin v. Casiraghi*, 656 S.W.2d 576, 579-80 (Tex. App.--Austin 1983, no writ) (refusing to consider business income of well-located restaurant); *State v. Villarreal*, 319 S.W.2d 408, 410 (Tex. Civ. App.--San Antonio 1958, writ ref'd n.r.e.) (upholding exclusion of evidence of income generated by grocery store); *Marshall v. City of Amarillo*, 302 S.W.2d 943, 945 (Tex. Civ. App.--Amarillo 1957, no writ) (refusing to consider income generated by pawn shop).

not, Texas Water Code §13.254(g) would limit any compensation to revenue from existing customers.

D. Definition of "Useless or "Valueless"

Aqua's attempt to ignore the plain meaning of the words "useless or valueless" when there is no express definition of "useless or valueless" violates the first rule of statutory construction.[19]

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

Because there was no property, as discussed above and in the City's Closing Arguments, there is no reason to determine whether any property has been rendered useless or valueless.

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

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

[19] 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").

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CERTIFICATE OF SERVCE

I, David Tuckfield, attorney for the City of Celina, certify that a copy of this document was served on all parties of record in this proceeding on November 14, 2016 in the following manner:

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