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

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BEFORE THE PUBLIC UTILITY

COMMISSION OF TEXAS

PUBLIC UTILITY COMMISSION
FILING CLERK

**AQUA'S RESPONSE TO EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

Aqua Texas, Inc. d/b/a Aqua Texas ("Aqua") files this Response to Exceptions to the Proposal for Decision, and in support would show as follows.

I. SUMMARY OF RESPONSE

Aqua fully supports the Proposal for Decision ("PFD") issued in the above-styled docket. While Aqua does not concur with the portion that relates to lost economic opportunity, Aqua accepts the recommended decision on that issue as proposed, agrees with the remainder of the PFD, and respectfully requests that the Commission adopt the sound reasoning set forth therein.

Conversely, the City of Celina ("Celina") seems intent on ensuring that it pays nothing for replacing Aqua as the retail public water and sewer utility service provider in the area decertified from Aqua CCN Nos. 13201 and 21059 in Docket No. 45329. Aqua disagrees with all of Celina's exceptions with one very minor exception.¹ Further, Aqua respectfully disagrees with the exceptions filed by Commission Staff contending that the Honorable ALJs were wrong to find that money retains property status in decertification matters after it is spent. The PFD correctly addresses these issues and Aqua respectfully requests the Commission adopt the PFD.

¹ Aqua concurs that Conclusion of Law No. 1 should properly refer to "retail public utilities."

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II. RESPONSE TO EXCEPTIONS: THE PROPOSAL FOR DECISION CORRECTLY FINDS THAT MONEY RETAINS COMPENSABLE PROPERTY STATUS AFTER IT IS SPENT

A broad definition of “property” and a constitutionally-based interpretation of what it means for such property to be rendered “useless or valueless” is required to effect the just and reasonable result required by Texas Water Code (“TWC”) §13.254(d) and (g).² The PFD correctly recognizes the testimony by experts for both Aqua and Celina opining that money and investments are personal property.³ Yet, both Commission Staff and Celina except to the PFD finding that a decertified CCN holder’s money may be considered property even after it is spent. They except to the PFD findings that Aqua’s money rendered useless or valueless from expenditures on planning, design or construction of service facilities allocable to the service area in question and on reasonable and necessary legal and professional fees in the decertification/compensation dockets may be properly viewed as compensable property. The PFD findings on these issues are correct.

The ALJs considered all the evidence and legal arguments presented by Aqua, Celina, and Commission Staff. With respect to planning and design expenditures, the ALJs properly rejected Celina’s theory that physical construction is a prerequisite to a finding of compensable property, correctly characterizing that theory as “strained and narrow.”⁴ The ALJs correctly found no support for Celina’s contention that physical construction is required, and, until that occurs, “the

² TWC §13.254(d) and (g); *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994); U.S. CONST. AMEND. V (“ . . . nor shall private property be taken for public use, without just compensation.”); TEX. CONST. Art. I, § 17 (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .”); *see also Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980) (holding in pertinent part that destruction of personal property by police required compensation); TEX. GOV’T CODE §311.021(1)-(3) (stating that in statutory construction there is a presumption that enacted statutes are intended to comply with “the constitutions of this state and the United States,” “the entire statute is intended to be effective,” and “a just and reasonable result is intended.”).

³ Tr. at 23-24 (Jones); Tr. at 68 (Waldock); Tr. at 131 (Korman). Commission Staff did not present a direct case or witnesses.

⁴ PFD, at 18-19.

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.”⁵ Similarly, the ALJs rightly found Staff’s analysis of Aqua’s expenditures “too narrow,” “granular,” and “incompatible with *State v. Public Utility Commission of Texas*.”⁶ The ALJs appropriately applied the same analysis to the issue of expenditures for legal and professional services.⁷ Neither Celina nor Commission Staff offer new legal or factual arguments in their exceptions.⁸

Commission Staff does appear to raise one new concern that centers around policy implications for adopting the PFD position that necessary and reasonable legal expenses and professional fees are compensable as property.⁹ Decertification proceedings serve no benefit to decertified CCN holders, damage their business, and typically come out of nowhere without cause. If Staff’s concern is about decertified CCN holders taking an unreasonable litigation position, that concern is equally applicable to both sides in the context of decertification proceedings. If the concern is about distinguishing between legal and professional fees incurred for planning and those incurred for protecting business interests in a decertification proceeding, Aqua submits both types of expenses are now required for CCN obligations in Texas on some level. The appropriate amount to compensate for both items are second phase hearing issues under the Commission’s new bifurcated procedure being implemented here for the first time. Regardless, all these expenditures are properly deemed property rendered useless or valueless as the PFD so finds.

⁵ *Id.*

⁶ *Id.*; see also 883 S.W.2d at 199-200.

⁷ PFD, at 25.

⁸ Inexplicably, Celina dismisses the ALJs’ analysis as presenting a “pithy and effective analogy on pages 18 and 19.” Celina Exceptions, at 6. Aqua is not certain exactly what Celina means here, but the analogy is sound.

⁹ Commission Staff Exceptions, at 3.

In sum, the Commission should reject all the exceptions offered by Celina and Commission Staff. Aqua maintains that its lost economic opportunity to serve customers within its decertified CCN areas is a relevant property interest warranting compensation. Nevertheless, the PFD properly finds Aqua is entitled to compensation for the other items identified as property rendered useless or valueless in Aqua's appraisal report. Thus, Aqua respectfully requests the Commission adopt the PFD and its proposed findings of fact and conclusions of law so that a second phase hearing may proceed.

III. RESPONSE TO CELINA'S EXCEPTION REGARDING CONCLUSION OF LAW NO. 1

The Commission should adopt the PFD and its proposed findings of fact and conclusions of law with a single exception. Aqua concurs with Celina that there appears to be a clerical error in Conclusion of Law No. 1. Celina is correct that TWC §13.002(19) defines "retail public utility" and that is the term that should be used instead of "public utilities." The latter has a narrower definition in TWC §13.002, but both Aqua and Celina qualify as "retail public utilities."

IV. CONCLUSION

Aqua respectfully requests the Commission: (1) adopt the Honorable Administrative Law Judges' Proposal for Decision, including its proposed findings of fact and conclusions of law with the single correction noted herein; and (2) order a second phase hearing to determine the just and adequate compensation owed to Aqua by Celina. Aqua further prays for all other relief to which it may be entitled at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on February 22, 2017, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

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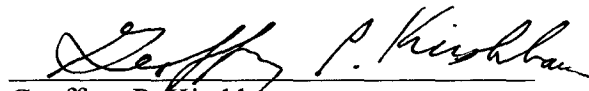
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