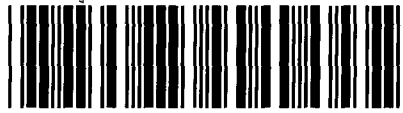


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Item Number: 62

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

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

**CITY OF CELINA'S
EXCEPTIONS TO PROPOSAL FOR DECISION**

The City of Celina (the "City") files this, its Exceptions to Proposal for Decision ("PFD"), in the above-styled matter. The City largely concurs with the PFD but has one minor "housekeeping" point and also disputes the Administrative Law Judge's conclusion that legal and professional costs and costs of planning, design, etc. are property.

Specifically, the City excepts to the PFD as follows:

Exception 1: Proposed Finding of Fact 46 is without basis in the record and should be modified to state "If Aqua had actually constructed facilities, some of Aqua's Permit related planning and design expenses would have been capitalized into those assets and treated like property.

Exception 2: Proposed Finding of Fact 48 is without basis in the record and should be modified to state "If Aqua had actually constructed facilities, Aqua's necessary and reasonable legal and professional fee expenses would have been capitalized into those assets and treated like property."

Exception 3: Proposed Conclusion of Law 1 is an erroneous conclusion because it should refer to "retail public utilities" instead of simply "public utilities."

Exception 4: Proposed Conclusion of Law 14 combines two concepts (money and investments) and those two concepts should be separated. Conclusion of Law 14A should state "Aqua's money is its personal property and, pursuant to with Texas Water Code § 13.254(g), when Aqua spends

63

money on property, it may be used to value the personal property for that which the money is spent.” Conclusion of Law 14B should state “Pursuant to Texas Water Code § 13.254(g), Aqua’s Investments in property may be used to value the personal property into that which it is invested.

Exception 5: Proposed Conclusions of Law 15 and 17 have no basis in law and should be combined and revised to state: “Because Aqua had no property that served the Tract, Aqua’s money spent on planning and design expenses are irrelevant to valuing property pursuant to Texas Water Code § 13.254(g).”

Exception 6: Proposed Conclusion of Law 16 and 18 have no basis in law and should be combined and revised to state: “Because Aqua had no property that served the Tract, Aqua’s money spent on legal and professional fees are irrelevant to valuing property pursuant to Texas Water Code § 13.254(g).”

Exception 7: Proposed Conclusions of Law 21 and 22 have no basis in law and should be deleted and replaced with the following: “Because no property has been identified for which compensation is available, there is no property to determine whether it was rendered useless or valueless.

Exception 8: Proposed Ordering Paragraph 1 should be revised to read: Aqua is not entitled to any compensation pursuant to Texas water Code § 13.254(d) or 16 Texas Administrative Code § 24.113(h).

Consistent with the January 30, 2017 Scheduling Memo from Stephen Journeay, the remainder of the City’s exceptions shall follow the outline of the proposal for Decision. In support of its exceptions, the City would respectfully show as follows:

I. INTRODUCTION

As stated, the City largely concurs with the PFD. The primary point in the PFD to which the City excepts is the conclusion that Aqua’s expenditures for legal and professional costs and for planning, design or construction of service facilities are property, and are thus compensable. This fundamental issue is the basis for the City’s Exceptions 1-2 and 4-8 and is discussed in detail below.

II. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The City concurs with Section II of the PFD.

III. FACTUAL BACKGROUND

The City concurs with Section III of the PFD.

IV. LEGAL FRAMEWORK

A. Water Code Provisions Regarding Property Rendered Useless and Valueless

The City concurs with Section IV.A. of the PFD.

B. Definition of Property

In the last paragraph of this Section, the PFD states that the ALJ's recommend that under Factors 3 and 7 of 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" and "in necessary and reasonable legal expenses and professional fees." As discussed in detail below, the City asserts that Factors 3 and 7 are tools for valuing identified property, not the identification of property. This disagreement is relevant to the City's Exceptions 1-2 and 4-8.

C. Burden of Proof

The City concurs with Section IV.C. of the PFD.

V. PRELIMINARY ORDER ISSUES

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]

a. Introduction

As discussed in detail below, the City disagrees with the last sentence of the first paragraph in this section wherein the ALJs state "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).” This disagreement is relevant to the City’s Exceptions 1-2 and 4-8.

b. Parties Positions

The City concurs with Section V.A.1.b. of the PFD.

c. Analysis

As discussed in detail below, the City disagrees with the statement that “Aqua . . . ha[s] a property interest in the company’s expenditures on planning or design related to the permit.” This disagreement is relevant to the City’s Exceptions 1-2 and 4-8.

i. The Permit and the CCN

The City concurs with Section V.A.1.c.i. of the PFD. With respect to the concerns raised in the last paragraph of this section, however, the City provides the following explanation for insertion in the PFD.

The ALJs and other parties have mentioned that the City has been inconsistent with some arguments on this score. The City sees no inconsistency. The City performed its appraisal under the same set of what had been generally accepted practices for these types of appraisals. The PUC and its predecessor agency also accepted such appraisals. These appraisals typically did not include a legal review that defined property and carefully applied the statutory language. Instead, the appraisals focused on the eight factors of §13.254.

When the PUC sent this matter to a contested case hearing, the agency specifically requested a determination of what property was rendered useless or valueless by Docket #45329. The City then was forced to evaluate what is “property” in a more legal manner. So, from a legal standpoint, the City believes the proper interpretation is that Aqua’s costs at issue here are not property.

ii. Expenditures for the Planning or Design of Service Facilities

The City disagrees with this Section of the PFD. This disagreement is relevant to the City's Exceptions 1-2 and 4-8. The City's disagreements and the basis for Exceptions 1-2 and 4-8 are as follows:

The Right to Make Money

The ALJs describe their findings and conclusions as being "... from a practical and regulatory standpoint." (PFD at 16). In attempting to be practical from a business standpoint, the City wonders if the ALJs might have engaged in circular reasoning. The ALJs found that the above expenses are property because Aqua spent money, which the ALJs say is property, on these expenses. (PFD at 17). The expenses, the ALJs continue, produced "corresponding property rights while Aqua held the CCN, including the right to make money with those investments." *Id.* The flaw, the City believes, is that the "right to make money"¹ is embodied by the CCN and the instrument to provide retail sewer service is the wastewater discharge permit. Neither of those items are property. (*see* PFD at 15). It is difficult to reconcile that money spent on items that are not property (CCN and discharge permit) somehow remains or becomes property. Money spent on non-property does not suddenly transform that money into a compensable property interest.² If this were the case, holders of CCN's would have no incentive to spend money wisely. If this were, in fact, the rule, they could spend twenty times what would normally be reasonable on attorneys, engineers, in-house consultants, and with nothing to show

¹ The amount of money that Aqua can make is regulated by the State of Texas and is dependent on actually providing service, which Aqua has not done.

² The City agrees with the ALJs and the witnesses that money can be property. PFD at 16. Money spent by Aqua on a non-property interest, however, becomes the property of another (the person to whom Aqua gives the money). Spent money might be used to value property upon which it was spent, but, as the Examiners determined in their PFD, neither the CCN nor the permit is property.

for that effort expect to be reimbursed every penny simply because they spent the money or made the investment.

Compensation Provisions of Water Code §13.254

Perhaps the central disagreement that the City has with the ALJs is the interpretation of the Water Code provisions §§13.254(d) and (g). The ALJs correctly describe the City's position that the eight factors in §13.254(g) do not, by themselves, constitute property. That is, once personal property is determined to exist and that personal property was rendered useless and valueless the value of that personal property is determined by the factors in §13.254(d). So, in the ALJs pithy and effective analogy on pages 18 and 19 of the PFD, the City would state that the eight factors in §13.254(g) do not have to be property but instead they are factors used to value compensation for the loss of personal property or the use of personal property due to expedited decertification. If there is no property, there is nothing to compensate. Again, CCNs and discharge permits are not property. Similarly, the expenses in obtaining a CCN or discharge permit are likewise not property. However, if the wastewater plant were built, then the costs of obtaining the permit, as well as cost of tangible infrastructure, would be considered in valuing the personal property to determine just and reasonable compensation. Spending money (property) on non-property (CCN/discharge permit) does not create a property right in the spent money. If the money were spent on pipelines, the pipelines are tangible personal property. The spent money is not property but it is a factor in valuing the pipeline. If the money spent was evidenced by a note payable, such as bank loan, then that note payable would be intangible personal property that evidences the valuing of the pipeline.

The City stresses that the plain language of the statute³ shows that eight factors in §13.254(g) are used to “determine” the “value of the personal property”. Those eight factors do not “identify” the personal property to be valued.

Rate Treatment of Costs

On page 18 of the PFD, the ALJs discuss that Aqua is able to capitalize the expenses and recover through rate base as intangible personal property. That statement raises some interesting points. First, the City questions that Aqua would be able to collect on legal and permitting costs for a permit for an un-built and non-used treatment plant since it would not meet a used and useful test. The ALJs noted that Mr. Blackhurst testified that permit related expenses are capitalized by a utility (PFD at 17). However, there was no testimony whether this was actually done for the costs in this matter. Furthermore, Mr. Blackhurst’s testimony was that “if you have permits when you actually end up building facilities, those are actually capitalized and become a part of the capital asset.” Tr. at 76 (emphasis added). Thus, even Mr. Blackhurst qualified the concept of capitalizing to those situations where there are actually facilities.⁴ Here there are none.

Second, to the extent that these costs are already in Aqua’s rate base and Aqua has been collecting, would requiring compensation from the City be “double-dipping”? That is, would Aqua be collecting twice for the same expenses?

³ In construing statutes, the goal is to give effect to the drafter’s intent. *Texas Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). This determination begins with the wording of the statutes or regulations involved. *In re Bay Area Citizens’ Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998). In construing a statute, courts presume that the Legislature intended the entire statute to be effective. *See* Tex. Gov’t Code Ann § 311.021(2) (West 1993). Accordingly, a court must interpret the statute as written. *See In re Doe*, 19 S.W.3d 346, 351 (Tex. 2000).

⁴ At Tr. 82-83 Mr. Blackhurst noted that these things “end up being capitalized into the project.” If there is no project, there is nothing for these investments to be capitalized into.

Practical Concerns

The ALJs note in the PFD that their recommendation on these issues is, at least in part, based on being practical. PFD at 16 & 17. It also appears, but is not stated, that some concept of fairness comes into play, at least in the City's mind. In any event, the City believes that the Legislature intended to be fair toward all sides in drafting the various versions of Water Code §13.254, including in SB 573. The City does not believe that it is unfair for retail public utilities to compensate the decertificated entity for reasonable items, but the statutory scheme requires such items to be tied to property of some kind.

The City's original appraisal included reasonable costs associated with permitting. Notwithstanding that, after a careful review of the statutory scheme for compensation, the City concluded that the costs at issue in this matter are not property. As stated, the City interprets the relevant provisions of Water Code §13.254 as limiting the decertificated utility's compensation to property—real and personal.

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

The City disagrees with this Section of the PFD. This disagreement is relevant to the City's Exceptions 1-2 and 4-8. The City's disagreements and the basis for Exceptions 1-2 and 4-8 are the same as they were for Section V.A.1.c.ii. of the PFD (Factor 3). The City adopts and incorporates by reference its discussion of Section V.A.1.c.ii. in this Section.

3. Lost Economic Opportunity

The City concurs with the entirety of Section V.A.3. of the PFD.

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

1. Definition of Useless or Valueless.

The City concurs with Section V.B.1. of the PFD, except to the extent that it concludes that Aqua had any property that could be rendered useless or valueless. This disagreement is discussed in detail in the City's exceptions to Section V.A.1.c.ii. of the PFD (Factor 3). The City adopts and incorporates by reference its discussion of Section V.A.1.c.ii. in this Section.

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

The City disagrees with this Section of the PFD to the extent that it concludes that Aqua had any property that could be rendered useless or valueless. This disagreement is discussed in detail in the City's exceptions to Section V.A.1.c.ii. of the PFD (Factor 3). The City adopts and incorporates by reference its discussion of Section V.A.1.c.ii. in this Section.

3. Necessary and Reasonable Legal Expenses and Professional Fees

The City disagrees with this Section of the PFD to the extent that it concludes that Aqua had any property that could be rendered useless or valueless. This disagreement is discussed in detail in the City's exceptions to Section V.A.1.c.ii. of the PFD (Factor 3). The City adopts and incorporates by reference its discussion of Section V.A.1.c.ii. in this Section.

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

The City disagrees with this Section of the PFD to the extent that it concludes that Aqua had any property that could be rendered useless or valueless. This disagreement is discussed in detail in the City's exceptions to Section V.A.1.c.ii. of the PFD (Factor 3). The City adopts and incorporates by reference its discussion of Section V.A.1.c.ii. in this Section.

VI. CONCLUSION

This has been a subtly deceptive matter to litigate and the City commends the ALJs for the thoughtful PFD. Other than the concept of certain of Aqua's costs being property as discussed in these exceptions, the City concurs with the PFD.

VII. FINDINGS OF FACT

The City excepts to the following Findings of Fact and in support of these exceptions refers to and incorporates by reference the discussion provided for Section V.A.1.c.ii. of the PFD:

Exception 1: Proposed Finding of Fact 46 is without basis in the record and should be modified to state "If Aqua had actually constructed facilities, some of Aqua's Permit related planning and design expenses would have been capitalized into those assets and treated like property."

Exception 2: Proposed Finding of Fact 48 is without basis in the record and should be modified to state "If Aqua had actually constructed facilities, Aqua's necessary and reasonable legal and professional fee expenses would have been capitalized into those assets and treated like property."

VIII. CONCLUSIONS OF LAW

In a very minor point, The City excepts to Proposed Conclusion of Law No. 1 because the ALJs define the City and Aqua as "public utilities". The proper term is "retail public utilities". However, it is true that Aqua is also a public utility pursuant to Water Code §13.002(23). For this reason, the City asserts the following exception:

Exception 3: Proposed Conclusion of Law 1 is an erroneous conclusion because it should refer to "retail public utilities" instead of simply "public utilities."

The City excepts to the following Conclusions of Law and in support of these exceptions refers to and incorporates by reference the discussion provided for Section V.A.1.c.ii. of the PFD:

Exception 4: Proposed Conclusion of Law 14 combines two concepts (money and investments) and those two concepts should be separated. Conclusion of Law 14A should state “Aqua’s money is its personal property and, pursuant to with Texas Water Code § 13.254(g), when Aqua spends money on property, it may be used to value the personal property for that which the money is spent.” Conclusion of Law 14B should state “Pursuant to Texas Water Code § 13.254(g), Aqua’s Investments in property may be used to value the personal property into that which it is invested.

Exception 5: Proposed Conclusions of Law 15 and 17 have no basis in law and should be combined and revised to state: “Because Aqua had no property that served the Tract, Aqua’s money spent on planning and design expenses are irrelevant to valuing property pursuant to Texas Water Code § 13.254(g).”

Exception 6: Proposed Conclusion of Law 16 and 18 have no basis in law and should be combined and revised to state: “Because Aqua had no property that served the Tract, Aqua’s money spent on legal and professional fees are irrelevant to valuing property pursuant to Texas Water Code § 13.254(g).

Exception 7: Proposed Conclusions of Law 21 and 22 have no basis in law and should be deleted and replaced with the following: “Because no property has been identified for which compensation is available, there is no property to determine whether it was rendered useless or valueless.

IX. ORDERING PARAGRAPHS

The City excepts to the following Ordering Paragraph and in support of this exception refers to and incorporates by reference the discussion provided for Section V.A.1.c.ii. of the PFD:

Exception 8: Proposed Ordering Paragraph 1 should be revised to read: Aqua is not entitled to any compensation pursuant to Texas water Code § 13.254(d) or 16 Texas Administrative Code § 24.113(h).

Respectfully submitted,

/s/ David Tuckfield

ANDY BARRETT & ASSOCIATES, PLLC

ANDREW N. BARRETT

State Bar Number: 01808900

3300 Bee Cave Road

Suite 650 # 189

Austin, Texas 78746

Telephone: 512-600-3800

Facsimile: 512-330-0499

THE AL LAW GROUP, PLLC

David Tuckfield

State Bar Number: 00795996

12400 West Hwy 71

Suite 350-150

Austin, TX 78738

Telephone: (512) 576-2481

Facsimile: (512) 366-9949

ATTORNEYS FOR THE CITY OF CELINA

CERTIFICATE OF SERVICE

I, David Tuckfield, attorney for the City of Celina, certify that a copy of this document was served on all parties of record in this proceeding on February 15, 2017 in the following manner:

Erika Garcia
Public Utility Commission of Texas
1701 N Congress
PO Box 13326
Austin, Texas 78711-3326
(512) 936-7268 (fax)
ATTORNEY FOR COMMISSION STAFF

Fax: (512) 936-7268

Paul Terrill
Geoffrey P. Kirshbaum
Scott R. Shoemaker
TERRILL & WALDROP
810 W. 10th Street
Austin, Texas 78701
(512) 474-9100
(512) 474-9888 (fax)
ATTORNEYS FOR AQUA TEXAS, INC. D/B/A AQUA TEXAS

Fax: (512) 474-9888

/s/ David Tuckfield
David Tuckfield