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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 OFFICE

OF

PUBLIC UTILITY COMMISSION
FILING CLERK

ADMINISTRATIVE HEARINGS

AQUA TEXAS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Aqua Texas, Inc. respectfully submits the following proposed Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

Procedural History

1. 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") water certificate of convenience and necessity (CCN) No. 13201 and sewer CCN No. 21059 in Denton County, Texas.
2. On April 12, 2016, the City of Celina ("Celina") filed a Notice of Intent to provide retail water and sewer service to Aqua's water and sewer CCN areas decertified in Docket No. 45329.
3. On April 14, 2016, the Public Utility Commission 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.
4. A public notice for Celina's Notice of Intent was published in the *Texas Register* on April 14, 2016.
5. On April 22, 2016, Celina filed a Notice of Non-Agreement on Single Appraiser, and Aqua filed a motion to intervene.
6. On April 25, 2016, the ALJ issued Order No. 2 requiring Celina and Aqua to each file an appraisal.
7. On June 13, 2016, Celina and Aqua timely filed their respective appraisals.
8. On July 7, 2016, the independent "third party engineering appraisal" of Bret W. Fenner, P.E. was filed at the request of the Commission's Executive Director.
9. On July 7, 2016, the Commission issued an Order of Referral which referred the matter to the State Office of Administrative Hearings ("SOAH").

10. On July 13, 2016, the SOAH ALJ issued Order No. 1, setting a prehearing conference and granting Aqua's motion to intervene.

11. On July 20, 2016, the Commission issued a Preliminary Order.

12. 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 on July 29, 2016.

13. On August 23, 2016, the SOAH ALJ issued SOAH Order No. 3, Requiring Statement of Request for Transcript of Hearing on the Merits.

14. On September 2, 2016, Celina filed a letter regarding the transcript in response to SOAH Order No. 3.

15. 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.

16. The hearing on the merits was conducted on September 16, 2016. All parties appeared and were represented by counsel.

17. On September 23, 2016, parties filed an agreed schedule and briefing outline.

18. On October 4, 2016, SOAH Order No. 5 was issued which adopted the parties' briefing schedule and outline.

19. On October 28, 2016, all parties filed their initial post-hearing briefs on closing arguments.

20. On November 14, 2016, all parties filed their respective replies to post-hearing briefs.

21. On December 27, 2016, the SOAH ALJ issued SOAH Order No. 6 which requested parties file proposed findings of fact and conclusions of law.

Appraisals

22. Aqua filed an appraisal report for its decertified CCN areas prepared by KOR Group and Texas state-licensed appraiser Joshua M. Korman.

23. Aqua's appraisal report was prepared by Mr. Korman in accordance with *Uniform Standards of Professional Appraisal Practice, 2016-2017* ("USPAP") and the Texas Water Code (TWC) § 13.254 compensation factors in place of USPAP where applicable.

24. USPAP provides appraisal standards which may be used by licensed appraisers to value tangible, intangible, real, and personal property.

25. Celina's appraisal report was prepared by Jason S. Jones, P.E. and was not prepared using USPAP.

26. The "third party engineering appraisal report" filed by Bret W. Fenner, P.E. at the request of the Commission's Executive Director was not prepared using USPAP.

27. Only Aqua filed an appraisal report prepared by a Texas state-licensed appraiser applying USPAP and TWC §13.254.

28. Failure to require Texas state-licensed appraisers to prepare TWC §13.254 appraisals could result in decertified CCN holders not receiving complete just and adequate compensation.

29. The three appraisals filed in this docket are all very different in terms of the property identified as rendered useless or valueless by the CCN decertifications in Docket No. 45329.

30. The three appraisals filed in this docket all find that Aqua is owed some amount of compensation for loss of its TCEQ-approved wastewater discharge permit (TPDES Permit WQ0014234001) and necessary and reasonable legal expenses and professional fees.

Types of Property that May be Rendered Useless or Valueless

31. The Texas Water Code does not define "property."

32. Other Texas statutes and the courts have ascribed a broad meaning to the term "property."

33. The compensation factors set forth in TWC §13.254(g) inform, but do not limit, the types of "property" that may be rendered useless or valueless to a decertified CCN holder as a result of a CCN decertification under the Texas Water Code.

34. "Property" rendered useless or valueless as a result of decertification under the Texas Water Code may be real, personal, tangible, or intangible.

35. "Property" rendered useless or valueless as a result of decertification under the Texas Water Code may include permits.

36. "Property" rendered useless or valueless as a result of decertification under the Texas Water Code may include money or monetary investments.

37. "Property" rendered useless or valueless as a result of decertification under the Texas Water Code may include monetary expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question.

38. "Property" rendered useless or valueless as a result of decertification under the Texas Water Code may include monetary expenditures on necessary and reasonable legal expenses and professional fees incurred as part of the decertification or compensation process.

39. “Property” rendered useless or valueless as a result of decertification may include the lost economic opportunity to conduct business within and earn revenue from customers within decertified CCN areas, a relevant compensation consideration.

40. A narrow view of “property” under the Texas Water Code could result in decertified CCN holders not receiving complete just and adequate compensation.

Meaning of “Useless or Valueless”

41. The Texas Water Code has established a system that permits partial decertification of CCN areas.

42. As in the eminent domain context, partial decertifications may result in allocable portions of property being rendered useless or valueless.

43. “Property” does not need to be completely rendered useless or valueless to warrant just and adequate compensation under the Texas Water Code.

44. “Property” may be physically located outside decertified CCN areas and still be compensable under the Texas Water Code if portions are rendered useless or valueless in furtherance of service to the subject areas.

45. Intangible “property,” such as money or monetary investments, has no physical location, but certain amounts may be rendered useless or valueless by CCN decertification in a particular location.

46. Within the water and sewer utility industry, active service to particular tracts of land cannot occur without investing in permitting and other planning both within and outside those tracts.

47. Within the water and sewer utility industry, active service to particular tracts of land often requires intangible facilities or property with no physical location.

48. “Service” is given a broad definition in the Texas Water Code and encompasses more than the physical distribution of public drinking water or physical collection of wastewater for treatment.

49. A narrow view of the terms “useless or valueless” under the Texas Water Code could result in decertified CCN holders not receiving complete just and adequate compensation.

Aqua “Property” Rendered “Useless or Valueless” by the Decertifications

50. When Aqua held the decertified areas as part of its water and sewer CCNs, it referred to the development project within the 128-acre tract as “Prosper Point.”

51. Aqua made investments of both money and time to serve the Prosper Point property.

52. Aqua undertook permitting, planning, and design activities with developers and engineers to serve the Prosper Point property, devoted time and resources to those activities, and spent money on those activities.

53. Aqua obtained and maintained a TCEQ wastewater discharge permit, TPDES Permit No. WQ0014234001 ("Wastewater Permit") specifically to serve the Prosper Point property.

54. Obtaining the Wastewater Permit was an essential planning step in designing physical wastewater treatment facilities for Prosper Point.

55. Aqua spent money and resources to prepare renewal applications for the Wastewater Permit.

56. Aqua ceased Wastewater Permit renewal activities as a result of the sewer CCN decertification in Docket No. 45329.

57. The Wastewater Permit is now expired.

58. All Aqua money spent on permitting, planning, and design activities to serve the Prosper Point property constitute property rendered useless or valueless to Aqua as a result of the CCN decertifications in Docket No. 45329.

59. All Aqua investments in permitting, planning, and design activities to serve the Prosper Point property constitute property rendered useless or valueless to Aqua as a result of the CCN decertifications in Docket No. 45329.

60. Such money and investments now rendered useless or valueless to Aqua represent stranded Prosper Point project costs allocable to the decertified property.

61. The Wastewater Permit constitutes property rendered useless or valueless to Aqua as a result of the CCN decertifications in Docket No. 45329.

62. The partially decertified CCN permits constitute property rendered useless or valueless to Aqua as a result of the CCN decertifications in Docket No. 45329.

63. Aqua has incurred necessary legal expenses and professional fees in this docket and Docket No. 45329 as a result of the decertifications in Docket No. 45329.

64. Aqua's money spent on reasonable and necessary legal expenses and professional fees incurred in this docket and Docket No. 45329 constitute property rendered useless and valueless to Aqua as a result of the decertifications in Docket No. 45329.

65. Aqua's water and sewer CCNs for the Prosper Point property were obtained with the goal of making money within the Prosper Point property.

66. Denton County is a high growth development area in Texas.

67. Aqua engaged in negotiations with multiple developers and entered various agreements regarding development within the Prosper Point property and service to same over the years.

68. More likely than not, development will occur within the Prosper Point property.

69. More likely than not, Aqua would have made money from active service to development within the Prosper Point property but for the decertifications in Docket No. 45329.

70. As a result of the decertifications in Docket No. 45329, Aqua has lost the economic opportunity to operate within the Prosper Point property and utilize its investments to make money through retail water and sewer utility service to customers within the Prosper Point property.

71. Aqua's lost economic opportunity interest as allocable to the lost Prosper Point CCN service areas is a property interest rendered useless or valueless to Aqua as a result of the decertifications in Docket No. 45329.

72. Aqua is entitled to just and adequate compensation for all the property items described above.

73. Aqua's filed appraisal is limited to property that was rendered useless or valueless to Aqua as by the decertifications in Docket No. 45329.

74. Other appraisals filed in this docket do not address all property that was rendered useless or valueless to Aqua by the decertifications in Docket No. 45329.

75. A second contested case hearing is needed so that the Commission may determine the value for the property described above rendered useless or valueless to Aqua by the decertifications in Docket No. 45329.

II. CONCLUSIONS OF LAW

1. If the legislature does not define a term, its ordinary meaning will be applied.¹

2. By its ordinary meaning, the term "property" extends to "every species of valuable right and interest."²

3. The term "property" is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal."³

¹ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994).

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

³ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis added).

4. Legislative intent indicates that a broad definition of “property” in TWC §13.254(d) is appropriate.⁴

5. 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.”⁵ Thus, the term “facilities” as defined by the Texas Water Code includes tangible and intangible real and personal property without limitation.⁶

6. “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 . . .”⁷ meaning that intangible assets may be used in furtherance of “service.”

7. The compensation factors in TWC §13.254(g) inform, but do not limit, the types of property that may be rendered useless or valueless as a result of a CCN decertification under TWC §13.254(d).⁸

8. The Commission rules that implement TWC §13.254(d) and (g) inform, but do not limit, the types of property that may be rendered useless or valueless as a result of a CCN decertification under TWC §13.254(d).⁹

9. 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.¹⁰

10. A wastewater permit may be intangible property.¹¹

⁴ Tex. H.B. 2035, 70th Leg., R.S. (1987); *see also* 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/senate_recordings/70th-R.S./700795a/index.html).

⁵ TWC §13.002(9); *see also* 16 TAC §24.3(24).

⁶ *Id.*

⁷ TWC §13.002(21); *see also* 16 TAC §24.3(62).

⁸ TWC §13.254(d), (g).

⁹ 16 TAC §24.113(h), (k).

¹⁰ TWC §13.254(g); *see also* 16 TAC §24.113(k).

¹¹ *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); TEX. TAX CODE §1.04(5).

11. A CCN permit may be intangible property.¹²

12. Money and investments are property.¹³

13. Money spent on permitting, planning, and design activities in furtherance of service to a decertified CCN area may be property rendered useless or valueless even if active service was not established at the time of decertification. “Service” may include other acts.

14. Necessary and reasonable legal expenses and professional fees incurred in Commission decertification/compensation dockets may be property rendered useless or valueless because they represent additional service project costs with respect to decertified areas.

15. Lost economic opportunity within a decertified CCN area may be property rendered useless or valueless under TWC §13.254(d) and lost business is a relevant factor for compensation under TWC §13.254(g).

16. Portions of property may be rendered useless or valueless as allocable to a decertified CCN area or on an incremental basis warranting compensation under TWC §13.254(d) and (g).

17. 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, personal, tangible, or intangible without limit.¹⁴

18. The Texas Water Code and Commission rules require just and adequate compensation for property rendered useless or valueless by CCN decertifications to prevent unlawful government takings.¹⁵

19. A second hearing must be held to ensure that Aqua receives just and adequate compensation for Aqua’s: (1) stranded permitting, planning, and design activity expenses within Prosper Point, including money invested in obtaining and maintaining the Wastewater Permit prior to its expiration; (2) necessary and reasonable legal expenses and professional fees incurred in Docket No. 45329 and this docket; and (3) lost economic opportunity interest within Prosper Point.

¹² *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); TEX. TAX CODE §1.04(5).

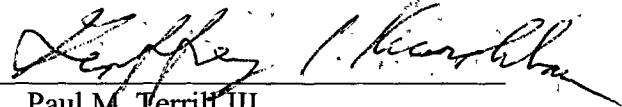
¹³ *See, e.g., Merryman v. State*, 391 S.W.3d 261, 276 (Tex. App.– San Antonio 2012, pet ref’d) (involving misapplication of fiduciary property and theft by deception where the property in question was money).

¹⁴ 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).

¹⁵ TWC §13.254(d), (g); 16 TAC §24.113(h), (k); 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 . . .”).

20. Aqua's filed appraisal was properly limited to property items rendered useless or valueless to Aqua by the decertifications in Docket No. 45329 and compensable under TWC §13.254(d) and (g).

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 January 10, 2017, 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

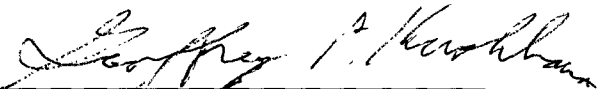
via fax to: (512) 366-9949

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