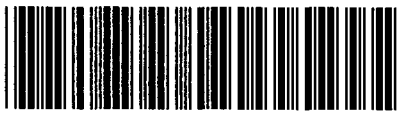

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SOAH DOCKET NO. 473-16-5011.WS
PUC DOCKET NO. 45848

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

AQUA TEXAS, INC.'S MOTION FOR REHEARING

May 8, 2017

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SOAH DOCKET NO. 473-16-5011.WS
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CITY OF CELINA'S NOTICE OF INTENT TO PROVIDE WATER AND SEWER SERVICE TO AREA DECERTIFIED FROM AQUA TEXAS, INC. IN DENTON COUNTY	§ § § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

AQUA TEXAS, INC.'S MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS:

COMES NOW Aqua Texas, Inc. d/b/a Aqua Texas ("Aqua") and timely files this Motion for Rehearing, and in support would show as follows.[1]

I. INTRODUCTION

While Aqua does not agree with portions of the findings and conclusions in the January 27, 2017 Proposal for Decision ("PFD"), the Public Utility Commission ("Commission") should have adopted the two Administrative Law Judges' ("ALJs") well-reasoned, legally-sound PFD in its entirety. The PFD carefully considered the legal questions and constitutional implications raised by this case of first impression. In contrast, the Commission's March 14, 2017 Final Order ("Order"), if allowed to stand, is premised on legal error; the Order relies almost exclusively on the notion, unsupported by any legal authority, that while money may constitute property under Texas Water Code § 13.254, once that money is invested in planning and design activities directed toward the provision of

[1] Pursuant to PUC PROC. Rule 22.264(a), motions for rehearing shall be governed by the Administrative Procedure Act ("APA"), which provides that "[a] motion for rehearing in a contested case must be filed by a party not later than the 25th day after the date the decision or order that is the subject of the motion is signed. TEX. GOV'T CODE § 2001.146(a). The Order for which Aqua seeks rehearing was signed on April 13, 2017. This Motion for Rehearing is timely filed.

utility service, it somehow loses its status as property until facilities have been constructed inside the area that is then decertified. There is simply no legal basis for such a determination and none is presented in the Commission's Order.

To reach such a conclusion, the Order: (1) deletes uncontroverted findings of fact that undermine the Commission's determination; (2) disregards established principles of statutory construction by reading words into the statute, ignoring words that are included in the statute, and failing to give the statutory terms their "plain meaning"; (3) relies on the resulting improper statutory interpretation to cast aside the findings of three independent appraisers; and (4) creates an *ex post facto* evidentiary standard regarding capitalization of costs that the Order implies could have changed the Commission's determination. In so doing, the Order eviscerates the overriding purpose of the statute, which is to provide "just and adequate" compensation resulting from decertification. The result is an unconstitutional taking.

The Commission's errors are amplified by its implementation of an unworkable bifurcated hearing process that required Aqua to retain and compensate an independent appraiser and participate in a year-long contested case proceeding only to be presented with a Commission conclusion, contrary to the presiding ALJs' conclusion, that none of its service investments or expenditures are compensable because they are not "property." This determination was made according to a new procedure and statutory interpretation that Aqua could not have reasonably foreseen at the outset of this docket when Aqua was forced to respond to Celina's petition.

Aqua urges the Commission to grant rehearing, reverse its Order, and render a final decision adopting the PFD. Left standing, the Commission's decision in this proceeding is

arbitrary and capricious, unsupported by substantial evidence, violative of the statute and underlying constitutional principles, and the result of an unlawful procedure that constitutes improper rulemaking under the Administrative Procedure Act ("APA") and a violation of Aqua's due process rights.[2]

II. ARGUMENT

The Commission's order constitutes legal error for the following reasons:

Point of Error No. 1

The Commission Erred in Determining that Aqua's Investments in Planning, Design or Construction of Facilities Allocable to the Decertificated Service Area Do Not Constitute Property Rendered Useless or Valueless under TWC § 13.254.

Texas law prohibits a retail public utility, such as Celina, from providing water or sewer service to areas decertified from Aqua's service area(s) until it compensates Aqua for any property the Commission determines was rendered useless or valueless to Aqua.[3] Both the record evidence and principles of statutory interpretation require a Commission determination that Aqua's investments in planning, design, or construction of facilities allocable to Aqua's decertificated areas constituted property that was rendered useless or valueless — regardless of whether physical facilities were built. The Order's reversal of the ALJs' thorough analysis, findings of fact and conclusions of law on this issue constitutes legal error for the reasons that follow.

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[2] TEX. GOV'T CODE § 2001.174; *Madden v. Tex. Bd. of Chiropractic Exam'rs*, 663 S.W.2d 622, 626-627 (Tex. App.–Austin, 1983, writ ref'd n.r.e.).

[3] TEX. WATER CODE § 13.254(d).

A. The Order Erroneously Requires that Physical Facilities be Constructed in the Decertificated Area.

The Order imposes a legally insupportable prerequisite to compensation under TWC § 13.254 that actual physical facilities must have been constructed in the decertificated area. This is revealed on the very first page of the Order, stating that "*[b]ecause* Aqua has *no facilities* that were rendered useless and valueless as a result of the decertification, Aqua is not entitled to any compensation..."[4] In so determining, the Commission has read into TWC § 13.254(g) a requirement that is simply not present and renders meaningless provisions for assessing the value of personal property. The statute requires compensation for "property" rendered useless or valueless.[5] Even if the statutory scheme authorized compensation only for "facilities," which it does not, the use of such term would require a finding that Aqua be compensated. As the ALJs recognized, "facilities" is defined in the Water Code to include "all tangible *and intangible real and personal property without limitation...*"[6]

The Order gives lip service to the notion that property must be construed broadly and includes personal intangible property, even purporting to recognize that money equals property as the ALJs correctly found.[7] However, the Commission's plain statement that because Aqua has no facilities it therefore has no property reveals the actual basis for the Commission's decision. The ALJs found that "it was not necessary for Aqua to construct

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[4] Order (March 14, 2017) at 1 (emphasis added).

[5] TWC § 13.254(d).

[6] PFD at 17 (quoting TWC § 13.002(9)) (emphasis added).

[7] Order at 7; PFD at 16, 21.

facilities on the Tract before its planning and design expenses can be considered property."[8] The Commission's reversal of that finding is legally unsupported by the Commission's analysis and should not stand. Along with other grounds not relevant here, the Commission may change an ALJ's finding of fact or conclusion of law "*only if the agency determines* that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions."[9] The Commission is further required to "state in writing the specific reason and legal basis for a change made" to the ALJs' findings.[10] Aqua submits that mere disagreement with the ALJs is insufficient to meet this statutory mandate. The Commission did not point to any provision in the statutory scheme that requires physical construction inside the decertificated area as a prerequisite to compensation, and the Commission must therefore reverse its determination that the ALJs' findings are wrong along with the Commission's other decisions in the Order based on that determination.

B. The Order is predicated on the Erroneous Proposition that Money, Once Invested, is No Longer Property.

The Commission's *de facto* determination that the presence of physical facilities in the decertificated area is required for compensation to be awarded is further evidenced by the Commission's erroneous conclusion that money, once spent, cannot be considered property or even a proxy for same. The ALJs correctly rejected this theory as posited by the City of

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[8] Order at 18.

[9] 2001 TEX. GOV'T CODE § 2001.058(e)(1) (emphasis added).

[10] *Id.*

Celina (the "City") and Commission Staff ("Staff").[11] Neither the City nor Staff cited any legal authority for such a narrow reading of "property." The ALJs recognized the absurdity of such a position, finding that it would require the money expended by Aqua to enter "*a sort of 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."[12]

The Commission provides no legal basis for its view that money invested in planning and design for physical infrastructure, but which physical infrastructure has not yet been constructed, somehow loses its status as property for the purpose of TWC § 13.254. Instead, the Commission simply states that it "disagrees with the ALJs."[13] The Order's assertion that "[o]ne generally does not retain any property interest in money spent to obtain products and services" actually supports the grant of compensation rather than its denial. The statement proves the point that money is not simply given away. Rather, it is exchanged for another form of property, be it real or personal, tangible or intangible. The "products and services" together *with* the money spent on these items are in this instance the very things that are being rendered useless and valueless[14] as to the decertified area: engineering, design, and planning services that are prerequisites to obtaining the permits and required regulatory

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[11] PFD at 18-19.

[12] PFD at 19.

[13] Order at 7.

[14] The ALJs' thorough analysis also correctly found that these Aqua property interests were rendered "useless" and "valueless" upon decertification by giving the terms their plain meaning. PFD at 35-36. The Commission did not reach the merits on this issue as the result of its incorrect interpretation that the statute inexplicably requires a phased hearing process where property and its value must be viewed in mutual isolation. Order at 10. Upon rehearing, the Commission must reinstate Finding of Fact Nos. 20-24.

approvals needed for the construction of physical infrastructure. Money spent planning for yet-to-be-built physical facilities in a decertified area is no different than money spent planning for built physical facilities in a decertified area; both expenditures can be rendered useless and valueless by decertification.

The PFD correctly noted that the types of planning, design and permitting expenditures made by Aqua are the type that Aqua would be entitled to capitalize, thus forming the book value of Aqua's assets.[15] However, the Order wrongly attempts to bolster its legally-unsupported position that invested funds are not property by creating an *ex post facto* evidentiary burden on Aqua. Noting that capitalized expense must be properly booked, the Commission faults Aqua for not producing evidence of the accounting treatment of its investments.[16] At its essence, the Commission is asserting that Aqua should have: (1) been aware that a specific portion of its CCN area would sometime in the future be decertificated; (2) booked its capital expenses incurred in planning a certain way before putting used and useful physical assets on the ground (even though such capital expenses are not typically allowed in rate base before such time); (3) filed a rate case; and (4) obtained approval for its regulatory accounting treatment all before receiving Celina's notice of intent.[17] The Commission then surmises that this "might have been informative."[18] In other words, the Commission might have reconsidered its theory that spent money is no longer property had

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[15] PFD at 18, proposed FoF 46, 48.

[16] Order at 7-8.

[17] Aqua notes that not all CCN holders are even subject to the Commission's regulatory ratemaking and accounting standards. Yet, TWC §13.254 applies to all CCN holders. Regardless, any such requirement should be adopted through a rulemaking procedure with public input to avoid an arbitrarily imposed requirement.

[18] Order at 8.

Aqua possessed adequate foresight to comply with an unwritten standard fraught with uncertainty.[19] This reasoning is untenable and further demonstrates why the Order should be reversed on rehearing.

The Commission's decision that money invested in planning and design for unbuilt physical infrastructure is not recoverable contravenes the plain language of TWC § 13.254. The Commission's Order violates Texas Gov't Code § 2001.058(e) by reversing the ALJs' findings, conclusions, and PFD without a proper basis and without sufficient explanation.

C. The Order is Premised on the Commission's Erroneous Determination that the Non-Exclusive Factors Set Forth in TWC § 13.254(g) Do Not Inform the Identification of Property.

The Commission's determination that costs are not property and that money, once spent, is no longer property ultimately rests entirely on the groundless theory that the list of non-exclusive factors *must* be read in isolation and as having absolutely no bearing on what is considered property. The unambiguous statutory language in TWC § 13.254(g) dictates that the Commission "shall include" these factors in order to ensure "that the compensation to a retail public utility is just and adequate" for personal property.[20] The factors cannot be given their plain meaning under the Commission's narrow reading. Thus, the PFD correctly applied the broad meaning of property mandated by *State v. Public Utility Commission* to conclude that the factors *identify* a utility's property interests.[21] The ALJs' PFD undertook a rigorous analysis to support this conclusion. In so doing, the ALJs rejected the same

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[19] *Id.*

[20] TWC § 13.254(g). Aqua notes that different standards not applicable here apply to real property compensation.

[21] PFD at 17; *see also State v. Public Util. Comm'n*, 883 S.W.2d 190, 200 (Tex. 1994).

arguments now adopted by the Commission, finding them "insupportably narrow"[22] and "incompatible with *State v. Public Utility Commission of Texas*."[23] The PFD's conclusion that the statutory provisions as a whole must be read in a uniform manner "such that property is indivisible from its value" is consistent with the statutory mandate that "the value of personal property shall be determined according to the factors in this subsection."[24]

In stark contrast, the Order again simply states that the Commission disagrees with the ALJs[25] and then proceeds to erect an artificial wall between the identification and valuation of property that is not evidenced by a plain reading of the statute. The Commission's determination that the factors are somehow prohibited from aiding in property identification is not only unsupported by the plain language describing the factors, but is simply illogical. The Commission's interpretation would *require* compensation for items that are not property at all under the Commission's "spent money" theory. For example, Factor 3; one of the factors that the Commission "shall include," requires the Commission to consider "the amount of any expenditures for planning, design or construction of service facilities." Yet under the Commission's "spent money" theory, neither expenditures nor the money put toward same for planning and design, including even those expenditures for permitting that are a state-imposed prerequisite to the construction and operation of facilities,

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[22] PFD at 17, 20.

[23] PFD at 21.

[24] PFD at 18 (emphasis in original) (citing TWC §13.254(g)).

[25] Order at 6.

are property. Thus, the Commission's statutory interpretation would mandate compensation for non-property items against statutory intent.

The Commission's prohibition on utilizing the factors to describe a utility's property interests also serves as the basis for its improper rejection of all three appraisals submitted in this proceeding.[26] The Commission dismisses the appraisals because they "focused on valuing the factors in 13.254(g)."[27] This passage demonstrates that the Commission's interpretation limiting the very nature of the enumerated factors to compensation and not also identification of property is incorrect and in error. Indeed, the fact that all appraisals proceeded in a similar manner reveals that, prior to the Commission's decision in *Zipp Road*,[28] it was generally understood and agreed among parties to decertification proceedings how the statute was to be implemented. At the very least, it demonstrates that the Commission's interpretation of the statute to narrowly limit the application of the mandatory statutory factors was less than obvious to all of the parties' retained experts. It reasonably follows that this circumstance existed because the statutory language plainly fails to support the Commission's new theories.

The Commission's decision violates plain statutory language and renders it meaningless. The Water Code requires compensation for property rendered useless or valueless by decertification.[29] For purposes of implementing the decertification section,

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[26] Order at 3-4.

[27] Order at 4.

[28] *Zipp Road Util. Co. Notice of Intent to Provide Service to Area Decertified from Guadalupe-Blanco River Authority in Guadalupe County*, Docket No. 45679, Order (Feb. 21, 2017).

[29] TEX. WATER CODE § 13.254(d).

which includes the compensation provisions, property includes real and personal property.[30] Among the factors for assessing the value of personal property is the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question.[31] Money used for expenditures is by definition no longer possessed by the spender, and yet the statute plainly assigns value and permits compensation for money expended for planning or design of service facilities. There is no requirement that the facilities be constructed in order for the planning expenditures to be rendered useless or valueless by decertification.

The Commission's decision that money invested in planning and design for unbuilt physical infrastructure is not recoverable contravenes the plain language of TWC § 13.254. The Commission's Order violates Texas Gov't Code § 2001.058(e) by reversing the ALJs' findings, conclusions, and PFD without a proper basis and without sufficient explanation.

D. The Result of the Commission's Finding that Investments in Planning and Design Activities for the Decertificated Area are Not Property is an Unconstitutional Taking.

The ALJs correctly determined that Aqua made investments specifically for the portion of its CCN area that has now been decertificated.[32] In reaching this finding, the ALJs properly relied upon established Texas Supreme Court precedent holding that the term "property" must be given its broadest meaning where no other definition is supplied by the

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[30] TEX. WATER CODE § 13.254(g).

[31] *Id.*

[32] PFD at 12; Aqua Ex. AT-A at 10.

relevant statutory provision.[33] Applying this principle to the plain words of TWC § 13.254(d), the ALJs found that "the interests of just compensation" required a broad reading of property given the statutory requirement that compensation be made "for *any* property... rendered useless or valueless...as a result of the decertification."[34]

The Order simply rejects the ALJs' cogent analysis out of hand and imposes an unduly restrictive compensation scheme which amounts to no compensation at all. By failing to give plain meaning to the governing purpose of TWC § 13.254(d) and (g), which is to ensure that retail public utilities such as Aqua are provided just and adequate compensation for lost property resulting from decertification,[35] the Order results in an unlawful regulatory taking, damaging, or destruction of property for public use in violation of the Texas and U.S. Constitutions.[36] This is particularly true given the unreasonably narrow interpretation of "service" applied by the Commission which has permitted decertification for lack of active physical facilities within the decertified tract.[37] Essentially, the possibility for compensation

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[33] PFD at 6-7 (citing *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 200 (Tex. 1994)).

[34] PFD at 8 (quoting TWC § 13.254(d) (emphasis in original).

[35] *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).

[36] 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 . . .").

[37] *E.g., 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. 35329, Final Order at 2, Conclusion of Law No. 6 (Mar. 22, 2016); *Petition of City of Midlothian to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity by Expedited Release in Ellis County*, Docket No. 44394, Final Order at 4, Finding of Fact No. 48, Conclusion of Law Nos. 11, 17 (May 1, 2015). Aqua disagrees with this interpretation, but acknowledges that this is not an issue to be determined here.

for certain expenditures as part of a TWC § 13.254(a-5) decertification is being eliminated by new Commission standards not present in the statutory text—an absurd result.[38]

The Commission is required to interpret a statute as consistent with the state and federal constitutions pursuant to the Code Construction Act.[39] The Commission is further obligated to interpret a statute in a manner in which "the entire statute is intended to be effective" and "a just and reasonable result is intended."[40] Under Tex. Gov't Code § 2001.058(e), the Commission can reverse the ALJs' findings, conclusions, and PFD only for specified bases and only with sufficient explanation. Finally, the Commission must not take property without adequate compensation. The Order accomplishes none of these tasks and must be reversed on rehearing. The Commission should adopt the PFD.

Point of Error No. 2

The Commission Erred in Determining that Aqua is Not Entitled to Compensation for Necessary and Reasonable Legal Expenses and Professional Fees.

The Commission's determination that Aqua is not entitled to compensation for necessary and reasonable legal expenses is premised on the same legally unsupported and unsupportable propositions that: (1) although money is property, it ceases to be the possessor's property once spent; (2) property is somehow divisible from its value; and (3) the mandated statutory requirements shall not give meaning to the term "property."[41] As

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[38] *See Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) (finding that statutes must be considered as a whole rather than their isolated provisions); *Texas Dept. Of Protective and Regulatory Services v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004) (finding that if a statute is unambiguous, the interpretation supported by its plain language must be adopted unless such interpretation would lead to absurd results).

[39] TEX. GOV'T CODE § 311.021(1) (requiring a presumption that "compliance with the constitutions of this state and the United States is intended.").

[40] *Id.* at § 311.021(2) and (3).

[41] Order at 9, Conclusion of Law 7C.

explained in Point of Error No. 1, which Aqua incorporates herein, these propositions lack any legal authority and must be overturned on rehearing.

The ALJs correctly found that Aqua's legal and professional fee expenditures incurred to defend its property interests in the decertification proceeding and in this docket are required to be treated as property interests under the plain meaning of the seventh mandatory factor of TWC § 13.254(g).[42] The PFD correctly finds that "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."[43] This finding was based on substantial record evidence.[44] Aqua did not initiate this proceeding. Rather, Aqua was compelled to defend itself against the decertification and in order to be made whole in light of Celina's position that Aqua should be awarded compensation for a fraction of its property rendered useless or valueless.[45] The Water Code specifically contemplates such compensation[46] and even Celina's expert appraiser recommended compensation for legal and professional fees required for Aqua to defend its property interests.[47] The Commission's appointed appraiser also determined that compensation for legal and professional fees was merited.[48] Thus, all three appraisers in this

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[42] PFD at 23.

[43] PFD at 23 (citing Aqua Ex. AT-A at 10-11; Aqua Ex. AT-C at 12; Aqua Ex. AT-1 at Aqua 000006).

[44] Ex. AT-A at 10-11; Ex. AT-B at 13-14; Ex. AT-C at 12; Ex. AT-1 at Aqua 000006; Tr. at 47-48, 55 (Jones Testimony).

[45] *Id.; see also* Ex. AT-3.

[46] TEX. WATER CODE § 13.254(g).

[47] Ex. CEL-102.

[48] Ex. AT-3.

docket and the ALJs agreed that these expenditures were compensable under the statutory scheme.[49]

The Commission's Order correctly recognizes that these fees were required, finding that "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."[50] Yet, the Commission once again wrongly employs its artificial construct wherein property and its value is somehow mutually exclusive to deny any compensation for these expenditures.[51] The Order simply cannot be synthesized with the overriding statutory purpose of TWC § 13.254(g) requiring just and adequate compensation.

By failing to give plain meaning to the governing purpose of TWC § 13.254(d) and (g), which is to ensure that retail public utilities such as Aqua are provided just and adequate compensation for lost property resulting from decertification,[52] the Order results in an unlawful regulatory taking, damaging, or destruction of property for public use in violation of the Texas and U.S. Constitutions.[53]

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[49] The Commission's rejection of all three appraisals could reasonably be determined to constitute a violation of TWC § 13.254(g)(1), which requires that the Commission appoint a third-party appraiser who is charged with making the determination of compensation. A plain reading of this section supports the notion that the Commission exceeded its authority in rejecting the third appraisal's determination.

[50] Order at Finding of Fact No. 47 (emphasis added).

[51] Order at 9.

[52] *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).

[53] 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 . . .").

The Commission's determinations that money spent is no longer property and that property identification and valuation must be mutually exclusive, and considered in isolation, cannot withstand constitutional scrutiny. This approach eviscerates the TWC § 13.254 compensation process. Therefore, the Commission should adopt the PFD.

Point of Error No. 3
The Commission has Erred by Engaging in Improper Rulemaking Through an Adjudicative Decision

The new evidentiary standards and procedures that the Commission has adopted in this docket were implemented well after this docket had commenced and after the Commission had ordered appraisals. Implementation of these standards constitutes improper *ad hoc* rulemaking under the APA because these standards are plainly intended to be generally applicable to all CCN holders, yet were adopted and implemented in this contested case proceeding without the required notice, publication, and public participation.[54] The Texas Supreme Court has held that "[w]hen an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid."[55] Similarly, the Court has decided that "in a rulemaking proceeding, blanket notice must be given to the public at large. Contested case procedures and rulemaking procedures simply cannot be mixed in one hybrid proceeding."[56]

Here, the Commission has established a unique bifurcated hearing process midway through a contested case proceeding without the required advanced notice and public

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[54] APA at §§ 2001.023-.030.

[55] *El Paso Hosp. Dist. v. Tex. HHS Comm'n*, 247 S.W.3d 709, 715 (Tex. 2008).

[56] *R.R. Comm'n v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 78 (Tex. 2003).

participation, and in so doing has created new requirements of general applicability to decide pending and future decertification proceedings. Applying the Supreme Court's requirements to this proceeding, the Commission's *de facto* rulemaking in the context of this contested case proceeding is invalid.

The Commission's error is particularly glaring given the TWC § 13.254 requirement that "[t]he Utility Commission shall adopt rules governing the evaluation of these [§ 13.254(g)] factors" because the newly adopted standards were not included in the Commission's rules effective when Celina filed its application.[57] The Commission's decision to assess whether property had been rendered useless or valueless before and separately from deciding the value of that property came after the parties had engaged appraisers to assess that value. Aqua has been harmed as a result and, at least in this particular case, should receive compensation for its property interests based either on the sound reasoning of the PFD or for good cause.

When the Commission first adopted the new procedure midway through this case, Aqua's alternative was simply to forfeit its property interests or continue. The Commission imposed a Hobson's choice of: (1) Aqua forfeiting its right to compensation for its property interests rendered useless or valueless by decertification; or (2) being subjected to significant legal costs in an unreasonably complex and lengthy process, all simply to try to make itself

[57] TWC § 13.254(g); 16 TAC § 24.113(h)-(k). While the Commission initiated a new rulemaking process in Project No. 46151 several months after the initiation of this docket, the Commission has only recently made a rulemaking decision through that process. Such rules may only operate prospectively. *E.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 221, 109 S.Ct. 468 (1988) (Scalia, J., concurring) ("Adjudication deals with what the law was; rulemaking deals with what the law will be."); *Amarillo Independent School Dist. v. Meno*, 854 S.W.2d 950, 958 (Tex. App – Austin 1993), writ denied). The final rule language does not even include the Commission's "property" standard pronounced in the Order and seems to implement a different process than that followed here.

whole. Aqua could not have reasonably foreseen the path on which it had embarked when it made the decision to protect its property interests, and ultimately, those of its shareholders.[58]

The new Commission process interjected into the middle of this proceeding increased legal and professional fees exponentially by imposing a new contested case hearing procedure on the parties. The Commission's new process actually imposes a second contested case hearing to determine valuation and thus, but for the Order, which was issued exactly one year and one day following Celina's application,[59] the Commission's burdensome new process would still be ongoing.[60] Given these circumstances, the Commission should grant rehearing and compensate Aqua for the significant costs of prosecuting its case both here and in Docket No. 45329, regardless of whether such costs are deemed "property."

Given that the Commission's actions in excess of its authority without prior notice to Aqua greatly enhanced Aqua's legal and professional fees, the Order's finding that such costs are non-compensable more than a year after the proceeding was initiated is both unjust and

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[58] At the time this proceeding was commenced, there was no provision in then-existing PUC Subst. R. 24.113 giving Aqua notice of this protracted hearing mechanism or the Commission's new statutory interpretations.

[59] Preliminary Order (July 20, 2017) at 2. The Commission's new process is not only an improper *de facto* rulemaking injected into an ongoing contested case hearing, but violates the straightforward directive of TWC § 13.254 that the Commission "shall ensure" compensation "not later than the 90th calendar day after the date on which a retail public utility notifies the utility commission of its intent to provide service to the decertified area." TWC § 13.254(e). There is no qualifying language or exception to this statutory deadline even though the statutory framework may be unworkable on a practical basis. The Commission's new bifurcated approach may also implicate the Texas Supreme Court's holding in the context of an electric utility ratemaking proceeding that "[t]here is no language in this or any other section of PURA that allows the PUC to *bifurcate* into multiple proceedings the issue of a single investment's prudence." *Coalition of Cities for Affordable Rates v. Public Utility Commission*, 798 S.W.2d 560, 565 (Tex. 1990).

[60] This is an extremely burdensome uphill battle that the Commission has decided all CCN holders must now bear to maintain even the slightest possibility of being justly and adequately compensated under TWC §13.254(g). From a policy standpoint, this decision will greatly bolster the efforts of developers and cities to take CCN areas in this State without providing any compensation at all to decertified CCN holders.

unreasonable. This is particularly the case in light of the record evidence that all three appraisals found compensation for such items to be appropriate. The Commission should therefore reverse its finding that these costs are not property consistent with its finding that such fees were reasonably and necessarily incurred, or at the very least, award compensation for these expenses based on equitable principles. Alternatively, the Commission should adopt the PFD.

Point of Error No. 4
The Commission has Violated Aqua's Due Process Rights

By revising the controlling definitions after the substantive hearing concluded, then deciding that Aqua had no right to compensation for its expenditures rendered useless or valueless by decertification, the Commission has violated Aqua's due process rights under the federal and state constitutions.[61] Among the elements of procedural due process are notice and hearing.[62] When an agency redefines a controlling term after the evidentiary hearing has closed, it deprives the parties of notice of the controlling terms and an opportunity to be heard and present a case under that redefined term.[63]

The Commission's decision that money expended for infrastructure planning and legal fees is not the property of the spender radically departed from the context and manner in which this case was presented to the ALJs. Had Aqua known how the Commission intended to redefine controlling terms, it could have conducted its business and presented its case

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[61] U.S. CONST. AMEND XIV; TEX. CONST. ART. I, § 19.

[62] *Madden v. Texas Bd. of Chiropractic Exam'rs*, 663 S.W.2d 622, 626 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *see also Texas State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 815 (Tex. App.— Austin 1988, writ denied).

[63] *Madden* at 627.

differently. The Commission's own order speculates about what sort of evidence might have been informative,[64] but there is no indication in the rules or statutes that such evidence would be necessary. Had Aqua received notice that the Commission was going to redefine property in a way that rendered expenditures for infrastructure planning or legal fees to be not property and non-compensable, it might have conducted its business or kept records differently. Had Aqua received notice that the Commission was going to redefine property in this way, it might have presented its case differently. The change in the definition of basic statutory terminology deprived Aqua of notice and a meaningful opportunity to be heard under the Commission's reinterpretation of the statute. Aqua lost the opportunity to recover its expenditures for planning and design of service facilities, legal expenses, and professional fees. In addition to erroneously redefining the word "property," the Commission deprived Aqua of due process in the compensation hearing. The Commission should grant rehearing and adopt the PFD.

III. CONCLUSION AND PRAYER

Aqua Texas, Inc. respectfully requests that its Motion for Rehearing be granted. Aqua further requests that the Commission issue an Order on Rehearing reversing its April 13, 2017 Order and adopting the Administrative Law Judges' January 27, 2017 Proposal for Decision. In so doing, Aqua requests that the Commission:

(1) reinstate and adopt Finding of Fact Nos. 37-42, 45, 46 and 48 and Conclusion of Law Nos. 13-18 and 20-24; and

(2) delete Conclusion of Law Nos. 7A, 7B and 7C.

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[64] Order at 8.

Aqua further requests that it be granted any and all further relief to which it shows itself to be entitled.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on May 8, 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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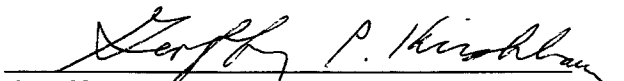

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