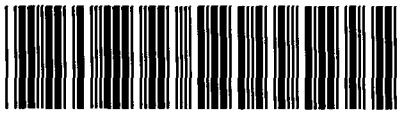

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State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

January 27, 2017

TO: **Stephen Journeay, Director**
Commission Advising and Docket Management
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

Courier Pick-up

RE: **SOAH Docket No. 473-16-5011.WS**
PUC Docket No. 45848

City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify the undersigned Administrative Law Judges and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

Meitra Farhadi
Administrative Law Judge

Travis Vickery
Administrative Law Judge

Enclosure
xc: All Parties of Record

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

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 ADMINISTRATIVE HEARINGS

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PROPOSAL FOR DECISION

I. INTRODUCTION

The City of Celina (City) filed an application with the Public Utility Commission of Texas (PUC or Commission) seeking to provide water and sewer service to an area decertificated from Aqua Texas, Inc. (Aqua). As a result, Aqua has claimed that it is entitled to compensation for the loss of certain property rights. The primary issue in this case is whether Aqua had any property rendered "useless or valueless" by having a portion of its Certificate of Convenience and Necessity (CCN) decertificated in Docket No. 45329.[1] This case is one of first impression.[2]

In this proposal for decision (PFD),[3] the State Office of Administrative Hearings (SOAH) Administrative Law Judges (ALJs) recommend that the property rendered useless and valueless to Aqua are:

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

2. Necessary and reasonable legal expenses and professional fees.

Aqua did not demonstrate entitlement to lost economic opportunity.

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[1] *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).

[2] *See* PUC Preliminary Order at 2 (July 20, 2016) (Docket No 45848) (Preliminary Order) ("This is the one of the first cases of this type to be referred to SOAH").

[3] As noted at the hearing on the merits, the ALJs have reproduced portions of the parties' briefing in the interests of judicial economy.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this proceeding pursuant to Texas Water Code (Water Code) Chapter 13. SOAH has jurisdiction over matters relating to the conduct of the hearing in these proceedings pursuant to Texas Government Code § 2003.049.

On March 22, 2016, the Commission issued an order in Docket No. 45329 approving the petition of CADG Sutton Fields II, LLC, for expedited release of approximately 128 acres from Aqua's water CCN No. 13201 and sewer CCN No. 21059, in Denton County, Texas (the Tract).

On April 12, 2016, the City filed a Notice of Intent to provide retail water and sewer service to the area decertified in that case, pursuant to Water Code § 13.254(e) and 16 Texas Administrative Code § 24.113(i).

On April 14, 2016, the Commission ALJ issued Order No. 1, requiring parties to notify the Commission whether they agreed on an independent appraiser by April 22, 2016. Notice of Celina's Notice of Intent to Serve was published in the *Texas Register* on April 14, 2016. On April 22, 2016, the City filed a Notice of Non-Agreement on Single Appraiser. Aqua filed a motion to intervene on April 22, 2016.

On April 25, 2016, the Commission ALJ issued Order No. 2 requiring Aqua and the City to each file an appraisal by June 13, 2016. Aqua and the City timely filed the appraisals. On July 7, 2016, an independent third appraisal was filed.

On July 7, 2016, the Commission issued an Order of Referral, referring this matter to SOAH requesting the assignment of an ALJ to conduct a hearing and issue a PFD, if necessary. On July 13, 2016, a SOAH ALJ issued SOAH Order No. 1, setting a prehearing conference and granting Aqua's motion to intervene.

On July 20, 2016, the Commission issued a Preliminary Order On July 26, 2016, Aqua, the City, and Commissions staff (Staff) attended an initial prehearing conference in this matter and adopted a procedural schedule, which was memorialized in SOAH Order No. 2, issued July 29, 2016.

On September 14, 2016, the parties attended a final prehearing conference regarding procedures for the hearing on the merits and objections to prefiled testimony, which was memorialized in SOAH Order No. 4, issued on September 14, 2016.

The hearing on the merits was held on September 16, 2016, and was attended by the City, Aqua, and Staff. On September 23, 2016, the City, Aqua, and Staff filed an Agreed Schedule and Briefing Outline, which was adopted by the SOAH ALJs in SOAH Order No. 5, issued on October 6, 2016. The record closed on January 10, 2017.

III. FACTUAL BACKGROUND

The parties are in agreement as to the operative facts in this case. There is no dispute as to the following:

- Aqua does not own any real or personal property on the Tract;[4]
- Aqua has no physical improvements on the Tract, such as water and or sewer lines, other pipes or tanks, etc.;[5]
- Aqua has been certificated to the Tract since approximately 2004;
- There has been no development on the Tract;[6]
- The Texas Commission on Environmental Quality (TCEQ), or its predecessor agency, issued to Aqua Texas Pollutant Discharge

[4] City Ex. CEL-100 at 9.

[5] City Ex. CEL-100 at 6.

[6] City Ex. CEL-100 at 6.

Elimination System wastewater discharge permit, Permit No. WQ0014234001 (permit);[7]

- No wastewater treatment plant or attendant structures have been constructed;[8]
- Although there was a letter of intent with the previous owners of the Tract to receive service from Aqua, actual water and/or sewer service was not received on the Tract;[9]
- The current landowner did not request service from Aqua;[10] and
- Aqua serves a residential subdivision located approximately 1.5 miles from the Tract called the Willow Wood Addition Meadow Vista with retail water service but not with sewer service.[11]

Furthermore, all three appraisals agree that:[12]

- Aqua has no debt allocable to the Tract;[13]
- Aqua has no service facilities on the Tract;[14]
- Aqua has no existing customers on the Tract;[15]

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[7] Tr. at 123.

[8] City Ex. CEL-100 at 6; Docket 45329 Final Order at Finding of Fact No. 28.

[9] Docket 45329 Final Order at Finding of Fact No. 31.

[10] Docket 45329 Final Order at Findings of Fact Nos. 24 and 32.

[11] City Ex. CEL-100 at 13.

[12] Aqua and the City each provided an appraisal (Aqua Ex. AT-1 and City Ex. CEL-102, respectively). Pursuant to Texas Water Code (Water Code) § 13.254(g-1), the PUC appointed Bret W. Fenner, P.E., as a third appraiser to make a determination of compensation.

[13] City Ex. CEL-102-004; Aqua Ex. AT-3 at Aqua 000616; Aqua Ex. AT-1 at Aqua 000005.

[14] City Ex. CEL-102-005; Aqua Ex. AT-3 at Aqua 000616; Aqua Ex. AT-1 at Aqua 000005.

[15] City Ex. CEL-102-006; Aqua Ex. AT-3 at Aqua 000617; Aqua Ex. AT-1 at Aqua 000006. Although Aqua witness Joshua M. Korman testified at hearing that, in his opinion, the developer is a customer of Aqua (Tr. at 157) the ALJs agree with the City that a developer not receiving service does not meet the definition of customer under Commission rules. 16 Texas Administrative Code § 24.3(23) defines "customer" as a "person, firm . . . provided with services by any retail public utility." The City notes that in Docket No. 45329 the Commission found that there is no service to the Tract. Mr. Korman also acknowledged that the developer was not receiving services. Tr. at 157. As a result, the ALJs do not consider this to be a disputed fact.

- Aqua has no contractual obligations allocable to the Tract;[16] and
- There is no demonstrated impairment of Aqua's service to other customers or increase of cost to other customers of Aqua as a result of the decertification.[17]

Because there are no operative facts in dispute, the issues to be decided are primarily questions of law. The ALJs also note that, based on the uncontested facts and Aqua's allegations, the categories of property sought only involve intangible personal property. Aqua does not seek recovery for loss of real property, nor tangible personal property.

IV. LEGAL FRAMEWORK

A. Water Code Provisions Regarding Property Rendered Useless and Valueless

Water Code § 13.254(d) states:

> A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section without providing compensation for any property that the utility commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.

To assist in determining the value of any property rendered useless and valueless to the decertified retail public utility, Water Code § 13.254(g) provides:

> For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain and the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall include:[18]

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[16] City Ex. CEL-102-006; Aqua Ex. AT-3 at Aqua 000617; Aqua Ex. AT-1 at Aqua 000006.

[17] City Ex. CEL-102-006; Aqua Ex. AT-3 at Aqua 000617; Aqua Ex. AT-1 at Aqua 000006.

[18] The factors are not numbered in the original text of Water Code § 13.254(g). However, to assist in the analysis of the parties' arguments, the ALJs have numbered the factors for ease of reference.

1. The amount of the retail public utility's debt allocable for service to the area in question;
2. The value of the service facilities of the retail public utility located within the area in question;
3. The amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question;
4. The amount of the retail public utility's contractual obligations allocable to the area in question;
5. Any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification;
6. The impact on future revenues lost from existing customers;
7. Necessary and reasonable legal expenses and professional fees; and
8. Other relevant factors.

B. Definition of "Property"

There is no dispute that the only type of property at issue in this proceeding is intangible personal property. As a result, the ALJs limit their analysis to this area.

The parties agree that the Water Code and Texas Administrative Code do not provide definitions of property.[19] Nevertheless, Aqua argues that Water Code § 13.245(g) outlines certain property interests that must be considered in determining the value of property rendered valueless or useless by decertification of an affected area.

In interpreting Water Code § 13.245(g), Aqua notes that the Texas Supreme Court has held that the term "property" must be applied in its broadest sense where no further definition is provided in the relevant statute:

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[19] *See* Aqua Texas, Inc.'s Initial Brief at 5 (Oct. 28, 2016) (Aqua Initial Brief); City of Celina's Closing Argument at 4 (Oct. 28, 2016) (City Initial Brief); Staff's Initial Brief at 5 (Oct. 28, 2016) (Staff Initial Brief).

> In construing a statute, if the legislature does not define a term, its ordinary meaning will be applied. By its ordinary meaning, the term "property" extends to "every species of valuable right and interest." It is "commonly used to denote everything to which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal."[20]

Aqua points out that the Federal and Texas Constitutions require just compensation when the government takes, damages, or destroys property of any variety for public use whether that property is real or personal and they too provide no limitation on the term "property."[21] Staff agrees with Aqua that *State v. Public Utility Commission of Texas* provides valuable guidance in reaching and interpreting a definition of property.

Aqua also argues that legislative history supports a broad definition of property. Aqua notes that the property language in Water Code § 13.254(d) has not changed since it was first added to that section through S.B. 1 in 1997, despite other changes to Water Code § 13.254 through H.B. 2876 in 2005.[22] Aqua points out, however, that the language first originated in Water Code § 13.255 through H.B. 2035 in 1987, before its incorporation into the Water Code § 13.254 decertification provisions.[23] Unlike Water Code § 13.254, Water Code § 13.255 applies to limited municipal annexation situations and is restricted to certain types of retail public utilities, such as water supply corporations. Aqua notes that the House Sponsor of H.B. 2035, Representative Hinojosa, specifically stated in a Senate Committee Meeting discussing H.B. 2035 that affected water supply corporations would be compensated for "any bonded indebtedness that it may have or *for any other property that it may lose because the City is going*

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

[21] 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).

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

[23] Tex. H.B. 2035, 70th Leg., R.S. (1987).

into the certified area and providing water."[24] As a result, Aqua argues that no property limitation was contemplated for either provision.

The ALJs agree with Aqua that, in the interests of just compensation, the Water Code should be read as consistent as possible with a broad interpretation of property interests.[25] Consistent with this concept, the ALJs note that Water Code § 13.254(d) requires "compensation for *any* property . . . rendered useless or valueless . . . as a result of the decertification."[26]

Staff also provided a broad set of guiding principles for determining personal property. Staff noted that personal property is *any* property that is not real property,[27] and intangible personal property is:

> A claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document. It includes a stock, bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate of deposit, share account, share certificate account, share deposit account, insurance policy, annuity, pension, cause of action, contract, and goodwill.[28]

Regarding Aqua's alleged property interests in this case, the ALJs note that witnesses for both the City and Aqua testified that money and investments are personal property.[29] As explained below, consistent with the principle that money and investments are personal property,

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[24] *See* Attachment A to Aqua's Initial Brief, partial transcript of the Senate Committee on Intergovernmental Relations hearing on May, 28, 1987, 70th Leg. R. S. (The audio of the full hearing is available at https://www.tsl.texas.gov/ref/senaterecordings/70th-R.S./700795a/index.html.)

[25] *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)).

[26] Water Code § 13.254(d) (emphasis added).

[27] Texas Tax Code (Tax Code) § 1.04(4); *see also* PROPERTY, Black's Law Dictionary (10th ed. 2014) (Personal Property- any movable or intangible thing that is subject to ownership and not classified as real property).

[28] Tax Code § 1.04(6).

[29] Tr. at 23-24 (Jones); Tr. at 68 (Waldock); Tr. at 131 (Korman).

the ALJs recommend that under Water Code § 13.254(g), Factor 3, Aqua has property interests in any expenditure for the planning or design of service facilities allocable to the Tract. Similarly, under Water Code § 13.254(g), Factor 7, Aqua has a property interest in necessary and reasonable legal expenses and professional fees. However, because Water Code § 13.254(g), Factor 6, limits recovery for the impact on future revenues to losses from *existing* customers, the ALJs recommend that lost future revenues from currently *non-existing* customers are not property and are not compensable under Water Code § 13.254(g).

C. Burden of Proof

The ALJs recommend that Aqua has the burden to prove what property is rendered useless and valueless. Only the City addressed this matter, but only argued that Aqua has the burden of showing that lost economic opportunity is property and that the Water Code authorizes compensation for that property. The ALJs are familiar with SOAH Order No. 2 in the City of Cibolo case, which places the burden of proof on the city seeking decertification.[30] However, in that matter, decertification of the CCN holder's certificated area has yet to occur.

The ALJs are also aware that the Commission is working on a rule amendment on this point. In a hearing such as this, the rule as proposed places the ". . . the burden to prove what property is useless or valueless . . ." on the former CCN holder.[31] The ALJs' assignment of the burden to Aqua is consistent with the Commission's proposed rule. Furthermore, in these types of cases, the former CCN holder is the moving party that seeks relief.[32] As a result, the ALJs find that Aqua is the party with the burden of proof in this docket.

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[30] *Application of the City of Cibolo for Single Certification in Incorporated Area and to Decertify Portions of Green Valley Special Utility District's Sewer Certificate of Convenience and Necessity in Guadalupe County*, Docket No. 45702, SOAH Docket No. 473-16-5296, Order No. 2 (August 19, 2016).

[31] *Project to Amend 16 Tex. Admin. Code Section 24.113 Relating to Revocation or Amendment of a Water or Sewer Certificate and Section 24.120 Relating to Single Certification in Incorporated or Annexed Areas*, Project No. 46151 at 22, 38: http://www.puc.texas.gov/industry/projects/water/46151/46151.aspx

[32] 16 Tex. Admin. Code § 24.12; 1 Tex. Admin. Code § 155.427.

V. PRELIMINARY ORDER ISSUES

In the Preliminary Order the Commission identified the following issues for SOAH to address:[33]

1. What property, if any, has been rendered useless or valueless to Aqua by the decertification granted in Docket No. 45329? Water Code § 13.254(d) and 16 Texas Administrative Code § 24.113(h).

2. Are the existing appraisals limited to property that has been determined to have been rendered useless or valueless by decertification?[34]

A. Identification of Aqua's Property Interests

1. Expenditures for Planning, Design, or Construction of Service Facilities that are Allocable to Service the Area in Question [Factor 3] [35]

a. Introduction

Aqua seeks recovery of expenditures for the planning and design of service facilities. Although Aqua never constructed service facilities on the Tract, Aqua argues that its permit and any related expenditures are its property under Water Code § 13.254(g). The City disagrees, arguing that a wastewater permit is not property, and thus expenses associated solely with a permit are not compensable. Taking a different approach, Staff asserts in its Initial Brief that the permit *was* intangible personal property, but that Aqua's related planning and design expenditures are not. As explained below, the ALJs recommend that Aqua's permit is not property. However, because Aqua spent money, which is property, expenditures for planning and design of service facilities allocable to the Tract are also compensable property under Water Code § 13.254(d) and (g).

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[33] Preliminary Order at 3.

[34] The PUC did not include any valuation in this docket. Preliminary Order at 2.

[35] Water Code § 13.245(g); 16 Tex. Admin. Code § 24.113(k). Factor 3 is also sometimes referred to in testimony as "appraisal factor 3."

For this section of the PFD, the operative provisions are Water Code 13.245(g), Factor 3, and the Commission's rule at 16 Texas Administrative Code § 24.113(k). Both provisions use identical language and state:

> For the purpose of implementing this section . . . the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall include:
>
> > . . . the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question . . .[36]

b. Parties' Positions

The parties' evidence and argument regarding whether Aqua's planning and design expenses are property also involve a discussion of whether Aqua's permit was property. Aqua argues that both its permit and project investments were personal property. According to Aqua, the term "property" in Water Code § 13.254(d) must include planning and design expenses under Section 13.254(g), Factor 3, such as Aqua's investments in:

- facilities planning and design;
- water source contract negotiations;
- analysis of wastewater treatment options;
- analysis of water distribution;
- budgeting; and
- permitting and permit renewal activities.[37]

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[36] Water Code § 13.245(g); 16 Tex. Admin. Code § 24.113(k).

[37] Aqua Ex. AT-A at 8-9; Aqua Ex. AT-B at 12; Aqua Ex. AT-C at 10-12; Aqua Ex. AT-1 at Aqua 000005-000006; Tr. at 43-44.

Aqua points out that its investments in permitting activities were not incurred to serve any other tract of land besides the Tract.[38] Although Aqua installed no facilities on the Tract, it notes that active service cannot occur without investing in permitting and other planning within or beyond a subject tract.[39] As a result, while Aqua still held the CCN in question, it obtained and maintained a wastewater permit to enable design and construction of physical facilities once the Tract's owner was ready.[40] Aqua argues that investments leading up to physical construction are the intangible property assets of a CCN holder, which the utility described as potentially "stranded costs."[41]

In response, the City argues that, although Aqua expended funds on design and planning to obtain and maintain the permit, such expenditures do not become the property of a permittee. The City points out that Water Code § 26.029(c) states that "a permit does not become a vested right in a permittee." As for Aqua's CCN, the City argues that 16 Texas Administrative Code §§ 24.113(a) and 24.116 prohibit a CCN from being classified as property. As a result, the City argues that permits and CCNs are not property.

The City acknowledges that Factor 3 allows the Commission to include expenditures for the design and planning of such improvements as part of compensation to a decertificated utility. The City contends, however, that the factors in Water Code § 13.254(g) are merely "compensation factors" and do not describe personal property. As a result, the City claims that in seeking to classify such expenses as "property" Aqua has conflated the provision's compensation factors with types of personal property.

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[38] Aqua Ex. AT-A at 10; Water Code § 13.254(g); 16 Tex. Admin. Code § 24.113(k).

[39] Aqua Ex. AT-A at 7-11; Aqua Ex. AT-B at 12-14; Tr. at 75; Tr. at 26-28, 43-44.

[40] Aqua Ex. AT-A at 7-11; Staff Ex. 1.

[41] Aqua Ex. AT-A at 7-11; Aqua Ex. AT-B at 12-14; Tr. at 75; Aqua Ex. AT-C at 8-13; Aqua Ex. AT-1 at Aqua 000005-000006; Tr. at 26-28, 30, 43-44, 75. Water Code § 13.254(g); 16 Tex. Admin. Code § 24.113(k).

The City also acknowledges that a wastewater permit authorizes a utility to construct physical facilities, such as a treatment plant, force mains, etc.[42] And like a wastewater permit, a CCN allows a utility to construct improvements. The City argues, however, that Aqua's expenditures on planning efforts, without any actual construction, does not create property. Jason S. Jones, a licensed Professional Engineer and principal at Jones-Heroy & Associates, Inc., a company which provides planning services to water utility providers, testified on behalf of the City that before such "stranded capital" can be compensated, it must either be property or be tied to property.[43] Thus, according to the City, if the permit and CCN are not property, then any related expenditures cannot be considered property, because Aqua never followed-up on the permit with physical construction of plant, lines, or other wastewater-related physical improvements.[44]

Staff's argument differs from the City's but leads to the same result. Staff argues that Aqua's permit is intangible personal property, but that Aqua's project investments, despite falling under Water Code § 13.254(g), Factor 3, are not property.[45]

First, relying on the testimony of City witness, Paul Hornsby, a real estate appraiser and owner of Paul Hornsby & Co., Staff analyzed Aqua's wastewater permit to determine whether it is property. Based on factors used by appraisers, Staff argues the permit can be classified as intangible property because:

- The permit is a right, legally identified by a regulatory authority, and protected because the permit grants Aqua the sole right to treat and discharge waste from the Prosper Point Wastewater Treatment Facility;[46]

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[42] *See* Water Code § 26.027(c), prohibiting construction of wastewater facilities until the TCEQ issues a permit.

[43] City Ex. CEL-100 at 12.

[44] City Ex. CEL-100 at 8, 12.

[45] Staff Initial Brief at 6-10.

[46] Aqua Ex. AT-1 at Aqua 000308-000342.

- There is evidence of the permit's existence, in the form of a physical and tangible paper document;[47]
- The permit provides that it is legally transferable, as long as the transfer is processed according to the provisions of 30 Texas Administrative Code § 305.64;[48] and
- The permit has a distinct date of creation, or "birthday," which is the issue date of January 9, 2003.[49]

Based on this analysis, Staff concludes that Aqua's permit is property.

Second, using the same analysis, Staff concludes that Aqua's planning and design expenditures are not property. Although Aqua's activities such as water source contract negotiations and analysis of wastewater treatment options and distribution may have tangible evidence of existence, such as contracts, plans, or permits, Staff argues that they are not legally identified and protected, not legally transferable, and do not always have a specific date of creation. As a result, Staff concludes that such expenditures are not property.

Staff acknowledges that planning and design expenditures are identified in Water Code § 13.254(g), Factor 3. Like the City, however, Staff contends that Factor 3 is only a compensation factor and does not identify property. Staff concludes that, although Aqua's permit-related expenditures are not property, Aqua may recover for such expenses under Factor 3 to ensure that compensation is just and adequate.

c. Analysis

The ALJs recommend that Aqua's permit and CCN are not property. Aqua does, however, have a property interest in the company's expenditures on planning or design related to

[47] Aqua Ex. AT-1 at Aqua 000308-000342.

[48] Aqua Ex. AT-1 at Aqua 000318. Staff argues that while the permit was made non-transferable as a result of an agreement with the Upper Trinity Regional Water District (UTRWD), that restriction is contractual and does not go to the nature of the property. Aqua Ex. AT-1 at Aqua 000336-342.

[49] Aqua Ex. AT-1 at Aqua 000308.

the permit. In reaching this recommendation, the ALJs reiterate the Texas Supreme Court's holding in *State v. Public Utility Commission of Texas* that, unless there is specific statutory authority otherwise, the ordinary meaning of property must be broadly interpreted and:

> . . . extends to "every species of valuable right and interest." It is "commonly used to denote everything to which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible . . ."[50]

Accordingly, Water Code § 13.254(d) and (g) must be read consistent with a broad interpretation of property. The ALJs analyze below each of Aqua's alleged property interests: Aqua's permit and CCN; and Aqua's related expenditures.

i. The Permit and CCN

The ALJs agree with the City that neither Aqua's CCN nor its permit are property, because there is statutory and regulatory authority that permits and CCNs do not create vested rights. Water Code § 26.029(c) plainly states "a permit does not become a vested right in a permittee." As for Aqua's CCN, 16 Texas Administrative Code § 24.113(a), states a "certificate or other order of the commission does not become a vested right . . . ." And 16 Texas Administrative Code § 24.116 states "[a]ny certificate granted under this subchapter shall not be construed to vest exclusive service or property rights in and to the area certificated." Although the Water Code allows the sale of a CCN, and TCEQ rules generally allow transfers of wastewater permits, these are corollary rights to a permit or CCN holder. The ALJs find that Water Code § 26.029(c) and 16 Texas Administrative Code §§ 24.113(a) and 116, are more directly on point.[51] Thus, the ALJs agree with the City that permits and CCNs are not property.

The ALJs acknowledge analysis in Staff's Initial Brief for why the permit should be considered property. Yet, that analysis did not take into account the statutory and regulatory

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[50] 883 S.W.2d at 199-200 (emphasis in original).

[51] 30 Tex. Admin. Code § 305.64. Water Code § 13.251 permits the sale of "a [CCN] or any right obtained under a certificate" with Commission approval after it determines "the purchaser, assignee, or lessee is capable of rendering adequate and continuous service."

authority that permits and CCNs do not create vested rights. Staff recognizes this authority in its Reply Brief, noting that "vested" means something fully and unconditionally guaranteed, and not contingent.[52] Staff also admits that the permit is explicitly conditional and may be amended, suspended and reissued, or revoked for cause.[53] As a result, the ALJs find that Staff's initial analysis does not overcome authority that CCNs and wastewater permits do not create vested rights.

Finally, Staff and Aqua are correct that the City's position in this case conflicts with some of its evidence. Nevertheless, the ALJs agree with the City that neither a permit nor a CCN is property because there is statutory and regulatory authority to that effect.

ii. Expenditures for the Planning or Design of Service Facilities

The ALJs recommend that, from a practical and regulatory standpoint, Aqua's expenditures for the planning and design of service facilities are property under Water Code § 13.254(d) and (g).

The planning, design, and construction of service facilities necessarily requires a permit.[54] Regardless of whether a permit is property or whether the facilities are ever actually constructed, a utility must incur costs to obtain a permit authorizing construction of the proposed facilities. This means the utility must spend money. Expert witnesses Joshua Korman,[55] Daryl Waldock,[56] and Mr. Jones all agreed that money (or investments) may be considered property.[57]

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[52] *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).

[53] Aqua Ex. AT-1 at Aqua 000308, 000316; *see* 30 Tex. Admin. Code Chapter 305, Subchapter D.

[54] *See* Water Code § 26.027(c), prohibiting construction of wastewater facilities until the TCEQ issues a permit.

[55] Aqua witness Joshua Korman is a principal at real estate consulting and appraisal firm, KOR Group, Inc.

[56] Aqua witness Daryl Waldock is the North Texas Area Manager for Aqua.

[57] Aqua Ex. AT-C at 10-11; Tr. at 131; Tr. at 68; Tr. at 22, 24.

Aqua invested its money in planning, design, permitting, and litigating CCN decertifications as part of its CCN obligations for the Tract.[58] The money Aqua spent in reliance on its CCN was its property and produced corresponding investment property rights while Aqua held the CCN, including the right to make money with those investments.[59] For instance, Aqua witness Stephen H. Blackhurst, P.E., explained that various permit-related expenses are capitalized by a utility into the related asset and are considered property.[60] Thus, from a practical and business standpoint, the ALJs recommend that Aqua retained property rights in the monies it expended on planning and design expenses.

Furthermore, contrary to the assertions of the City and Staff, the ALJs recommend the factors listed in Water Code § 13.254(g) identify a utility's property interests, which must be broadly interpreted.[61] Consistently, the term "facilities" is broadly defined under Water Code chapter 13 to include:

> 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.[62]

Furthermore, Water Code § 13.254(g), Factor 2, clearly refers to a utility's personal property. That provision includes the "value of *the service facilities* . . . located within the area in question."[63] Had Aqua constructed physical service facilities to serve the Tract, no party would contest that the company could recover the value of those facilities under Factor 2 *as personal property*.

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[58] Water Code § 13.242(a) and 13.250(a).

[59] Aqua Ex. AT-A at 7-11; Aqua Ex. AT-B at 12-14; Tr. at 75; Aqua Ex. AT-C at 10-12; Aqua Ex. AT-1 at Aqua 000005-000006; Tr. at 26-28, 43-44.

[60] Tr. at 82-83. The ALJs acknowledge that Mr. Blackhurst was responding to a question regarding legal expenses and professional fees (Factor 7). However, he extended his response to permitting expenses and the ALJs find that there is no analytical distinction between them on this point. *See also* Tr. at 76; Aqua Ex. AT-B at 13.

[61] *State v. Public Utility Commission of Texas*, 883 S.W.2d at 199-200.

[62] Water Code § 13.002(9) (emphasis added).

[63] Water Code § 13.254(g) (emphasis added).

Similarly, in keeping with a broad interpretation of property, Factor 3 also describes a utility's personal property interest. Regardless of whether service facilities were ever constructed for the Tract, Aqua invested its money in related permit and CCN expenses. That money did not suddenly transform into non-property, once spent. Instead, Aqua was entitled to capitalize those expenses and recover them through rates as intangible personal property. Thus, Water Code § 13.254(g), Factor 3 refers to Aqua's property interest.

In contrast, the City and Staff's interpretation of Water Code § 13.254(g) is insupportably narrow. Both parties argue that the factors are mere "compensation factors," and do not describe property interests.[64] This interpretation of Water Code § 13.254(g), however, separates property from its value. The operative clause in Section 13.254(g) reads:

> . . . the *value of personal property* shall be determined according to the factors in this subsection . . .[65]

That is, the legislature intended that the factors be used to determine the value of a utility's personal property. While the provision does include the term "compensation," it is in the context of ensuring a utility receives just and adequate compensation for the full value of property rendered useless and valueless. Just and adequate compensation for the taking of property is not somehow exclusive of determining the value of that property. Rather, the ALJs find that this language must be read such that property is indivisible from its value.

Next, the ALJs find that it was not necessary for Aqua to construct facilities on the Tract before its planning and design expenses can be considered property. The City argues that because a permit is not property, and Aqua constructed no physical facilities on the Tract, the company's planning and design expenses are not property. If that is correct, then the statute would require the value of property to be determined by non-property. Specifically, the City argues that, under Water Code § 13.254(g), the property (money) a utility expends on planning

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[64] "Aqua conflates the term 'personal property' with the factors used to value such property." City Initial Brief at 5.

[65] Water Code § 13.254(g) (emphasis added).

remains property only if some form of physical construction occurs on the subject tract.[66] Until that occurs, the property (money spent) enters a sort of property purgatory, transformed into non-property until some form of actual property (a physical facility) attaches-to and rescues it, at which point, the expended money once again becomes property. The ALJs find no support for such a strained and narrow reading of Section 13.254(g), Factor 3.

In fact, the City's position in this case is so narrow that it removes statutory language from Water Code § 13.254(g) altogether. On behalf of the City, Mr. Jones addressed the concept of "stranded capacity" in his testimony. He explained that stranded capacity *should* be compensated:

> . . . Stranded capacity is not a term used in the Texas Water Code . . . However, as applied to water and sewer CCN matters, [it] refers to a utility's investments in existing regional facilities intended to serve undeveloped portions of its CCN, which will be underutilized as a result of decertification. . . . Capital investments made to serve undeveloped portions of a utility's CCN are necessary to meet the fundamental obligations of the certificate holder, which is to provide continuing and adequate water service to every customer who requests service in a certificated area. Compensation for 'stranded capacity' satisfies the intent of appraisal factor 3, in [16 Texas Administrative Code § 24.113(k)], which considers "compensation for the *construction* of service facilities allocable for service to the area in question."[67]

Mr. Jones concluded that Aqua has no stranded capacity because it has no facilities on the Tract: "having this property decertificated from Aqua does not impact its capacity since there is none."[68]

Yet, the quote provided by Mr. Jones for the language of Factor 3 is not found in the text of 16 Texas Administrative Code § 24.113(k). Specifically, Mr. Jones' quoted language limits the intent of "appraisal factor 3" to "compensation for the *construction* of service facilities

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[66] City Ex. CEL-100 at 11-12.

[67] City Ex. CEL-100 at 12 (emphasis added).

[68] City Ex. CEL-100 at 12.

allocable for service to the area in question."[69] It is unclear where this quoted limitation to the "construction" of service facilities derives from because the language of 16 Texas Administrative Code § 24.113(k) is no different from the language of Water Code 13.245(g) as they apply to Factor 3. Both provisions state:

> . . . the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question . . .[70]

As a result, the ALJs conclude that the City's position as to Factor 3 is insupportably narrow. The Water Code has no stated requirement that physical facilities be present or under construction before a utility can recover its investment for the planning or design of service facilities under Factor 3.

Furthermore, Mr. Jones was addressing the intent of Factor 3. There is no need, however, to seek the legislative intent of Water Code § 13.245(g) on this specific point because the language is unambiguous. It clearly states that "*any* expenditures for *planning, design, or* construction of service facilities" shall be used to determine the value of a utility's personal property.[71] Because the provision is not vague on this point, there is no need to divine the legislature's intent.

The ALJs are cognizant that Mr. Jones was describing the concept of "stranded capacity," which implies existing physical plant so that the utility can provide continuous and adequate water service in a certificated area. Nevertheless, the City relies on this portion of Mr. Jones' testimony in making its argument that – for planning or design expenditures to represent property – the expenditures must attach to some other form of property.[72]

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[69] City Ex. CEL-100 at 12 (emphasis added).

[70] Water Code § 13.245(g); 16 Tex. Admin. Code § 24.113(k).

[71] Water Code § 13.245(g), 16 Tex. Admin. Code § 24.113(k), Factor 3.

[72] City Ex. CEL-100 at 11-12.

Staff's initial position was that Aqua's permit is intangible personal property but that related planning expenses are not. In reaching this conclusion, Staff employed a granular analysis. For instance, although Staff acknowledged that Aqua made the investments with money, which is property, and which likely resulted in contracts, etcetera; Staff argues that Aqua's planning investments are not legally identified, protected, transferable, and do not always have a specific date of creation. Yet, this would be true of such expenses even if Aqua had existing facilities in the ground. And, according to Staff's authority, contracts can embody a property right. Even based on Staff's analysis, Aqua's expenses captured in dated contracts would represent property interests. As with the City's interpretation of Water Code § 13.254(g), the ALJs find Staff's reading to be too narrow and incompatible with *State v. Public Utility Commission of Texas*.[73]

The ALJs recommend that by applying a broad view of the ordinary meaning of property, the plain text of Water Code § 13.254(g), Factor 3, describes a utility's property interest, not a mere compensation factor. As a result, Aqua's intangible personal property includes its expenditures on planning and design of facilities allocable to the Tract.

2. Necessary and Reasonable Legal Expenses and Professional Fees [Factor 7]

Aqua contends that it incurred legal and professional expenses in response to Docket No. 45329 and this docket, which represent its property.[74] The City and Staff argue that legal expenses and professional fees are not property under Water Code § 13.254(g).[75] Consistent with their recommendation regarding Factor 3 and planning and design expenditures, the ALJs recommend that Aqua's expenditures on legal and professional services are property.

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[73] 883 S.W.2d at 199-200.

[74] Aqua Ex. AT-A at 10-11; Aqua Ex. AT-C at 12; Aqua Ex. AT-1 at Aqua 000006; and Aqua Ex. AT-B.

[75] City Ex. CEL-100 at 19.

a. Parties' Positions

The parties' arguments regarding whether expenditures on legal and professional fees can be property, track their arguments on planning and design expenditures. Aqua argues that it has incurred legal expenses and professional fees in response to Docket No. 45329 and this docket, which are continuing.[76] Aqua reiterates that "property" in Water Code § 13.254(d) must be construed broadly to include necessary and reasonable legal expenses and professional fees.[77] Aqua concludes that these costs represent an investment that will be stranded without just and adequate compensation under Water Code § 13.254(g).[78]

The City argues that legal and professional fees are clearly costs, but cannot be classified as Aqua's property. Specifically, Mr. Jones testified that he does not believe necessary and reasonable legal expenses and professional fees are property.[79] The City also asserts that Aqua conflates compensation factors under Water Code § 13.254(g) with property interests.

Staff acknowledges that legal expenses and professional fees are recoverable as compensation under Water Code § 13.254(g). Staff contends, however, that such recovery is only permitted if the decertified retail public utility is eligible for compensation, which only occurs if it is determined that property has been rendered useless or valueless to the utility as a result of the decertification. In short, Staff argues that legal expenses and professional fees are a part of compensation but are not a property interest.

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[76] Aqua Ex. AT-A at 10-11; Aqua Ex. AT-C at 12; and Aqua Ex. AT-1 at Aqua 000006; *see also* Aqua Ex. AT-B at 13-14.

[77] *State v. Public Utility Commission of Texas*, 883 S.W.2d at 199-200; Aqua Ex. AT-B at 12; Aqua Ex. AT-C at 12; Aqua Ex. AT-1 at Aqua 000006; *see also* Section III.A. discussion of "Definition of Property" and authorities cited therein, *supra.*; Water Code § 13.254(g); 16 Tex. Admin. Code § 24.113(k).

[78] Aqua Ex. AT-A at 10-11; Aqua Ex. AT-B at 13-14; Aqua Ex. AT-C at 12; Aqua Ex. AT-1 at Aqua 000006; Water Code § 13.254(g); 16 Tex. Admin. Code § 24.113(k).

[79] City Ex. CEL-100 at 8, 19; Tr. at 31.

As for Aqua's contention that money spent on legal and professional fees results in a property interest,[80] Staff acknowledged that Aqua's money, when it exists in Aqua's possession, could be considered its tangible personal property because it is a valued resource, and it is physical, movable, and subject to Aqua's ownership interest. However, once Aqua spent its money on legal expenses and professional fees, Staff argues Aqua relinquished its rights in that money. Staff contends that Aqua received professional and legal services in return for its payment, but not an ownership interest in the money spent, and no claim for a property interest.[81]

Finally, Staff notes that Aqua characterized legal and professional expenses as "costs," which Staff argues are not property.[82] Although Staff agrees that necessary and reasonable legal expenses and professional fees are specifically mentioned in Water Code § 13.254(g), Staff maintains that this is only a factor for ensuring that the compensation to Aqua is just and adequate, not for identifying them as property.

b. Analysis

The ALJs' analysis is the same for Factor 7 as it was for Factor 3. As explained below, the ALJs recommend that reasonable and necessary expenditures for legal and professional services are property under Water Code § 13.254(d) and (g).

The experts agreed that Aqua's money or investments may be considered Aqua's property.[83] Aqua would not have spent its money on legal expenses or professional fees in this docket or Docket No. 45329, except for the need to respond to the expedited release petition and to assert its interests in this docket.[84] As a result, expenditures for legal or professional services

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[80] Tr. at 68.

[81] Celina Ex. CEL-100 at 19.

[82] Staff Initial Brief at 10.

[83] Aqua Ex. AT-C at 10-11; Tr. at 104, 131 (Korman Testimony); Tr. at 68 (Waldock Testimony); Tr. at 82-83 (Blackhurst Testimony); Tr. at 22, 24 (Jones Testimony).

[84] Aqua Ex. AT-A at 10-11; Aqua Ex. AT-C at 12; Aqua Ex. AT-1 at Aqua 000006.

are Aqua's property and fall under Water Code § 13.254(g), Factor 7.[85] When Aqua spent its money on legal and professional fees it did not transform into non-property. As explained by Mr. Blackhurst, such expenses, like permit-related planning and design expenses, are capitalized into the asset and thus treated like property:

> Q. Okay. So, in your opinion, are those legal expenses and professional fees a property interest?
>
> A. I think some of them could be. It depends on exactly what they were. I mean, as I mentioned earlier, when you capitalize assets there's a lot of expenses that go into, like permitting and those sorts of things. So you have legal expenses in some cases for hearings and things that go with getting permits and all. Those end up being capitalized into the project. And so in that sense I would say they are considered property.[86]

Similarly, Mr. Korman testified that Aqua's legal expenses and professional fees are "additional Prosper Point project costs comprising Aqua's intangible property interests."[87] He also testified that, ". . . in a roundabout way it is an intangible property interest to defend your property" when expenses and fees are incurred in an action such as this.[88]

Staff took issue with Mr. Korman's and Mr. Blackhurst's assertions, arguing that both effectively characterized legal and professional fees as Factor 3 expenditures for planning, or design, which is a compensation factor and not a property interest. The ALJs disagree and recommend that Factors 3 and 7 reflect Aqua's property interests and are not mere compensation factors. Furthermore, Staff's argument illuminates the congruence between Factor 3 and Factor 7 that favors Aqua – both types of expenditures are treated similarly by utilities and tend to be capitalized just like other project-related property.

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[85] Aqua Ex. AT-A at 10-11; Aqua Ex. AT-B at 13-14; Aqua Ex. AT-C at 12; Aqua Ex. AT-1 at Aqua 000006; Water Code § 13.254(g); 16 Tex. Admin. Code § 24.113(k).

[86] Tr. at 82-83.

[87] Aqua Ex. AT-C at 12.

[88] Tr. at 104.

Again, the ALJs apply the same analysis for Factor 7 as was applied to Factor 3. It does not matter whether Aqua's expenditures for legal and professional services are characterized as costs, expenses, or investments, they represent money that Aqua spent pursuant to its obligations under the permit and CCN and to protect its interests. As a result, expenditures for legal and professional services are still Aqua's property.

3. Lost Economic Opportunity [Factor 6]

a. Parties' Positions

Aqua contends that the Commission should allow it to recover lost economic opportunity as a property loss resulting from decertification of the Tract. Aqua claims that its goal of making money through service to future customers on the Tract was an intangible property right which was eliminated when the Tract was decertified from Aqua's CCN. This intangible property interest, in Aqua's opinion, existed separate and apart from the CCN itself—the CCN was merely one necessary component of the overall project. Based on this theory, Aqua argues that lost economic opportunity should be construed as property and taken into consideration for compensation under the "other relevant factors" prong of Water Code § 13.254(g).[89]

Mr. Waldock testified that Aqua has invested "time and money" into a project which Aqua intended to be developed within the Tract.[90] He explained that Aqua spent 225 internal staff hours in performing planning and design activities and also committed facilities to serve the Tract. Examples of these activities include time spent negotiating with the Upper Trinity Regional Water District and the Mustang Special Utility District related to wholesale water supply and wholesale wastewater treatment options for the Tract.[91] Mr. Waldock stated that the Tract is located in a high growth area in Denton County and that, prior to the adoption of an

[89] Aqua Initial Brief at 2-3, 15, 18-19.

[90] Aqua Ex. AT-A at 8.

[91] Aqua Ex. AT-A at 8.

expedited release statute in 2005, Aqua considered its investments in planning efforts for the Tract to be a relatively safe investment.[92]

Mr. Korman testified that decertification of the Tract has resulted in Aqua losing a portion of their "regional economic opportunity."[93] He explained that, based on his experience in eminent domain proceedings, when a portion of a piece of land is condemned, compensation is determined not only for the part that was actually taken, but also for any damages to the remainder of the land. In estimating the injury to the owner, it must be an injury specific to the owner which relates to the ownership, use, or enjoyment of the land that is not experienced by the general community.[94] In analyzing Aqua's loss of the Tract from its certified area, Mr. Korman stated that the loss of that economic opportunity represents a partial taking of a property interest, which would justify compensation to Aqua.[95] While Mr. Korman testified that he believes a CCN is a property interest, he clarified that the property interests he refers to as requiring compensation are not just the interests he believes Aqua had in the CCN, but rather the interests that Aqua acquired through its planning and investments in reliance on the CCN.[96]

Aqua explains that the Legislature has placed it in a peculiar position, whereby it allows a CCN to be taken away from a utility, thus depriving the utility from its goal of, and investments toward, making money through service to future customers. Because this economic opportunity held by a utility with a CCN is an intangible property interest, Aqua argues, just and adequate compensation must be provided to prevent an unconstitutional taking. Per Aqua, the mechanism for providing such compensation is Water Code § 13.254(d) and (g)—requiring compensation for property rendered useless and valueless by decertification and allowing for the consideration of "other relevant factors" in ensuring that the compensation is just and adequate.

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[92] Aqua Ex. AT-A at 9, 11.

[93] Aqua Ex. AT-C at 12.

[94] Aqua Ex. AT-C at 13.

[95] Aqua Ex. AT-C at 13-14.

[96] Tr. at 101, 106-07; Aqua Ex. AT-C at 14.

The City and Staff, on the other hand, assert that there is no recognizable property interest in lost future profits. Both agree that lost economic opportunity for future water and wastewater connections is not intangible personal property, and therefore it is not a property interest which may be rendered useless and valueless by decertification.[97]

City witness Mr. Jones testified that Aqua's use of the Water Code definition of "facilities"[98] to assert that lost economic opportunity is an intangible property interest tied to facilities is improper. He explained that intangible personal property must have a connection to the hard assets—the plant and equipment. If there are no hard assets, then there is no intangible personal property to be included in the definition of "facility."[99] When asked on cross how he would characterize costs associated with planning for the hard assets, Mr. Jones stated that those costs should be considered professional fees.[100]

City witness Mr. Hornsby explained that contrary to Mr. Korman's analysis, lost profits are not considered in eminent domain cases unless there are actual facilities or an ongoing business on the property that is taken.[101] However, Mr. Hornsby testified that the following factors are used by appraisers to identify intangible property: 1) it is legally identified and protected (like a trademark); 2) it is legally transferable, can be sold, and has tangible evidence of its existence; and 3) it has a date of creation, or "birthday."[102] Applying the factors identified by Mr. Hornsby, Staff contends that lost future profits fail to meet the definition of intangible property, regardless of whether or not the utility has made capital investments in anticipation of growth.[103].

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[97] Staff Initial Brief at 8; City Ex. CEL-100 at 15-16.

[98] Water Code § 13.002(9) ("'Facilities' means 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.")

[99] City Ex. CEL-100 at 15-16; Tr. at 42-43.

[100] Tr. at 43.

[101] City Ex. CEL-103 at 8.

[102] Tr. at 151-52.

[103] Staff Initial Brief at 13-14.

The City also contends that rules of statutory construction dictate that Water Code § 13.254(g) prevents the recovery of lost future revenue from customers that do not exist. The City first points to the language of the statute itself, which provides that the value of personal property shall include "the impact on future revenues lost from existing customers."

> The factors ensuring that the compensation to a retail public utility is just and adequate shall include: (1) the amount of the retail public utility's debt allocable for service to the area in question; (2) the value of the service facilities of the retail public utility located within the area in question; (3) the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; (4) the amount of the retail public utility's contractual obligations allocable to the area in question; (5) any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; (6) *the impact on future revenues lost from existing customers*; (7) necessary and reasonable legal expenses and professional fees; and (8) other relevant factors.[104]

Because the Legislature has identified the type of future revenues that shall be considered in ensuring that a utility is properly compensated, the City notes that Aqua's interpretation of future revenues from future customers as something that should be considered under Factor 8, "other relevant factors," would render the words "from existing customers" in Factor 6 a nullity, and thus violate the principles of statutory construction.[105]

The City next points to the legislative history of Water Code § 13.254 as support for its argument that the impact on future revenues from future customers is not a proper factor for a utility to be compensated for. Specifically, the City notes that in the 75th Legislative Session, in S.B. 1, the legislature amended Water Code § 13.254 by adding subsection (g)—the factors to be considered when compensating a utility for decertification of all or a part of its CCN. At that time, the legislature included "the impact on future revenues and expenses of the retail public utility" as one of the compensation factors.[106] Additionally, the legislature adopted the following provision as subsection (h) to Water Code § 13.254:

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[104] Water Code § 13.254(g) (emphasis added).

[105] City Initial Brief at 17-18.

[106] City Ex. CEL-110 at 3.

> 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.[107]

Therefore, the City argues, the legislature clearly contemplated compensating a retail public utility for lost revenues from future customers. However, the legislature changed course in 2005 when it passed H.B. 2876, removing any reference to compensating a retail public utility for the loss of business or future revenues from future customers.[108] Specifically, the City notes that the 79th Legislature repealed subsection (h) to Water Code § 13.254, amended subsection (g) from "the impact on future revenues and expenses of the retail public utility" to "the impact on future revenues from existing customers;" removed the phrase "at a minimum" when identifying the factors to be considered in determining compensation for a retail public utility; and deleted the language that the compensation factors are to include compensation for the loss of the utility's business.[109]

Aqua witness Mr. Blackhurst testified that when this change occurred he was a Texas Natural Resource Conservation Commission manager, where his duties included participating in legislative and rulemaking processes.[110] When asked about now-repealed subsection (h) to Water Code § 13.254, 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.[111]

While Staff generally agrees with the City's argument that the legislative intent of Water Code § 13.254(g) precludes lost future profits, Staff disagrees with the City's analysis of

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[107] City Ex. CEL-110 at 3.

[108] City Initial Brief at 19; City Ex. CEL-111 at 15-16.

[109] City Initial Brief at 19; City Ex. CEL-111 at 15-16, 22; *See also* Aqua Ex. AT-B at 14.

[110] Aqua Ex. AT-B at 6.

[111] Tr. at 83-84.

now-repealed subsection (h) to Water Code § 13.254. In line with Mr. Blackhurst's testimony, Staff believes that 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.[112]

Finally, the City argues and Staff agrees that a rule of statutory construction—the express mention or enumeration of one person, thing, consequence or class is equivalent to an express exclusion of all others—applies here.[113] Because the legislature expressly included "future revenues lost from existing customers," it therefore expressly excluded other types of "future revenues."[114] The City contends, therefore, that even if lost economic opportunity from future customers is a property right, the Water Code does not provide for its compensation.[115]

b. Analysis

Commission rules are clear—a CCN is not a vested interest and it does not create a property interest.[116] Therefore the rendering useless of the CCN itself, is not something that Aqua is to be compensated for. While Aqua argues that removing the Tract from its CCN hurt its "regional economic opportunity," such "opportunity" from non-existent customers is speculative and precisely the type of hypothetical damages the Legislature sought to avoid in drafting the statute. As discussed earlier, property is to be broadly defined *except* where the statute is clear—which is the case for Factor 6.

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[112] Staff Reply Brief at 8-9.

[113] City Initial Brief at 21; Staff Reply Brief at 8; *Johnson v. Second Injury Fund*, 688 S.W.2d 107, 109 (Tex. 1985).

[114] City Initial Brief at 21

[115] City Initial Brief at 21.

[116] 16 Tex. Admin. Code §§ 24.113(a), .116.

In construing statutes, the goal is to give effect to the drafter's intent.[117] This determination begins with the wording of the statutes or regulations involved.[118] As the Texas Supreme Court has explained:

> It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise . . . every word excluded from a statute must also be presumed to have been excluded for a purpose. This rule complements another general statutory construction principle that courts should not insert words in a statute except to give effect to clear legislative intent.[119]

Applying principles of statutory construction, it is clear that the legislature did not intend a decertified utility to be compensated for future revenues from customers who do not yet exist at the time of decertification. The statute itself is clear when it states that compensation shall include the impact on future revenues lost from *existing* customers.[120]

While Aqua argues that "lost economic opportunity" should be considered an intangible property right and compensation should be provided for under Factor 8 (other relevant factors),[121] its interpretation ignores the clear intent of the legislature in drafting § 13.254(g) of the Water Code to only allow consideration of future revenues lost from *existing* customers. Because the "lost economic opportunity" Aqua seeks compensation for is future revenues from future customers, and because the legislature has specified the type of future revenues that a utility may be compensated for, Aqua may not circumvent the intent of the legislature in choosing to limit the type of future revenues that are compensable by categorizing it as an "other relevant factor."

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[117] *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004).

[118] *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998).

[119] *In re Bell*, 91 S.W. 3d 784, 790 (Tex. 2002).

[120] Water Code § 13.254(g).

[121] Aqua Ex. AT-C at 12.

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

The parties are in agreement that Aqua does not have any real property that was rendered useless or valueless by the decertification. Instead, as previously discussed, Aqua claims that it has intangible personal property that has been rendered useless and valueless by the decertification of the Tract. Specifically, Aqua contends that (1) economic opportunity; (2) expenditures for planning, design, or construction of service facilities that are allocable to service the area in question, including the permit; and (3) necessary and reasonable legal expenses and professional fees are all intangible personal property interests for which Aqua should be compensated.

As previously discussed, the ALJs recommend that lost future revenues from future customers are *not* property; however, the ALJs do agree with Aqua that it has property interests in expenditures for the planning or design of service facilities allocable to the area in question, as well as necessary and reasonable legal expenses and professional fees. Therefore the ALJs now turn to the issue of whether or not the identified property interests have been rendered useless or valueless as a result of the decertification of the Tract.

1. Definition of "Useless or Valueless"

Neither the Water Code nor Commission Rules contain a definition of "useless or valueless." Therefore the terms should be given their ordinary or plain meaning.[122] The parties agree that looking to the plain meaning, "useless" means "having or being of no use," and "valueless" means "having no usefulness."[123] Therefore, in order for property to be rendered useless or valueless, it would have no use to Aqua.

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[122] Tex. Gov't Code § 312.002(a); *Mims v. State*, 3 S.W.3d 923, 924 (Tex. Crim. App. 1999) ("The first rule of statutory construction is that we interpret statutes in accordance with the plain meaning of their language unless the statutory language is ambiguous or the plain meaning leads to absurd results").

[123] *See* Aqua Initial Brief at 24; City's Initial Brief at 22; Staff's Initial Brief at 14 (all citing to the Merriam Webster Dictionary).

Aqua, however, contends that, the terms useless or valueless should not be interpreted in a way that would preclude compensation for the taking, damaging, or destruction of apportioned personal property rights from CCN holders.[124] Aqua asserts that eminent domain cases should be instructive here and in those cases property can be rendered useless or valueless in part. Because, Aqua argues, it will not ordinarily be a utility's entire CCN area that is decertified, a plain language reading of the terms "useless or valueless" could cause stranded investments. Therefore Aqua urges application of the terms from a constitutional perspective, rather than their plain meaning.[125]

City witness Mr. Jones testified that in his opinion the definition of "valueless" is when "there's capital investments made that will not be recovered by a utility."[126] To illustrate this definition, Mr. Jones provided a hypothetical where a utility constructed a 500,000 gallon elevated storage tank and subsequently had half of the service area for which the tank was constructed removed from its CCN through decertification.[127] Mr. Jones testified that the utility's investment would still have to be recovered through the utility's remaining ratepayers, though only a portion of that size tank was useful to those ratepayers.[128] When asked if the tank would be useless, Mr. Jones testified "Not 100 percent useless, but partially useless."[129] Aqua witness Mr. Korman similarly testified that personal property can be rendered useless or valueless in part.[130]

Staff, however, asserts that the statute as written does not contemplate compensation for a diminution in the use or value of property as a result of decertification and that application of

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[124] *See* Aqua Initial Brief at 27, *citing* 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 . . .).

[125] Aqua Initial Brief at 24-27.

[126] Tr. at 61.

[127] Tr. at 61-62.

[128] Tr. at 62.

[129] Tr. at 62.

[130] Tr. at 124; *see also* Aqua Ex. AT-B at 13.

"useless or valueless" to a portion of a property interest is contradictory and incorrect for the purposes of this proceeding.[131] If only a portion of a property interest is affected by decertification, Staff alleges, then the overall property interest may be diminished and may be less useful or less valuable to the utility. However, it is not rendered useless or valueless for purposes of Water Code § 13.254(d) unless there is no remaining use or no remaining value associated with the property as a whole.[132] Staff also stresses that, under eminent domain case law, a compensable regulatory taking occurs "when a governmental restriction denies the property owner all economically viable use of the property or renders the property valueless."[133]

Finally, Staff points to the standard established in *Texas General Land Office v. Crystal Clear Water Supply Corp.* (*Crystal Clear*), a streamlined expedited release case under Water Code § 13.254(a-5), to assert that the only property that can be rendered useless or valueless as a result of decertification is property that a retail public utility has committed to providing service to the particular piece of decertified land, and which is now of no value or without use to that retail public utility.[134] According to Staff *Crystal Clear* is the governing case law on the issue of whether a tract of land is "receiving service," which is defined by the court as a "fact-based inquiry requiring the Commission to consider whether the retail public utility has facilities or lines committed to providing water to the particular tract or has performed acts or supplied anything to the particular tract in furtherance of its obligation to provide water to that tract pursuant to its CCN."[135] Under *Crystal Clear*, a piece of property is not necessarily receiving service "simply because the retail public utility has performed an act, such as entering into a contract to secure water supply, unless the act was performed in furtherance of providing water to the tract seeking decertification."[136] Staff contends that this same standard applies for

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[131] Staff Initial Brief at 15; Staff Reply Brief at 10.

[132] Staff Initial Brief at 15.

[133] *City of Dallas v. Blanton*, 200 S.W.3d 266, 274 (Tex. App- Dallas, 2006); *see Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("A compensable regulatory taking can also occur when governmental agencies impose restrictions that either [1] deny landowners of all economically viable use of their property, or [2] unreasonably interfere with landowners' rights to use and enjoy their property.").

[134] 449 S.W.3d 130 (Tex. App.-Austin 2014, pet. denied).

[135] *Id.* at 140.

[136] *Id.* at 141.

determining whether property is rendered useless or valueless to a retail public utility as a result of decertification under Water Code § 13.254(a-5).[137]

Aqua responds that Staff is incorrect in its application of *Crystal Clear*. Specifically, Aqua asserts that *Crystal Clear* is inapplicable here because it was a case-specific ruling regarding a tract of real property that was not receiving service from the decertified CCN holder; there was no discussion of what was or was not property rendered useless or valueless for purposes of Water Code § 13.254(d) or (g); and a distinction was made between receiving service and providing service, and the decision only speaks to receiving service.[138] Aqua argues that apportioned property rights should be viewed as being rendered useless or valueless in order to allow utilities to properly plan for service in areas where decertification may occur.

The ALJs recommend that the rules of statutory construction should be applied here, and the terms "useless or valueless" should therefore be given their ordinary or plain meaning. As explained below, the two categories of property which Aqua has committed to providing service to the Tract, are now of no value or use to Aqua. Thus, expenditures on planning and design and reasonable and necessary legal and professional fees, have been rendered useless or valueless as a result of the decertification.

2. Expenditures for Planning, Design, or Construction of Service Facilities that are Allocable to Service the Area in Question

Staff agrees that the permit is property that has been rendered useless and valueless as a result of decertification.[139] The City agrees that if the permit is determined to be property, then it has been rendered useless and valueless.[140] As discussed previously, the ALJs recommend that the permit is not property, however, the expenditures for planning, design, or construction related

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[137] Staff Initial Brief at 16.

[138] Aqua Reply Brief at 25.

[139] Staff Initial Brief at 17.

[140] City Initial Brief at 22; City Ex. CEL-100 at 17.

to the Tract are property. City witness Mr. Jones agreed that Aqua engaged in planning and design activities related to the Tract, and that its expenditures related to those activities are now useless and valueless.[141] Because the permit was obtained and renewed for the specific purpose of providing service to the Tract,[142] the expenditures Aqua made to obtain and renew the permit have no further use to Aqua as a result of the decertification and are therefore useless and valueless. Likewise, the expenditures Aqua made for planning, design, or construction of service facilities that are allocable to service the Tract and which are now of no value or without use to Aqua,[143] are therefore useless and valueless.

3. Necessary and Reasonable Legal Expenses and Professional Fees

Because both Staff and the City assert that necessary and reasonable legal expenses and professional fees are not property, they argue that an evaluation of whether or not they have been rendered useless or valueless is unnecessary. Aqua, on the other hand, asserts that it should receive just and adequate compensation for this lost monetary property interest related to legal expenses and professional fees rendered useless or valueless by decertification of the Tract. As previously explained, the ALJs recommend that reasonable and necessary expenditures for legal and professional services are property under Water Code § 13.254(d) and (g); and to the extent they were spent pursuant to Aqua's obligations under the permit or its CCN, or to protect its interests thereunder, they have been rendered useless or valueless by decertification of the Tract.

C. Are the Existing Appraisals Limited to Property that has been Determined to have been Rendered Useless or Valueless by Decertification?

The appraisal commissioned by Aqua is not limited to property that has been determined to be rendered useless or valueless by decertification because it includes a valuation of lost economic opportunity. The appraisal commissioned by the City, and performed by Mr. Jones, is

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[141] Tr. at 23.

[142] Aqua Ex. AT-A at 7-11; Staff Ex. 1.

[143] Aqua Ex. AT-C at 11, AT-A at 8-10.

limited to property that has been determined to be rendered useless or valueless by decertification. It does not include a value for lost economic opportunity. It does, however, include values for expenditures for planning, design, or construction of service facilities that are allocable to service the area in question, and necessary and reasonable legal expenses and professional fees that have been rendered useless or valueless by decertification.[144] Likewise, the independent third appraisal is limited to property that has been determined to be rendered useless or valueless by decertification.[145]

VI. CONCLUSION

As eloquently stated by the City in its initial closing brief, the value to a retail public utility is in the investment, not in the CCN.[146] While the parties all seem to agree on this basic concept, the devil, as always, lies in the details. As discussed in this PFD, the ALJs recommend that, based on an inclusive view of the concept of property, the property rendered useless and valueless to Aqua are necessary and reasonable legal expenses and professional fees and expenditures for planning, design, or construction of service facilities that are allocable to service the Tract, but not lost economic opportunity.

VII. FINDINGS OF FACT

Procedural History

1. On March 22, 2016, the Public Utility Commission of Texas (PUC or Commission) issued an order in *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) 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 (the Tract).

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[144] City Ex. CEL-102; Tr. at 59-61.

[145] Aqua Ex. AT-3.

[146] City Initial Brief at 15.

2. On April 12, 2016, the City of Celina (City) filed with the Commission a Notice of Intent to provide retail water and sewer service to the Tract decertified in Docket No. 45329.

3. On April 14, 2016, a Commission Administrative Law Judge (ALJ) issued Order No. 1, requiring the parties to notify the Commission whether they agreed on an independent appraiser by April 22, 2016.

4. Notice of Celina's Notice of Intent to Serve was published in the *Texas Register* on April 14, 2016.

5. On April 22, 2016, the City filed a Notice of Non-Agreement on Single Appraiser and Aqua filed a motion to intervene.

6. On April 25, 2016, the Commission ALJ issued Order No. 2 requiring Aqua and the City to each file an appraisal by June 13, 2016. Aqua and the City timely filed appraisals.

7. On July 7, 2016, an independent third appraisal was filed.

8. On July 7, 2016, the Commission issued an Order of Referral, referring this matter to the State Office of Administrative Hearings (SOAH) requesting the assignment of an ALJ to conduct a hearing and issue a proposal for decision (PFD), if necessary.

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

10. On July 20, 2016, the Commission issued a Preliminary Order identifying the following issues for SOAH to address:

    1. What property, if any, has been rendered useless or valueless to Aqua by the decertification granted in Docket No. 45329? Water Code § 13.254(d) and 16 Texas Administrative Code § 24.113(h).

    2. Are the existing appraisals limited to property that has been determined to have been rendered useless or valueless by decertification?

11. On July 26, 2016, Aqua, the City, and Commissions staff (Staff) attended an initial prehearing conference in this matter and the SOAH ALJs adopted a procedural schedule, which was memorialized in SOAH Order No. 2, issued July 29, 2016.

12. The hearing on the merits was held on September 16, 2016, and was attended by the City, Aqua, and Staff.

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

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

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

16. On January 10, 2017, the parties filed proposed findings of fact and conclusions of law. The record closed on that day.

Appraisals

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

18. The City's appraisal report was prepared by Jason S. Jones, P.E.

19. A "third party engineering appraisal report" was filed by Bret W. Fenner, P.E. at the request of the Commission's Executive Director.

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

21. The three appraisals filed in this docket all find that Aqua is owed some amount of compensation for expenditures it made to obtain the Texas Commission on Environmental Quality (TCEQ)-approved wastewater discharge permit, Texas Pollutant Discharge Elimination System Permit No. WQ0014234001 (Permit) and necessary and reasonable legal expenses and professional fees.

Aqua's Property

22. Aqua does not own any real or personal property on the Tract.

23. Aqua has no physical improvements on the Tract, such as water and or sewer lines, other pipes or tanks, etc.

24. Aqua has been certificated to the Tract since approximately 2004.

25. There has been no development on the Tract.

26. The TCEQ or its predecessor agency issued the wastewater discharge Permit to Aqua.

27. No wastewater treatment plant or any attendant structures have been constructed.

28. Although there was a letter of intent with the previous owners of the Tract to receive service from Aqua, actual water or sewer service was not received on the Tract.

29. The Tract's current landowner did not request service from Aqua.

30. Aqua serves a residential subdivision located approximately 1.5 miles from the Tract called the Willow Wood Addition Meadow Vista with retail water service but not with sewer service.

31. Aqua has no debt allocable to the Tract.

32. Aqua has no service facilities on the Tract.

33. Aqua has no existing customers on the Tract.

34. Aqua has no contractual obligations allocable to the Tract.

35. There is no demonstrated impairment of Aqua's service to other customers or increase of cost to other customers of Aqua as a result of the decertification.

36. While Aqua still held the CCN in question, it obtained and maintained a wastewater permit to enable design and construction of physical facilities once the Tract's owner was ready to proceed.

37. Active service cannot occur on a subject tract of land without investing in permitting and other planning within or outside the subject tract.

38. Aqua made investments of both money and time to serve the Tract.

39. Aqua undertook permitting, planning, and design activities with developers and engineers to serve the Tract, devoted time and resources to those activities, and spent money on those activities.

40. Aqua obtained and maintained the Permit specifically to serve the Tract.

41. Obtaining the Permit was an essential planning step in designing physical wastewater treatment facilities for the Tract.

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

43. Aqua ceased permit renewal activities as a result of the sewer CCN decertification in Docket No. 45329.

44. The Permit is now expired.

45. Aqua's expenditures in permitting activities for the Tract were not incurred to serve any other tract of land besides the Tract.

46. Some of Aqua's Permit-related planning and design expenses would be capitalized into an asset and treated like property.

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

48. Aqua's necessary and reasonable legal and professional fee expenses would be capitalized into an asset and treated like property.

VIII. CONCLUSIONS OF LAW

1. The City and Aqua are public utilities as defined in Texas Water Code § 13.002(19).

2. The Commission has jurisdiction and authority over this docket under Texas Water Code §§ 13.041 and 13.254(d)-(e).

3. SOAH has jurisdiction over matters related to the hearings of this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code §§ 2001.058 and 2003.049.

4. Notice of the hearing was provided consistent with Texas Government Code § 2001.052 and 16 Texas Administrative Code § 24.106.

5. Aqua has the burden of proof in this case. 16 Tex. Admin. Code § 24.12 and 1 Tex. Admin. Code § 155.427.

6. Texas Water Code §13.254(d) and 16 Texas Administrative Code §24.113(h) prohibit a retail public utility from providing service to an area that has been decertified under that section without providing compensation for any property that the Commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.

7. Texas Water Code §§ 13.254(e) and 24.113(i) require that the Commission determine the amount of monetary compensation, if any, that must be paid when a retail public utility seeks to provide service to a previously decertified area.

8. Texas Water Code § 13.254(g) requires the value of personal property to be determined according to the following factors to ensure that the compensation to a retail public utility is just and adequate: the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors.

9. Unless there is specific statutory authority otherwise, the ordinary meaning of property must be broadly interpreted and ". . . extends to 'every species of valuable right and interest.' It is 'commonly used to denote everything to which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible . . . .'" *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994).

10. Texas Water Code §§ 13.254(d) and (g) must be read consistent with a broad interpretation of property.

11. A CCN may not be classified as property. 16 Tex. Admin. Code §§ 24.113(a) and 24.116.

12. A wastewater permit issued by the TCEQ or the Commission is not property. Tex. Water Code § 26.029(c).

13. Under Texas Water Code § 26.027(c), a wastewater permit issued by the TCEQ or the Commission authorizes a utility to construct physical facilities, such as a treatment plant, force mains, etc.

14. Aqua's money and investments are its personal property.

15. Aqua's money spent on planning and design expenses remained Aqua's property.

16. Aqua's money spent on legal and professional fees remained Aqua's property.

17. Under Texas Water Code § 13.254(g), Aqua has a property interest in any expenditure for the planning or design of service facilities allocable to the Tract.

18. Under Texas Water Code § 13.254(g), Aqua has a property interest in necessary and reasonable legal expenses and professional fees.

19. Texas Water Code § 13.254(g) limits recovery for the impact on future revenues to losses from existing customers. Aqua's lost future revenues from currently non-existing customers are not property and are not compensable under Texas Water Code §§ 13.254(d) and (g).

20. The terms "useless or valueless" should be given their ordinary or plain meaning.

21. All money Aqua spent on permitting, planning, and design activities to serve the Tract constitute property rendered useless or valueless to Aqua as a result of the CCN decertifications in Docket No. 45329. Tex. Water Code §§ 13.254(d) and (g).

22. All money Aqua 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. Tex. Water Code §§ 13.254(d) and (g).

23. The City's appraisal and the independent third appraisal are limited to property rendered useless or valueless by the decertification in Docket No. 45329. Tex. Water Code §§ 13.254(d) and (g).

24. Aqua's appraisal is not limited to property rendered useless or valueless by the decertification in Docket No. 45329. Tex. Water Code §§ 13.254(d) and (g).

IX. ORDERING PARAGRAPHS

1. The City may not provide retail water or sewer service to the Tract without compensating Aqua for:

    a. Reasonable and necessary legal expenses and professional fees incurred in this docket and Docket No. 45329; and

    b. Permitting, planning, and design expenses related to the Permit and the Tract.

2. Aqua and the City shall each pay half the cost of the transcript.

3. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted, are denied.

SIGNED January 27, 2017.

MEITRA FARHADI
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS