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CITY OF CELINA'S NOTICE OF § BEFORE THE STATE OFFICES
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DECERTIFIED FROM AQUA TEXAS, §
INC. IN DENTON COUNTY § ADMINISTRATIVE HEARINGS

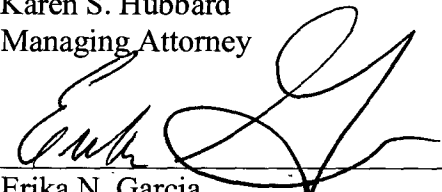
COMMISSION STAFF'S REPLY BRIEF

Respectfully submitted,

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**SOAH DOCKET NO. 473-16-5011.WS
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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	§ § § § §	BEFORE THE STATE OFFICES OF ADMINISTRATIVE HEARINGS
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COMMISSION STAFF'S REPLY BRIEF

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Reply Brief. Pursuant to SOAH Order No. 5, the deadline for reply briefs is November 14, 2016. Therefore, Staff's Reply Brief is timely filed. In support of its Reply Brief, Staff states the following:

I. INTRODUCTION

Staff continues to recommend that the only property that has been rendered useless or valueless to Aqua Texas, Inc. (Aqua) as a result of the decertification is TPDES Permit No. WQ0014234001 (Prosper Point wastewater permit), and that the City of Celina (Celina) and the independent third appraisal are limited to property rendered useless or valueless.

II. PROCEDURAL BACKGROUND

No reply.

**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)¹**

A. Definition of Property

In their initial briefs, all parties agree that the Texas Water Code (TWC) and the Texas Administrative Code (TAC) do not provide a definition for property.² Staff notes that its Initial Brief provided the only statutory definition for property, taken from the Texas Tax Code.³

¹ Preliminary Order at 3.

Aqua cites *State v. Public Utility Commission of Texas*⁴ to show the Texas Supreme Court's interpretation of "property" where the legislature did not provide an explicit meaning.⁵ Staff believes *State v. Public Utility Commission of Texas* provides valuable guidance in interpreting the definition of property, and that the Court's definition is consistent with the definition set forth by the Texas Tax Code.

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

In its Initial Brief, Celina asserts that its position is that the Prosper Point wastewater permit is not property.⁶ However, this remains inconsistent with Celina's Exhibit CEL-102, in which Celina witness Jason Jones concluded that "the value of the *property* associated with the Aqua Texas and Sewer Certificate of Convenience and Necessity considered in this evaluation is \$38,000," which included an award of compensation for the Prosper Point wastewater permit.⁷ Celina failed to clarify the apparent inconsistencies between its position and its evidence.

2. Necessary and reasonable legal expenses and professional fees

No reply.

3. Lost economic opportunity

No reply.

² See Aqua Texas, Inc.'s Initial Post-Hearing Brief at 5 (Oct. 28, 2016) (Aqua's Initial Brief); City of Celina's Closing Argument at 4 (Oct. 28, 2016) (Celina's Initial Brief); Commission Staff's Initial Brief at 5 (Oct. 28, 2016) (Staff's Initial Brief).

³ Staff's Initial Brief at 5.

⁴ 883 S.W.2d 190, 199-200 (Tex. 1994).

⁵ Aqua's Initial Brief at 6.

⁶ Celina's Initial Brief at 9.

⁷ Ex. CEL-102 at 003.

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

Celina argues that Aqua cannot be compensated for its Prosper Point wastewater permit since “wastewater permits, by themselves, do not become property of the permittee.”⁸ To support this contention, Celina cites TWC § 26.029(c), which provides that “a permit does not become a vested right in the permittee.” While Texas courts have specifically provided that a CCN is not a vested property right,⁹ Celina did not cite any case law to support its claim that “the State of Texas prohibits a wastewater permit from being property or a property right.”¹⁰

Staff agrees that a wastewater permit, like a CCN, is not a vested right. The plain language meaning of “vested” is something that is fully and unconditionally guaranteed, and not contingent.¹¹ The Prosper Point wastewater permit is not unconditional at all; the text of the permit itself provides that Aqua is authorized to treat and discharge wastes from the Prosper Point Wastewater Treatment Facility, “only according with effluent limitations, monitoring requirements, and other conditions set forth in this permit, as well as the rules of the Texas Commission on Environmental Quality (TCEQ), the laws of the State of Texas, and other orders of the TCEQ.”¹² The permit grants Aqua the right to treat and discharge wastes from its facility, but may be amended, suspended and reissued, or revoked for cause.¹³

Staff believes a wastewater permit is in some ways distinguishable from a CCN because its holder must pay a fee for both the issuance of the permit, and any subsequent renewals. A CCN holder does not pay for the issuance of a CCN, and is not required to renew a CCN unless the holder intends to amend the CCN by adding or removing service area.¹⁴

⁸ Celina’s Initial Brief at 10.

⁹ *Texas General Land Office v. Crystal Clear*, 449 S.W.3d 130, 145 (Tex. App- Austin 2014, pet. denied).

¹⁰ Celina’s Initial Brief at 11.

¹¹ See Merriam Webster.com Dictionary (accessed Nov. 20, 2016) (Vested: fully and unconditionally guaranteed as a legal right, benefit, or privilege); VESTED, Black’s Law Dictionary (10th ed. 2014) (Vested: Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute).

¹² Aqua Ex. AT-1 at Aqua 000308.

¹³ *Id.* at Aqua 000316; see 30 TAC Chapter 305, Subchapter D.

¹⁴ See generally 16 Tex. Admin. Code § 24.101-120 (TAC).

Finally, Staff notes that 30 TAC § 305.122(c) provides that a permit issued within the scope of Subchapter F of the TAC “does not convey any property rights of any sort, nor any exclusive privilege, and does not become a vested right in the permittee.” Subchapter F of the TAC relates to “Permit Characteristics and Conditions” and the applicability of the subchapter is to “establish the characteristics and standards for permits issued for injection wells including subsurface area drip dispersal systems, waste discharge, radioactive material disposal, and solid waste management, including sewage sludge.”¹⁵ Aqua’s Prosper Point wastewater permit was granted under the provisions of Chapter 26 of the TWC and Section 402 of the Clean Water Act,¹⁶ and it is not for an injection well; therefore it would not be a permit issued within the scope of 30 TAC § 305.122(c). However, Staff acknowledges that in *Domel v. City of Georgetown*,¹⁷ the Court of Appeals applied this provision to a similar wastewater permit, finding that “the permit language derived from the Administrative Code simply clarifies that granting a permit confers no property rights to the permittee.”¹⁸

2. Necessary and reasonable legal expenses and professional fees

Aqua argues that its legal expenses and professional fees are *costs* which are “an expansion of Aqua’s Property project investment property that will be stranded without just and adequate compensation under TWC § 13.254(g) and are specifically mentioned within the compensation factors.”¹⁹ Aqua continues to characterize these expenses and fees as *costs*, which Staff maintains are not property.²⁰ Staff agrees that necessary and reasonable legal expenses and professional fees are specifically mentioned by TWC § 13.254(g), but as a factor for ensuring that the compensation to Aqua is just and adequate; not as property.

3. Lost economic opportunity

In its Initial Brief, Aqua cites *State v. Central Expressway Sign Associates (CESA)*²¹ to illustrate the rule for when lost profits are compensable in an eminent domain proceeding.

¹⁵ 30 TAC § 305.121.

¹⁶ Aqua Ex. AT-1 at Aqua 00308.

¹⁷ 6 S.W.3d 349 (Tex. App- Austin 1999).

¹⁸ *Id.* at 361.

¹⁹ Aqua’s Initial Brief at 17-18.

²⁰ *See* Staff’s Initial Brief at 10.

²¹ 302 S.W. 3d 866 (Tex. 2009).

However, the section Aqua quotes is clearly distinguishable from the present proceeding. The first line of the text states that “Texas law allows *income from a business operated on the property* to be considered in a condemnation proceeding in two situations . . .” (emphasis added).²² Aqua would clearly fail to qualify for recovery in a condemnation proceeding under this standard. Aqua does not have a business operated on the Prosper Point property, as it had no facilities there and never provided water or sewer utility service to the property. Further, Aqua never received any income from this non-existent business. Aqua also acknowledges that this matter is not a real property condemnation proceeding, and therefore, these rules are not directly applicable.²³

Staff is also unconvinced by Aqua’s interpretation of *City of Blue Mound v. Southwest Water Co. (Blue Mound)*.²⁴ The court in *Blue Mound* held that a taking must be compensated, and if it was not compensable under Texas’s general condemnation statutes, then some specific statute or mechanism must exist authorizing the compensation.²⁵ However, the court applied that principle to mean that where compensation was not authorized, the taking was also not authorized.²⁶ Aqua misapplies the court’s finding to argue that the specific statute or mechanism *must* exist, and therefore here it is TWC § 13.254(d) and (g). Staff asserts that there is no specific statute or mechanism in the TWC or the Commission’s substantive rules that allows Aqua to be compensated for its claimed lost economic opportunity. Again, as this is not an eminent domain proceeding, these principles are not directly applicable to the present proceeding. For example, a “taking” must meet specific criteria under condemnation law, which have not been addressed here.

Finally, Aqua asserts that the fact that language compensating a retail public utility for the “taking, damaging, or loss of personal property, including the retail public utility’s business” was removed from TWC § 13.254(g) by the Legislature does not eliminate lost economic

²² Aqua’s Initial Brief at 20.

²³ *Id.* at 22.

²⁴ 449 S.W. 3d 678 (Tex. App. – Ft. Worth 2014, no pet.).

²⁵ *See id.* at 689.

²⁶ *See id.* (holding that Appellees conclusively established their entitlement to summary judgment on the ground that no statutory procedures exist authorizing the City’s condemnation suit); *Lone Star Gas Co. v. City of Fort Worth*, 98 S.W.2d 799 (Comm’n App. 1936) (Because a mechanism to compensate the utility owner for the taking of the going-concern aspect of the utility was required under the Texas constitution but existed neither in Texas statutes nor in the city’s charter, condemnation was not authorized);

opportunity as a compensable property interest.²⁷ Staff disagrees. As Celina argues, in interpreting statutory construction and legislative intent, effect must be given to each word, as well as to each exclusion.²⁸ The Legislature's removal of specific language from the statute demonstrates the intent that the language was not to still be considered.

Staff generally agrees with Celina's argument that the statutory construction/legislative intent of TWC § 13.254(g) precludes compensation for lost future profits from future customers,²⁹ with the following exception. Celina pointed to the new subsection (h) added to TWC § 13.254 by Senate Bill 1 of the 75th Legislative Session, which reads:

(h) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time. If there were no current customers in the area decertified and no immediate loss of revenues or if there are other valid reasons determined by the commission, installment payments as new customers are added in the decertified area may be an acceptable method of payment.³⁰

Celina argues that this language made it clear that "the Legislature contemplated a retail public utility that had its CCN, either totally or partially, decertificated, would be compensated, at least at some level, for lost revenues from customers that did not exist at the time of decertification."³¹ Staff believes that a plain reading of subsection (h) provides that "as new customers are added in the decertified area" relates to the timeline the new utility had to complete the payment of compensation. This subsection allowed a new utility to make installment payments on a compensation award, as it began providing service to its own new customers in the decertified area. The "new customers" language in subsection (h) did not relate to the determination of what a decertified utility should be compensated for, but to the duration of payments of the compensation.

In his direct testimony, Aqua witness Stephen Blackhurst testified that when this change occurred he was a Texas Natural Resource Conservation Commission (TNRCC) manager, where

²⁷ Aqua's Initial Brief at 23-24.

²⁸ Celina's Initial Brief at 16-17.

²⁹ See Celina's Initial Brief at 15- 21.

³⁰ See *id.* at 18; Celina Ex. CEL 110-002.

³¹ Celina's Initial Brief at 19.

his duties included participated in legislative and rulemaking processes.³² At the hearing on the merits, Mr. Blackhurst was asked specifically about this subsection (h). Mr. Blackhurst testified that the “new customers” referenced in this subsection “would be customers added by the entity that took over the CCN” and not customers of the decertified utility.³³ Therefore, these customers would not exist until after the new utility was able to commence service, which would be after compensation occurred. This cuts against Celina’s interpretation that subsection (h) was intended to allow the decertified utility to be compensated for lost revenues from future customers of the decertified utility.

D. Definition of “Useless” or “Valueless”

All parties agree that since the terms “useless” and “valueless” are not defined by the Legislature in the TWC or the Commission’s substantive rules, the terms must be given their plain meaning.³⁴ The plain meaning of the terms would indicate that in order for property to be rendered useless or valueless it would have *no use* to Aqua.

Aqua sought to extend the plain meaning of these terms to allow property to be rendered useless or valueless in part.³⁵ Aqua argues that partial takings are common in eminent domain cases.³⁶ However, Aqua also acknowledges that this body of law is not directly on point with this proceeding.³⁷ To the extent that it is instructive here, Staff reasserts its position that eminent domain case law supports the plain language definitions.³⁸ Further, Staff reurges that the *Crystal Clear* standard must be applied in determining whether property has been rendered useless or valueless.³⁹

Staff does not disagree with Aqua that through the decertification process, a CCN holder can potentially have “. . . significant stranded investments go to waste or be underutilized to the

³² Aqua Ex. AT-B at 6.

³³ See Tr. at 83-84.

³⁴ See Aqua’s Initial Brief at 24; Celina’s Initial Brief at 22; Staff’s Initial Brief at 14.

³⁵ Aqua’s Initial Brief at 24-25.

³⁶ See *id.* at 25.

³⁷ See *id.* at 22.

³⁸ See Staff’s Initial Brief at 15-16.

³⁹ See *id.* at 16.

detriment of a decertified CCN holder and its remaining customers.”⁴⁰ However, this does not alter the plain meaning of TWC § 13.254(d), which requires that there be no remaining use or no remaining value associated with the property as a whole. The statute as written does not contemplate the compensation of a decertified utility for a diminution in the use or value of property as a result of decertification. Aqua’s attempt to broaden these definitions to avoid precluding compensation is inappropriate and unfounded.

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 argues that it should be compensated for “. . . lost planning, design, and permitting property rendered useless or valueless . . .”⁴¹ However, 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, and therefore cannot be rendered useless or valueless. The fact that these costs are useless or valueless to Aqua only goes to the compensation award for the property they are connected to, which is the Prosper Point wastewater permit.

2. Necessary and reasonable legal expenses and professional fees

Aqua argues that it 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 decertification in Docket No. 45329.”⁴² Staff continues to urge that these costs are not property, but that 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). Therefore, Staff is not arguing that Aqua should not receive compensation for its necessary and reasonable legal expenses and professional fees, but that such compensation will not be a result of a finding that these costs are property.⁴³

⁴⁰ *Id.* at 26.

⁴¹ Aqua’s Initial Brief at 28.

⁴² Aqua’s Initial Brief at 29.

⁴³ *See* Staff’s Initial Brief at 18-19.

3. Lost economic opportunity

No reply:-

IV. ARE THE EXISTING APPRAISALS LIMITED TO PROPERTY THAT HAS BEEN DETERMINED TO HAVE BEEN RENDERED USELESS OR VALUELESS BY DECERTIFICATION?⁴⁴

Staff continues its position that 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, which is not property. The appraisal filed by Celina and the independent third appraisal are properly limited to property rendered useless or valueless, as they both identify the Prosper Point wastewater permit as the only property for which compensation should be provided

V. CONCLUSION

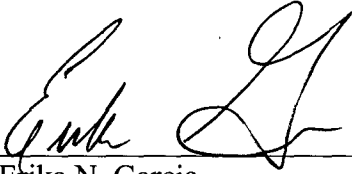
Staff continues to request that the presiding officer issue a proposal for decision that recommends that the only property that has been rendered useless or valueless to Aqua as a result of the decertification is the Prosper Point wastewater permit, and that Celina's appraisal and the independent third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

⁴⁴ Preliminary Order at 3.

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record on November 14, 2016,
in accordance with 16 TAC § 22.74.



Erika N. Garcia