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

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

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

November 14, 2016

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

Aqua Texas, Inc. d/b/a Aqua Texas (Aqua) files this Post-Hearing Reply 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

Aqua agrees with Commission Staff in part, but completely disagrees with Celina in terms of its position that no property items were rendered useless or valueless by the TWC §13.254(a-5) certificate of convenience and necessity (“CCN”) area decertifications against Aqua in Docket No. 45329. However, if either party position is fully adopted, Aqua will not receive just and adequate compensation for all property rendered useless or valueless by those decertifications. That result would violate TWC §13.254(d), (g), and the Federal and State constitutions which place no limits on the type of “property” that may be lost. Further, compensation must be provided for allocated partial property losses, and Aqua disagrees with both parties that the TWC §13.254(a-5) standard for “receiving service” set forth in *Texas General Land Office v. Crystal Clear Water Supply Corp.* (which Aqua disputes) has any

application in this TWC §13.254(d) and (g) compensation proceeding.¹ Thus, Aqua respectfully re-urges its request that the ALJs and Commission find Aqua has justified entitlement to compensation for all items identified in the Aqua Appraisal Report as property rendered useless or valueless to Aqua as a result of the Docket No. 45329 decertifications. Aqua respectfully requests the Commission direct a second phase hearing to establish the value of compensation Aqua is owed.

II. 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)

A broad definition of “property” and a constitutionally-based interpretation of what it means for such property to be rendered “useless or valueless” is required to effect the just and reasonable result required by Texas Water Code (“TWC”) §13.254(d) and (g).² The statute’s overriding purpose is to provide just and adequate compensation to decertified retail public utilities.³ No matter how these terms are characterized, the goal of the TWC §13.254 “just and adequate compensation” provisions are to make retail public utilities whole for what they lose when CCN service areas are stripped away in whole or in part.⁴ The same

¹ *Texas General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).

² See Aqua Texas, Inc.’s Initial Post-Hearing Brief (Docket Item No. 51) (October 28, 2016) (“Aqua Brief”) and authorities cited therein; see also TEX. GOV’T CODE §311.021(1)-(3) (stating that in statutory construction there is a presumption that enacted statutes are intended to comply with “the constitutions of this state and the United States,” “the entire statute is intended to be effective,” and “a just and reasonable result is intended.”).

³ TWC §13.254(d) and (g).

⁴ TWC §13.254(d) and (g); Ex. AT-B, at 8-12 (Blackhurst Direct); see also *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*

holds true for what it means for property to be rendered “useless or valueless.”⁵ If the Commission’s final interpretation of these terms at the end of the day means Aqua receives zero compensation as City of Celina (“Celina”) advocates, then the compensation provisions of TWC §13.254(d) and (g) will be rendered meaningless, absurd, and this exercise will not produce a “just and reasonable result.”⁶

A. Definition of Property

Commission Staff seems to agree with Aqua that a broad view of “property” is required under TWC §13.254(d).⁷ Conversely, Celina advocates for strict limits on this term and claims that “Aqua conflates the term ‘personal property’ with the factors used to value such property.”⁸ Respectfully, Aqua disagrees with Celina’s “property” position.

State v. Public Utility Commission of Texas requires that property be defined in its broadest sense where no further definition is provided in the statute where used.⁹ Further, 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

Association, Inc. v. Public Utility Commission of Texas, 110 S.W.3d 524 (Tex. App.—Austin 2003, pet. denied).

⁵ *Id.*

⁶ TWC §13.254(d) and (g); TEX. GOV’T CODE §311.021(1)-(3); *Tex. Lottery Comm’n v. State Bank of McQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

⁷ Commission Staff’s Initial Brief (Docket Item No. 50) (October 28, 2016), at 5-6 (“Staff Brief”).

⁸ City of Celina’s Closing Argument (Docket Item No. 49) (October 28, 2016), at 5 (Celina Brief”).

⁹ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

personal without limit.¹⁰ In the Aqua Brief, Aqua presented several other justifications for a broad “property” interpretation which are incorporated by reference here.¹¹

Aqua finds the authorities cited by Commission Staff are no different in this respect.¹² Further, the fact that the Texas Tax Code includes “license or permit” among its examples of “intangible property” highlight why the TWC compensation provisions may exist despite pre-existing language elsewhere stating that CCNs and wastewater permits are not vested rights.¹³ Such permits are intangible property with special value to those in possession of same which are saleable or transferable.¹⁴

Importantly, the authorities cited by Aqua and Commission Staff in their respective briefs all point to the conclusion that money is “property.”¹⁵ Testifying experts agreed and this issue should be considered undisputed.¹⁶ Once spent to undertake CCN obligations, Aqua money was invested in various project activities, such as planning, design, permitting,

¹⁰ 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).

¹¹ Aqua Brief, at 6-9.

¹² Staff Brief, at 5-6.

¹³ TEX. TAX CODE §1.04(5); 16 TAC §24.113(a), TWC §26.029(c).

¹⁴ TWC §13.251; 30 TAC §305.64; Ex. AT-C, at 11-12 (Korman Direct); Ex. AT-1, at Aqua 000095.

¹⁵ Aqua Brief, at 6-9; Staff Brief, at 5-6.

¹⁶ Ex. AT-C, at 10-11 (Korman Direct); Tr. at 131 (Korman Testimony); Tr. at 68 (Waldock Testimony); Tr. at 22, 24 (Jones Testimony).

and litigating CCN decertifications.¹⁷ Every dollar of Aqua’s money spent in reliance on its CCNs was its “property” and produced corresponding investment “property” rights while Aqua held the CCNs, including the right to make money with those investments.¹⁸ Aqua’s expert appraiser, Mr. Korman, simply tried to categorize those property rights based on the factors outlined in TWC §13.254(g).¹⁹ But they all flow from the fact that Aqua spent money relying on Aqua’s rights and obligations held by virtue of the CCNs for the subject decertified property (“Property”).²⁰

Celina incorrectly contends that the “property” characterization under TWC §13.254(d) somehow turns on the decision in *Texas General Land Office v. Crystal Clear Water Supply Corp.*²¹ Celina attempts to improperly convert that decision into a requirement that “physical assets” must be present.²² But, the *Crystal Clear* decision is inapplicable here. That decision made a ruling, which Aqua disagrees with, based on case-specific facts that a tract of real property was not “receiving water service” from the decertified CCN holder under TWC §13.254(a-5).²³ There is no discussion about what is or is not “property” for

¹⁷ 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).

¹⁸ *Id.*

¹⁹ Ex. AT-1. This was a reasonable approach given that this is a case of first impression before the Commission.

²⁰ TWC §§13.242(a) and 13.250(a).

²¹ *Texas General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140-141 (Tex. App.—Austin 2014, pet. denied).

²² Celina Brief, at 6-7.

²³ *Crystal Clear*, 449 S.W.3d at 142.

purposes of TWC §13.254(d) or (g). In fact, *Crystal Clear* recognized that “the Water Code provides that there be compensation for any property that the Commission determines is rendered useless or valueless to a decertified retail public utility as a result of decertification.”²⁴ That very issue is under consideration here.

In sum, TWC §13.254(d) “property” is not as limited as Celina would like it to be and it does not need to be physical or tangible. Thus, compensation to Aqua is required for all property items identified in the Aqua Appraisal Report as rendered useless or valueless by the decertification free from artificial limitations plainly not present in the Texas Water Code.²⁵

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

The three categories of alleged property at issue in this proceeding are as follows: (1) expenditures for planning, design, or construction of service facilities that are allocable to the service area in question, including Aqua’s now expired wastewater permit; (2) necessary and reasonable legal expenses and professional fees; and (3) lost economic opportunity. Aqua contends all three are eligible “property” warranting compensation under TWC §13.254(d). The other parties’ positions vary.

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

There is a disconnect between the Celina Brief’s descriptions of its current position on this issue and the record evidence. Celina’s expert witness, Mr. Jason S. Jones, P.E.,

²⁴ *Id.* at 144.

²⁵ Ex. AT-1 (Aqua Appraisal Report).

initially testified in line with the Celina Brief that the issuance of a CCN and/or a wastewater discharge permit does not create a vested right and is not property.²⁶ However, under cross-examination, Mr. Jones agreed that items such as a wholesale water/wastewater contract or *permits* could be an intangible type of “facility.”²⁷ “Facilities” is a term broadly defined at TWC §13.002(9) for TWC Chapter 13 purposes that includes “*all* plant and equipment, 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.”²⁸ Similarly, the report filed for Celina by Mr. Jones awarded money based on estimated engineering and legal fees associated with obtaining and renewing Aqua’s wastewater permit because it was rendered “useless and valueless” upon decertification.²⁹ Thus, Celina’s current position does not match that of its own proffered expert witness.

It seems the third party appraiser hired by the Commission’s Executive Director considered Aqua’s wastewater permit to be “property” because he recommended an award for “allocable planning and design work and the discharge permit” which he stated the decertification rendered “obsolete.”³⁰ Commission Staff offered no evidence other than discovery responses from Aqua at trial, but it appears Commission Staff still considers the

²⁶ Ex. CEL 100, at 9-10 (Jones Direct); Celina Brief, at 9.

²⁷ Tr. at 43-44 (Jones Testimony).

²⁸ TWC §13.002(9) (emphasis added).

²⁹ Ex. CEL 102-005 to -006 (Celina Report).

³⁰ Ex. AT-3 (Third Party Report).

permit to be compensable “property.”³¹ Commission Staff indicates, “expenditures for planning, design, or construction of service facilities that are allocable to the service area in question” are a compensation factor under TWC §13.254(g), but not “property.”³²

Aqua maintains that all Aqua’s investments in planning 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 even Celina witness Mr. Jones admitted are now stranded.³³ This also includes the permit as Commission Staff recognizes, but Aqua’s expenses represent investments bound up in the permit and its overall Property project now lost to the abyss of decertification.

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.³⁴ All three compensation reports filed in this docket recommend an award for these fees.³⁵ Now,

³¹ Staff Brief, at 7.

³² *Id.*

³³ 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).

³⁴ 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).

³⁵ Ex. AT-1, AT-2, and AT-3.

Staff maintains these expenses may be appropriate for compensation, but are not property.³⁶

Celina contends there is no property at all, including these expenses.³⁷

Aqua money spent on these expenses are part of its Property project expenses, investments, and, therefore, additional compensable property.³⁸ Testifying experts in this case agreed that money or investments may be considered “property.”³⁹

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.⁴⁰ 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. 45329.⁴¹ Both Staff and Celina assert there is no recognizable property interest in lost future profits for reasons unsupported by applicable law and case-specific facts.⁴²

³⁶ Staff Brief, at 7, 10-12.

³⁷ Celina Brief, at 9, 11-12.

³⁸ 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).

³⁹ Ex. AT-C, at 10-11 (Korman Direct); Tr. at 131 (Korman Testimony); Tr. at 68 (Waldock Testimony); Tr. at 22, 24 (Jones Testimony).

⁴⁰ Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-C, at 10-14 (Korman Direct); and Ex. AT-1, at Aqua 000006-000008.

⁴¹ Ex. AT-C, at 12-14 (Korman Direct); Ex. AT-1, at Aqua 000006-000008.

⁴² Staff Brief, at 8; Celina Brief, at 10.

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

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

Aqua agrees with Commission Staff that its permits may be considered “property,” but disagrees that the money invested in the Property project falls only within a TWC §13.254(g) compensation factor, or factors, and is not TWC §13.254(d) Aqua “property.” Commission Staff has attempted to define property only by Mr. Hornsby’s test and the Texas Tax Code.⁴³ However, as Staff points out elsewhere, the nature of “property” is much broader.⁴⁴ Aqua maintains that a broader test, such as that described in *State v. Public Utility Commission of Texas*, is required and includes Aqua’s permits, money spent on its permits, and other project investments.⁴⁵

Mr. Korman, also a very experienced licensed appraiser, opined that a broad view of property is required.⁴⁶ Celina witness Mr. Hornsby’s limited view of “property” is not surprising given that his appraisal practice is focused on limiting awards paid by condemnors to condemnees in eminent domain proceedings.⁴⁷ This narrow approach is contrary to applicable law since “property” is not defined or limited in TWC §13.254(d).⁴⁸

⁴³ Staff Brief, at 8-10.

⁴⁴ Staff Brief, at 5.

⁴⁵ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994).

⁴⁶ Ex. AT-C, at 10-14 (Korman Direct); Tr. at 131; Ex. AT-1.

⁴⁷ Tr. at 134-136.

⁴⁸ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994).
Aqua Texas, Inc.’s Post-Hearing Reply Brief

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

Aqua reiterates that the unlimited “property” in TWC §13.254(d) must be construed to include both its money and its corresponding intangible property investments that properly include necessary and reasonable legal expenses and professional fees.⁴⁹ Commission Staff concedes that money in Aqua’s possession was “property.”⁵⁰ Yet, Commission Staff opines that after it was spent, that money was no longer Aqua property compensable under TWC §13.254(d) even though it may be considered for compensation under TWC §13.254(g).⁵¹ Celina takes a similar view.⁵² This approach is contrary to the broad view of property that is required in the absence of a TWC §13.254(d) limitation.⁵³

Respectfully, Aqua submits that its money bought some type of property interest wrapped up in all its Property project investments, including planning, design, permitting, and the legal and professional fees spent here. The money did not vanish. Thus, the compensable property interest analyzed under TWC §13.254(d) must either be the money when it was in Aqua’s possession or the intangible property interests Aqua used the money

⁴⁹ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); Ex. AT-B, at 12 (Blackhurst Direct); Ex. AT-C, at 12 (Korman Direct); Ex. AT-1, at Aqua 000006; *see also* Aqua Brief, at 6-9 and authorities cited therein; TWC §13.254(g); 16 TAC §24.113(k).

⁵⁰ Staff Brief, at 10-12.

⁵¹ *Id.*

⁵² Celina Brief, at 11-12.

⁵³ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); 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).

to buy. Concluding there is no property interest here could potentially leave Aqua without just and adequate compensation as TWC §13.254(d), (g), and the Federal and State constitutions require.⁵⁴

3. *Lost Economic Opportunity.*

Commission Staff and Celina both take an improperly narrow view of property to counter Aqua's contention that its lost economic opportunity within the Property is an intangible property interest acquired through Aqua's investments.⁵⁵ This is the most important property interest Aqua lost as a result of the Property decertifications.

The fact is that Aqua's CCNs allowed it the exclusive opportunity to make money within the Property through retail water and sewer utility service.⁵⁶ However, to have that opportunity, Aqua was required to undertake its planning, design, and other permitting activities to place it in position to fulfill its CCN obligations.⁵⁷ Aqua did not make its investments for the sake of the investments themselves. In some situations, a CCN holder may not have spent any money on such activities attributable to decertified property or the location may be so remote as to render any economic opportunity overly speculative. As Mr. Korman and other Aqua witnesses testified, neither was the case here in this high growth

⁵⁴ *Id.*; see also TWC §13.254(d) and (g).

⁵⁵ Staff Brief, at 12-14; Celina Brief, at 12-21.

⁵⁶ TWC §13.242(a).

⁵⁷ TWC §13.250(a).

Denton County area.⁵⁸ Thus, Aqua acquired an intangible economic opportunity interest that existed while it held the CCNs.⁵⁹ Now, it is gone.

a. Response to Commission Staff Position

Contrary to Commission Staff's assertions, the Aqua Appraisal Report contains non-speculative evidence supporting the economic opportunity interest that was lost.⁶⁰ While parties may differ on the amount that was lost, there is unquestionably a loss at this particular location and Mr. Korman attempted to quantify it for Aqua and the Commission.⁶¹ The new bifurcated TWC §13.254(d) and (g) process renders the precise amount a second hearing issue. But the Aqua Appraisal Report is evidence that the property interest exists.

In response to other Staff critiques of Aqua's lost economic property interest position, Aqua responds as follows. First, future profits by definition cannot be fully identified or realized today, but they can be assessed a present day value using established methods as Aqua presented in the Aqua Appraisal Report.⁶² Second, a broad view of "property" is required in place of the narrow view offered by Mr. Hornsby.⁶³ Third, CCNs are transferable

⁵⁸ 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.

⁵⁹ *Id.*

⁶⁰ Ex. AT-1.

⁶¹ *Id.*

⁶² Ex. AT-1, at Aqua 000006-000008 (Aqua Appraisal Report).

⁶³ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); 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).

and, thus, so is the right to make money within the certificated area.⁶⁴ Finally, Aqua presented additional legal justifications in the Aqua Initial Brief for why this interest must be viewed as compensable property and incorporates that discussion by reference here.⁶⁵

b. Response to Celina Position

Not surprisingly, Celina contends Aqua's lost economic opportunity is not TWC §13.254(d) property for multiple reasons.⁶⁶ Aqua responds as follows.

1. Response to Celina's Legal Contentions

First, if Aqua had physical plant or customers in place strictly within or committed to the Property as Celina contends is required for this property right, this compensation proceeding would not be occurring because there could be no decertification under TWC §13.254(a-5).⁶⁷ Thus, the notion that Aqua's compensable property rights must be limited on that basis is circular.

Second, Celina has taken an overly narrow view of the very broadly worded TWC §13.002(9) definition of "facilities."⁶⁸ Nothing about that definition indicates it is limited to physical plant or equipment. Similarly, the "service" definition in TWC §13.002(21), as

⁶⁴ TWC §13.251.

⁶⁵ Aqua Brief, at 18-24.

⁶⁶ Celina Brief, at 12-21.

⁶⁷ TWC §13.254(a-5); *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) (interpreting same).

⁶⁸ TWC §13.002(9) (stating that "facilities" means "all plant and equipment, 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.") (emphasis added).

recognized in *Crystal Clear*, is extremely broad regardless of how it is interpreted in relation to TWC §13.254(a-5) “receiving service” for release purposes.⁶⁹ Celina cannot reasonably contend that Aqua’s secured and renewed wastewater permit did not qualify as an intangible “facility” or that Aqua’s activities and investments in securing a wastewater permit, design, and other planning did not qualify as service “acts” or things “supplied” sufficiently to demonstrate “ongoing [Aqua] business” within, or at least “dedicated” to, the Property.⁷⁰ Aqua did not sit idle even though no physical plant was built.

Third, Celina is conflating Aqua’s other property arguments with Aqua’s lost economic opportunity interest position. Money was Aqua’s property before it was spent. Aqua’s lost economic opportunity was an Aqua property interest after its money was spent.

Fourth, despite eminent domain limits on situations where lost profits are considered, lost profits or income are routinely considered in such cases and other types of constitutional takings cases where appropriate.⁷¹ More importantly, however, the system the Legislature has provided under TWC §13.254(d) and (g) cannot be strictly limited by eminent domain law even though some aspects may be viewed as analogous. *City of Blue Mound v. Southwest Water Co.* held “the Texas constitution requires that a taking for public use must

⁶⁹ TWC §13.002(21) (stating that “service” 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, as well as the interchange of facilities between two or more retail public utilities); see also *Texas General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex. App.—Austin 2014, pet. denied).

⁷⁰ *Id.*; Celina Brief, at 13.

⁷¹ *State v. Central Expressway Sign Associates*, 302 S.W.3d 866 (Tex. 2009); see also *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)).

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."⁷² Aqua submits TWC §13.254(d) and (g) operate as the mechanism to compensate Aqua for its lost economic opportunity property interest regardless of limitations that may or may not present themselves within the context of eminent domain law. TWC §13.254 does not contain the same limits, has no limit on "property," and contains a broadly worded set of compensation considerations that may extend to anything the Commission determines is "relevant."⁷³ Aqua's lost economic opportunity is relevant.

Fifth, Celina presents a lengthy statutory construction argument based on the changes to TWC §13.254(g) from 2005 concluding that Aqua's lost economic property right neither exists nor is compensable.⁷⁴ Aqua acknowledges the 2005 changes, but presents a contrary view. Celina's position is undermined by the following: (1) TWC §13.254(d) did not change in 2005; (2) the Texas Constitution did not change in 2005; (3) compensating "a retail public utility for the taking, damaging, or loss of personal property, including the retail public utility's business" remains just as relevant under the constitution today as it was prior to 2005

⁷² *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)).

⁷³ TWC §13.254(d) and (g). The Commission was directed to "adopt rules governing the evaluation of these factors" and adopted a rule that includes "other relevant factors." *Id.*

⁷⁴ Celina Brief, at 15-21.

when the Property was first certificated;⁷⁵ (4) the Texas Code Construction Act (“CCA”) requires a presumption that “compliance with the constitutions of this state and the United States is intended;”⁷⁶ (5) the CCA requires a presumption that “the entire statute is intended to be effective,” including the “just and adequate compensation” and “other relevant factors” portions of TWC §13.254(g);⁷⁷ (6) the CCA requires a presumption that “a just and reasonable result is intended;”⁷⁸ and (7) statutory interpretations looking behind plain language cannot produce “absurd results,” such as limiting compensation to loss from “existing customers” who will never exist in a TWC §13.254(a-5) decertificated CCN area post-2005 compensation case.⁷⁹ The CCN rule and TWC §26.029 “vested right” language Celina relies upon are irrelevant since they existed prior to adoption of the TWC §13.254

⁷⁵ 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.*

⁷⁶ TEX. GOV’T CODE §311.021(1).

⁷⁷ TEX. GOV’T CODE §311.021(2).

⁷⁸ TEX. GOV’T CODE §311.021(3)

⁷⁹ *See Tex. Lottery Comm’n v. State Bank of McQueen*, 325 S.W.3d 628, 635 (Tex. 2010); *see also* TWC §13.254(a-5); *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) (interpreting same). A property will never be eligible for release under TWC §13.254(a-5) if there are existing customers because the property will be “receiving . . . service” even under the Commission’s interpretation of TWC §13.254(a-5).

compensation provisions.⁸⁰ In sum, Celina's statutory interpretation theories are severely flawed and do not support Celina's conclusions.

2. *Response to Additional Celina Arguments Asserted by Jason S. Jones, P.E.*

Celina downplays the fact that merely three years ago its own proffered expert, Jason S. Jones, P.E., recommended compensation for an investor-owned utility, Monarch Utilities I, L.P. ("Monarch"), in a TWC §13.254(a-5) decertification compensation matter based on similar grounds to those expressed in the Aqua Appraisal Report.⁸¹ The background of that case shows similarities in that the developer initially requested service from Monarch, Monarch performed planning activities needed to respond to that service request, and the developer then decided to undertake different service plans that involved the nearby City of Kyle.⁸² Mr. Jones recommended \$2,266,600.00 in compensation based on "other relevant factors," in part, because he found "[w]ith the current economic growth pattern in Texas, the expectations for a return on investment from future water sales within the Windy Hill Tract

⁸⁰ 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). TWC §26.029© also predates the TWC §13.254 compensation provisions because revisions to Tex. SB 1876, 75th Leg. R.S. (1997) show the §26.029© "vested right" language was not added or removed in 1997 and the change immediately prior occurred in 1985.

⁸¹ Compare Ex. AT-1 (Aqua Appraisal Report), with Ex. AT-11 (Monarch Utilities, I, L.P. Compensation Appraisal Report ("Monarch Report") prepared by Jason S. Jones, P.E./Jones-Heroy Associates, Inc., July 19, 2013, filed in Compensation Phase for Expedited Release Pursuant to Texas Water Code Section 13.254(a-5) from EB Windy Hill, L.P., to Decertify a Portion of Certificate of Convenience and Necessity (CCN) No. 12983 held by Monarch Utilities I, L.P., in Hays County; Application No. 37655-C; Texas Commission on Environmental Quality).

⁸² Ex. AT-11, Monarch Report, at 1 ("Background").

would be high to a prospective investor had this portion of the CCN been sold by Monarch on the open market.”⁸³ Here, on cross, Mr. Jones tried to distinguish Aqua’s fact pattern because there are no facilities constructed.⁸⁴ That was not identified as a key factor in Mr. Jones’s Monarch Report nor was there any indication this was not a property right that warranted compensation.⁸⁵ Similar to Monarch, Aqua has established systems and operations within its North Region if not directly within the Property (though Aqua’s wastewater permit at issue here was obtained solely for the Property), Aqua undertook planning for the Property, the Property represented a valuable portion of Aqua’s operational territory, and Aqua has regulated rates and return set for its regional certificated service areas that included the Property.⁸⁶

In the Celina Report filed here, Mr. Jones presented no analysis of the “other relevant factors” he considered when a decertificated utility CCN holder was his client.⁸⁷ Instead, after this matter was referred for hearing, Mr. Jones presented a series of after-the-fact justifications against Aqua’s position that lack merit and, in some instances, credibility: (1) agreement that compensation is not warranted for this item based on the position of Third Party Report author Bret W. Fenner, P.E. here and in the Monarch case, which the Aqua

⁸³ Ex. AT-11, Monarch Report, at 6 (discussing “Other relevant factors”).

⁸⁴ Tr. at 50.

⁸⁵ Ex. AT-11, Monarch Report, at 6 (discussing “Other relevant factors”).

⁸⁶ Ex. AT-11, Monarch Report, at 6 (discussing “Other relevant factors”); Ex. AT-1, at Aqua 000006-000008 (Aqua Appraisal Report); Ex. AT-A, at 1-2 (Waldock Direct).

⁸⁷ Ex. AT-2, at Aqua 00494 (Celina Report); Ex. CEL-102, at 102-006 (Celina Report).

Appraisal Report rebuts and has nothing to do with the nature of “property,” even though Mr. Jones previously disagreed with Mr. Fenner’s position;⁸⁸ (2) statutory construction arguments based on the TWC §13.254(g) factors, some of which are included in the Celina Brief and addressed herein;⁸⁹ (3) the outcome of this issue in the Monarch case, which was considered by TCEQ and not PUC, based on Mr. Fenner’s recommendation that Mr. Jones opposed (and which Aqua’s experts refute here);⁹⁰ (4) a qualified “public policy” argument that is inconsistent with Mr. Jones’s prior position and ignores Aqua’s specific Property planning, investments, service obligations, and competing policy views discussed in Aqua’s Initial Brief and the testimony of Aqua expert Steve Blackhurst, P.E.;⁹¹ (5) a statutory interpretation of the Commission’s CCN definition in 16 TAC §24.3(15) focusing on whether profits are guaranteed instead of whether they authorize making money at all through “retail water or sewer utility service” to a specified area, defined as providing these services “to the ultimate consumer for compensation;”⁹² (6) another statutory interpretation argument attempting to place an artificial limit on intangible “facilities” as only intangible property associated with

⁸⁸ Compare Ex. CEL-100, at 13-14 (Jones Direct), with Ex. AT-3 (Third-party Fenner Appraisal Report - Aqua/Celina Compensation) and AT-12 (Third-party Fenner Appraisal Report - Monarch/E.B. Windy Hill, L.P. Compensation); Tr at 48-56 (Jones Testimony). Mr. Fenner’s position is that calculations of lost revenue are too speculative to warrant compensation. Aqua and its experts disagree. In *Monarch*, Mr. Jones disagreed too.

⁸⁹ Ex. CEL-100, at 14 (Jones Direct).

⁹⁰ Ex. CEL-100, at 14-15 (Jones Direct); see also Ex. AT-13 (TCEQ Final Order, Monarch/E.B. Windy Hill, L.P. Compensation) (November 22, 2013).

⁹¹ Ex. CEL-100, at 15 (Jones Direct); Ex. AT-B, at 10-11 (Blackhurst Direct); Aqua Brief, at 1-3, 6-9, 22-24, n.9, and Attachment A legislative history discussion. Aqua did not obtain its CCNs to make money in a decertification hearing. Aqua obtained its CCNs to make money from retail water and sewer utility service within the Property. Ex. AT-A, at 11 (Waldock Direct).

⁹² Ex. CEL-100, at 15 (Jones Direct); 16 TAC §24.3(15) (defining “Certificate of Convenience and Necessity (CCN)”); TWC §13.002(20) and 16 TAC §24.3(59) (defining “Retail water or sewer utility service”) (emphasis added).

“hard assets” and not separate “intangible property,” while ignoring the full definition and later admitting on cross that permits may be intangible facilities or property needed to construct “hard assets;”⁹³ (7) baseless and improper reliance on two prior Aqua dockets that settled without Mr. Jones knowing any of the details;⁹⁴ and (8) an unsupported policy argument that “just and adequate compensation” under TWC §13.254(d) and (g) is meant to make an entity whole for out-of-pocket investment losses to the exclusion of lost “profits” or economic opportunity contrary to the position Mr. Jones took for Monarch.⁹⁵

During the hearing, Mr. Jones stated as follows regarding the “other relevant factors” considerations under TWC §13.254(d) and (g):

I’m a believer in private property rights, sir. So I would have to say that if I owned something and it’s got some value and it’s business per se, then I believe there’s an intangible benefit to that business. If that business is doing—conducting business, has made investments, has got income being generated, then I believe that there’s an intangible value that would be property associated with that business, sir.⁹⁶

Aqua is an ongoing business and has made investments. It seems Mr. Jones is actually on the same page as Aqua’s experts at least as to whether a lost economic opportunity property

⁹³ Ex. CEL-100, at 15-16 (Jones Direct); Tr. at 43-44 (Jones Testimony); TWC §13.002(9) (defining “facilities” plant and equipment to include”*all* tangible, 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.*)

⁹⁴ Ex. CEL-100, at 16 (Jones Direct); Tr. at 46-47 (Jones Testimony); Ex. CEL-102 (Celina Report), at 102-113 through CEL 102-123. The Notice of Approval from the referenced dockets shows that although the parties agreed on use of an appraiser, the final result was a settlement which was not to be “regarded as binding holding or precedent as to the appropriateness of any principle or methodology underlying the determination of compensation.” *Mustang Special Utility District Notice of Intent to Provide Water Service to Land Decertified from Aqua Texas, Inc.*, PUC Docket Nos. 45450, Notice of Approval (Docket Item No. 9) (March 14, 2016) and 45462 (Docket Item No. 9) (March 14, 2016).

⁹⁵ Ex. CEL-100, at 16 (Jones Direct).

⁹⁶ Tr. at 55-56 (Jones Testimony).

interest may exist. Here, case-specific facts show that interest did exist contrary to the position taken in the Celina Brief.

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

Aqua completely disagrees with Commission Staff and Celina’s strict interpretation of the terms “useless” or “valueless” to the extent that they do not permit recognition of allocable portions of property rendered useless or valueless by TWC §13.254 decertifications. Both rely on plain meaning interpretations for their positions, but without deference for the context in which they are used in TWC §13.254 to effect a constitutional, just and reasonable result feasible of execution.⁹⁷

First, this language was derived from takings jurisprudence which allows *part* of a property to be rendered useless or valueless and taken.⁹⁸ Partial takings in eminent domain cases are common where damages to the remainder are awarded.⁹⁹ 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.¹⁰⁰ Damage means “every loss or diminution

⁹⁷ TEX. GOV’T CODE §311.021(1)-(4).

⁹⁸ *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).

⁹⁹ 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).

¹⁰⁰ *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).

of what is a man's own, occasioned by the fault of another.”¹⁰¹ This is the proverbial “bundle of sticks” often used to describe property rights.¹⁰²

Second, neither party recognizes that TWC §13.254 sets up a special process whereby partial CCN areas may be taken from retail public utilities.¹⁰³ A strict application of eminent domain or inverse condemnation principles is not possible. The decertification process forces corresponding property interests to be damaged in varying degrees necessitating compensation under the constitution whether or not they are completely destroyed or transferred to the new provider.¹⁰⁴ Partial CCN area transfers will be the general rule and not the exception, which explains the *allocable* compensation factors in TWC §13.254(g).¹⁰⁵ Planning, design, and construction are most often performed on a regional or service area-wide basis rather than a tract-by-tract basis prior to development, meaning incremental property losses will ordinarily result from partial CCN decertifications for tracts where development plans are not yet fully realized.¹⁰⁶ Celina expert Mr. Jones recognized this in his Third Party Appraisal performed for the Commission Executive Director on May 24,

¹⁰¹ *Steele v. Houston*, 603 S.W.2d 786, 789-790 (Tex. 1980).

¹⁰² Ex. AT-C, at 12-14 (Korman Direct); Tr. at 22 (Jones Testimony).

¹⁰³ TWC §13.254 (a-5).

¹⁰⁴ TWC §13.254(g); Ex. AT-B, at 12-13 (Blackhurst Direct); Ex. AT-1, at Aqua 000005-000008.

¹⁰⁵ *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).

¹⁰⁶ Ex. AT-B, at 12-13 (Blackhurst Direct).

2016 in a different matter.¹⁰⁷ Property owners seeking expedited release from CCNs will not ordinarily own property matching a utility's entire CCN.¹⁰⁸ Landowners 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 without rendering the entirety of utility property completely useless or valueless.¹⁰⁹ Similarly, each dollar in a retail public utility's bank account may be rendered useless or valueless when the money (*i.e.*, property) is spent on a project short-circuited by decertification, but the entire bank account need not be drained. 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 property rights from CCN holders as required by the Federal and State constitutions.¹¹⁰ This is a "relevant factor" to consider in determining compensation.¹¹¹

Commission Staff incorrectly contends that the decision in *Texas General Land Office v. Crystal Clear Water Supply Corp.* sets a standard for whether property is rendered

¹⁰⁷ Ex. AT-10, at 2-4 (PUC Docket No 45679, *Expedited Release of Guadalupe-Blanco River Authority Sewer CCN No. 20892*, Third Party Appraisal, Jones-Heroy & Associates, Inc., Jason S. Jones, P.E. (May 24, 2016); Tr. at 27-29 (Jones Testimony).

¹⁰⁸ 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).

¹⁰⁹ 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).

¹¹⁰ 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).

¹¹¹ TWC §13.254(g).

“useless or valueless.”¹¹² The *Crystal Clear* decision is inapplicable here. As previously discussed, that decision made a ruling, which Aqua disagrees with, based on case-specific facts that a tract of real property was not “receiving water service” from the decertified CCN holder under TWC §13.254(a-5).¹¹³ There is no discussion about what is or is not “property” rendered “useless or valueless” for purposes of TWC §13.254(d) or (g). *Crystal Clear* recognized that “the Water Code provides that there be compensation for any property that the Commission determines is rendered useless or valueless to a decertified retail public utility as a result of decertification,” which is the very issue considered here.¹¹⁴ *Crystal Clear* further recognized the TWC definition of “service” is of “intentionally broad scope and may encompass an array of activities” that a retail public utility may engage in for “providing service.”¹¹⁵ *Crystal Clear* makes a specific distinction between *receiving* service and *providing* service.¹¹⁶ *Crystal Clear* only decided “receiving service,” and not “providing service.”¹¹⁷ If the Commission applies the same standard for lack of “receiving service” it uses to release a property owner in a manner that denies a utility compensation for steps

¹¹² *Texas General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140-141 (Tex. App.—Austin 2014, pet. denied); Staff Brief, at 16.

¹¹³ *Crystal Clear*, 449 S.W.3d at 142.

¹¹⁴ *Id.* at 144.

¹¹⁵ *Id.* at 137 (emphasis added) (citing TWC §13.002(21) definition of “service”).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

taken to “provide service,” retail public utilities will not be able to properly plan for service in areas where TWC §13.254(a-5) decertification is permitted.

In sum, the application of these terms must be made in the specific context the Legislature has set up with a constitutional perspective in mind. 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.

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. 45329.¹¹⁸

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

There does not seem to be a dispute that if Aqua’s wastewater permit is considered property, it was rendered useless or valueless by the decertification. Aqua agrees with Staff in part, but also contends all investments Aqua made in planning, design, and permitting for the Property and Aqua’s money spent on same were property similarly rendered useless or valueless by the decertification.¹¹⁹ Celina contends there is no compensable property in this category at all.¹²⁰ Celina plainly just wants authorization to serve Aqua’s removed CCN areas without paying anything. In sum, Aqua agrees with Commission Staff in part, but not Celina because compensable Aqua property was rendered useless or valueless.

¹¹⁸ *Id.*

¹¹⁹ Ex. AT-A, at 7-11 (Waldock Direct); Ex. AT-C, at 8-13 (Korman Direct); and Ex. AT-1, at Aqua 000005-000006.

¹²⁰ Celina Brief, at 22.

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. 45329.¹²¹ Celina contends this is not property and provides no further analysis.¹²² Commission Staff recognizes legal expenses and professional fees as a compensation factor, but not property rendered useless or valueless.¹²³ For reasons discussed in Aqua witness testimony and in its Initial Post-Hearing Brief, these expenses represent both project property interests of Aqua and Aqua money rendered useless or valueless as a result of the decertification.¹²⁴ Aqua has been forced into two decertification hearings (now three) under TWC §13.254(d) and (g) by Celina and Commission orders. It was reasonable for Aqua to defend its CCN territory in the first hearing and the Commission has established no other process for Aqua to fully recoup its project investments and lost property except this hearing process.

3. *Lost Economic Opportunity.*

Both Commission Staff and Celina contend there is no property for this item to analyze, but, if it is property, they argue the *Crystal Clear* standard Commission Staff

¹²¹ 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).

¹²² Celina Brief, at 23.

¹²³ Staff Brief, at 10-12 and 18-19.

¹²⁴ 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* Aqua Brief, at 28-29; Tr. at 47-48, 55 (Jones Testimony discussing that CCNs provide valuable right to make money); and Ex. CEL 102, at 102-006 (Celina Report) (Celina expert's recommendation for Aqua to receive compensation for this item).

advocates prevents recovery for the allocable portion of Aqua's regional economic opportunity attributable to the Property.¹²⁵ Aqua will not restate its contentions discussed previously for why this item is property. However, the alternative position Staff and Celina present, that it cannot be rendered useless or valueless because Aqua can still make money elsewhere, would be an absurd result that is not just and reasonable under the constitution.¹²⁶

Crystal Clear does not apply here for reasons previously stated. Further, there will never be a TWC §13.254(a-5) decertification case that takes away all of Aqua's certificated areas unless a property owner were to buy, for example, all of North Texas. Thus, if the Commission finds there is a property interest here as Aqua contends, it must allow recovery for the allocated portion attributable to the Property as presented in the Aqua appraisal report to afford Aqua just and adequate constitutional compensation for same.¹²⁷

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

Aqua continues to assert that 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. 45329.¹²⁸ The other two filed reports were

¹²⁵ Staff Brief, at 19-20; Celina Brief, at 23.

¹²⁶ TEX. GOV'T CODE §311.021(1)-(4).

¹²⁷ TWC §13.254(g); 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).

¹²⁸ Ex. AT-1.

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. 45329.¹²⁹ Aqua notes that the Commission Executive Director's Third Party Report was not offered or supported by Commission Staff or its author at trial.¹³⁰ No report identifies non-property items.¹³¹

V. CONCLUSION

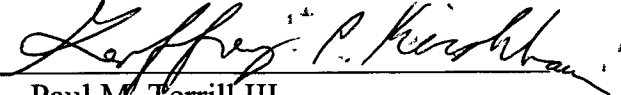
Aqua respectfully requests the Honorable Administrative Law Judges find and recommend that the Commission determine: (1) all property items described in the Aqua Appraisal Report are in fact property and were rendered useless or valueless to Aqua Texas, Inc. by the CCN decertifications in Docket No. 45329; (2) City of Celina must provide just and adequate compensation to Aqua for these property items before commencing service within the decertified areas; and (3) a second hearing must be held to determine the just and adequate compensation owed to Aqua by Celina.

¹²⁹ Ex. AT-2; Ex. CEL-102; Ex. AT-3.

¹³⁰ Ex. AT-3.

¹³¹ Ex. AT-1; Ex. AT-2; Ex. CEL-102; Ex. AT-3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on November 14, 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:

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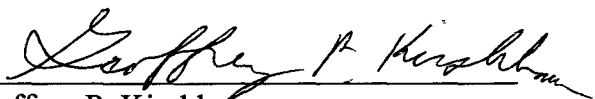
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