



Control Number: 45848



Item Number: 73

Addendum StartPage: 0

RECEIVED

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

MAY 22 PM 2:05  
PUBLIC UTILITY COMMISSION  
CLERK

**COMMISSION STAFF'S RESPONSE TO AQUA TEXAS, INC.'S MOTION FOR REHEARING**

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Commission Staff's Response to Aqua Texas, Inc.'s Motion for Rehearing. In support thereof, Staff shows the following:

**I. BACKGROUND**

On April 13, 2017, the Commission issued a final order in this matter. On May 8, 2017, Aqua Texas, Inc. (Aqua) timely filed a Motion for Rehearing. Pursuant to Tex. Govt. Code § 2001.146(b), a party must file a reply to a motion for rehearing not later than the 40<sup>th</sup> day after the date the decision or order that is the subject of the motion is signed. Therefore, this reply is timely filed by May 23, 2017.

**II. STAFF'S REPLY**

Staff supports the Commission's decision in this proceeding and respectfully recommends denial of Aqua's Motion for Rehearing. The Commission's Order<sup>1</sup> is supported by substantial evidence, is in the public interest, and is in compliance with the law. The Motion for Rehearing filed by Aqua is without merit, fails to raise any new substantive issues, and should be denied.

In particular, contrary to Aqua's procedural claims,<sup>2</sup> the Commission's Order discusses with specificity that the Commission (1) concludes that the factors listed in Tex. Water Code §

<sup>1</sup> Order (Apr. 13, 2017).

<sup>2</sup> Aqua's Motion for Rehearing at 5, 13 (claiming that the Commission's Order is procedurally deficient under the APA by failing to state in writing the basis for the Commission's modifications to the Proposal for Decision)

73

13.254(g) (TWC) are intended to be used only to value property and do not identify property interests,<sup>3</sup> (2) disagrees with the Administrative Law Judges' (ALJs') interpretation of TWC § 13.254(g) that expenditures by a utility are property,<sup>4</sup> (3) concludes that lost economic opportunity is not property,<sup>5</sup> (4) adopts the ALJs' findings that Aqua's wastewater permit and certificates are not property,<sup>6</sup> and (5) finds that, in light of the foregoing, Aqua failed to show that it has any property that was rendered useless or valueless as a result of the decertification.<sup>7</sup> The Order also states with specificity that the ALJs' proposed findings of fact and conclusions of law were modified to be consistent with the holdings described above.<sup>8</sup> The Commission articulated rational, well-reasoned connections between the evidence, the law, and its decision.

Further, Aqua's claim that the Commission engaged in improper *ad hoc* rulemaking by establishing new procedures, which include a bifurcated hearing process at the State Office of Administrative Hearings (SOAH),<sup>9</sup> is without merit, and outside the scope of this proceeding. In the Preliminary Order, the Commission expressly designated "[w]hether the Commission may refer this docket to SOAH" as an issue not to be addressed.<sup>10</sup> The Preliminary Order stated that under TWC § 13.254, the Commission is tasked with "... making a determination of what property has been rendered useless or valueless by decertification," and that "[i]n order to properly make this fact-intensive determination, the Commission has decided that it needs to refer the matter to SOAH for a hearing."<sup>11</sup> The Commission did not, as Aqua claims, improperly establish new rules or requirements, but enacted a process to best make the determination required by an existing statute. As this issue was identified as one not to be addressed in this proceeding, the Commission should not consider Aqua's Point of Error No. 3.<sup>12</sup>

---

<sup>3</sup> Order at 6.

<sup>4</sup> *Id.* at 7-9.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 7-10.

<sup>9</sup> Aqua's Motion for Rehearing at 16-19, Point of Error No. 3.

<sup>10</sup> Preliminary Order at 3 (Jul. 20, 2017).

<sup>11</sup> *Id.*

<sup>12</sup> Aqua's Motion for Rehearing at 16.

Aqua's claim that the Commission violated Aqua's due process rights by redefining a controlling term after the evidentiary hearing had closed<sup>13</sup> is also unfounded. Aqua asserts that the Commission erroneously *redefined* the word "property," which deprived Aqua of notice and a meaningful opportunity to be heard.<sup>14</sup> However, it has been clear throughout this proceeding that this is a case of first impression<sup>15</sup> and that as part of the Commission's determination of what property, if any, was rendered useless or valueless to Aqua,<sup>16</sup> a preliminary determination of what constitutes "property" was necessary. As agreed by all parties and the ALJs, the Texas Water Code and the Texas Administrative Code do not provide a definition of property.<sup>17</sup> The Commission's Order sets forth the Commission's holding that expenditures are not property.<sup>18</sup> The Commission has not "redefined" the term property, but has properly interpreted the term as employed by TWC § 13.254. Accordingly, Aqua's procedural claims should be denied.

Aqua's substantive claims<sup>19</sup> do not raise any new issues which were not already raised in the briefing and exceptions in this proceeding, and already considered by the Commission and addressed in the Order. Accordingly, Aqua's substantive claims should also be denied.

### III. CONCLUSION

For the above stated reasons, Staff recommends that the Commission deny Aqua's Motion for Rehearing.

---

<sup>13</sup> *Id.* at 19-20, Point of Error No. 4.

<sup>14</sup> *Id.* at 20.

<sup>15</sup> See Preliminary Order at 2 ("This is one of the first cases of its type to be referred to SOAH").

<sup>16</sup> *Id.* at 3 (Issues to be addressed).

<sup>17</sup> See Aqua Texas, Inc.'s Initial Brief at 5 (Oct. 28, 2016); City of Celina's Closing Argument at 4 (Oct. 28, 2016); Staff's Initial Brief at 5 (Oct. 28, 2016); Proposal for Decision at 6 (Jan. 27, 2017).

<sup>18</sup> Order at 7-8.

<sup>19</sup> See generally Aqua's Motion for Rehearing (claiming that Aqua's investments in planning, design, or construction of facilities allocable to its decertified areas constitute property rendered useless or valueless, Aqua's spent money is property, and Aqua's reasonable and necessary legal expenses and professional fees are property rendered useless or valueless).

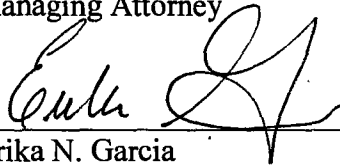
Dated: May 22, 2017

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
LEGAL DIVISION**

Margaret Uhlig Pemberton  
Division Director

Karen S. Hubbard  
Managing Attorney



Erika N. Garcia  
State Bar No. 24092077  
(512) 936-7290  
Public Utility Commission of Texas  
1701 N. Congress Avenue  
P.O. Box 13326  
Austin, Texas 78711-3326  
(512) 936-7268 (facsimile)  
Erika.garcia@puc.texas.gov

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

**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served on all parties of record on May 22, 2017, in accordance with 16 TAC § 22.74.



Erika N. Garcia