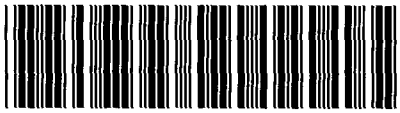

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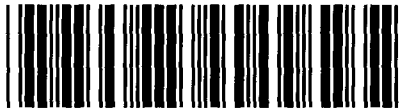

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SOAH DOCKET NO. 473-16-5379.WS
PUC DOCKET NO. 45956

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APPLICATION OF THE CITY OF SCHERTZ 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	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

GREEN VALLEY SPECIAL UTILITY DISTRICT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

May 25, 2017

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GREEN VALLEY SPECIAL UTILITY DISTRICT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Green Valley Special Utility District ("Green Valley") submits its Exceptions to the Administrative Law Judge's ("ALJ") May 9, 2017 Proposal for Decision ("PFD") in the above-referenced Docket ("Exceptions"). These Exceptions are timely filed pursuant to Commission Advising & Docket Management's May 11, 2017 letter to all parties of record establishing deadlines in this proceeding. In support of its Exceptions, Green Valley respectfully submits as follows:

I. INTRODUCTION

Green Valley excepts to the PFD's summary decision finding that no property will be rendered useless or valueless by decertification of a significant portion of high growth area in its wastewater Certificate of Convenience and Necessity ("CCN") No. 20973, as requested in the TWC § 13.255 single certification application ("Application") filed by the City of Schertz ("Schertz") in this docket.[1] If the Commission were to adopt the PFD, Green Valley will be deprived of adequate and just compensation as mandated by TWC § 13.255(c) and the Federal and State constitutions, which place no limits on the type of "property" that may be lost. Nor does the statute, constitutional provisions or applicable precedent prohibit allocated partial property losses, which losses will constitute the overwhelming majority of takings requiring compensation under the statutory

[1] PFD at 4. Green Valley incorporates in this Section I its Exceptions to the analysis, findings of fact, and conclusions of law set forth in the remainder of these Exceptions.

decertification scheme. Schertz failed to meet its burden of proof in this proceeding and summary decision was therefore improper. While the PFD relies on numerous fact findings proposed by Schertz, despite depriving Green Valley of the opportunity to cross examine Schertz's witnesses in an evidentiary hearing on the merits, those facts are largely irrelevant to the PFD's incorrect legal conclusions on the issue of property identification. The Commission's determinations in *Celina* serve as the foundation for the PFD's erroneous conclusions.[2] It is inappropriate for the PFD to rely on *Celina* because that decision is not final, is subject to rehearing and appeal, and thus has no precedential value. But procedural status aside, *Celina* was wrongly decided and its incorrect premises should not be perpetuated here.

Green Valley respectfully requests that the Commission modify the PFD to reflect these exceptions, adopt Green Valley's identification of property that will be rendered useless or valueless as the result of Schertz's proposed decertification, and direct a second phase hearing to establish the value of adequate and just compensation for Green Valley's property items. Otherwise, Green Valley will not be made whole for Schertz's partial CCN takeover.

II. NOTICE, JURISDICTION AND BURDEN OF PROOF

Green Valley excepts to the PFD's statement that "[o]therwise notice and jurisdiction are not disputed."[3] The Preliminary Order recognized that Green Valley contested the adequacy of notice and jurisdiction in this docket,[4] and Preliminary Order Issue Nos. 2, 3 and 4 direct that those issues

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[2] *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, Docket No. 45848, Order (April 13, 2017). A motion for rehearing was filed on May 8, 2017.

[3] PFD at 4.

[4] Preliminary Order (Sep. 12, 2016) at 1 ("Green Valley argues the Commission lacks jurisdiction to consider Schertz's application because the 180-day notice required for the application was deficient...").

be considered.[5] However, the Preliminary Order also directed that this first phase of the hearing be limited to consideration of what Green Valley property will be rendered useless or valueless as a result of the decertification, and what property, if any, the municipality has requested to be transferred to it.[6] The initial presiding ALJ further clarified that the remaining Preliminary Order Issues were reserved to a second phase.[7] Based on these Commission and ALJ directives limiting the issues to be considered in this phase of the bifurcated hearing process, Green Valley has not submitted evidence on the jurisdictional or notice issues. Nonetheless, those issues remain, and the PFD's statement to the contrary is wrong.

III. EVIDENCE ADMITTED AND MATTERS OFFICIALLY NOTICED

Green Valley excepts to the ALJ's admission, over Green Valley's timely filed objections to and motions to strike the Direct Testimony of Robert Adams,[8] the Rebuttal Testimony of Robert Adams,[9] and the Rebuttal Testimony of Jack Stowe and certain exhibits with same.[10] Green Valley incorporates by reference its Objections to Schertz's Prefiled Direct Testimony and Exhibits and Motion to Strike,[11] as well as its Objections to and Motion to Strike Schertz's Rebuttal Testimony.[12] Green Valley witness Joshua Korman was the only qualified appraiser to present testimony in this

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[5] Preliminary Order at 3.

[6] *Id.* at 2.

[7] SOAH Order No. 2 (Sep. 14, 2016) at 1 ("As a result, the first phase of this proceeding will only address Issue Nos. 8, 9, and 10, in the Commission's Preliminary Order.").

[8] Ex. 53. (For consistency with the PFD, Green Valley hereinafter uses the same exhibit number system for referenced documents as adopted by the ALJ in the PFD.)

[9] Ex. 70.

[10] Ex. 69.

[11] Ex. 54.

[12] Ex. 72.

proceeding.[13] Mr. Korman's opinions as to what constitutes property have been accepted in similar proceedings addressing property to be rendered useless or valueless following decertification.[14] Mr. Korman's pre-filed testimony is that the appraisal, attached as Exhibit GVSUD-1 to his testimony, and previously submitted to the Commission on July 15, 2016 per the Commission's directive in Order No. 2 in this Docket,[15] identified the property that will be rendered useless or valueless.[16] Mr. Korman went through a comprehensive and detailed process of identifying GVSUD property, and relied on the *Uniform Standards of Professional Appraisal Practice*, 2016-2017 Edition ("USPAP"), where applicable, in his property identification.[17] Mr. Korman's methodology and identification of GVSUD property that will be rendered useless or valueless upon decertification is uncontroverted other than through the unexplained and unsubstantiated theory that only "infrastructure" located "within" the decertificated area constitutes property.

To the contrary, Schertz's "appraisal" did not conform with applicable standards governing appraisals,[18] and therefore failed to meet the plain wording of TWC § 13.255(l) requiring an "appraiser" who is "qualified."[19] Beyond the absence of a competent Schertz appraisal, its witnesses

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[13] Ex. 56 (Korman Direct) at 3-6.

[14] *Id.* at 5, lines 4-12 (referencing Mr. Korman's testimony in PUC Docket No. 45848 on behalf of Aqua Texas, Inc. and his testimony in PUC Docket No. 45702 on behalf of Green Valley).

[15] Order No. 2 at 1 (June 21, 2016).

[16] Ex. 56 (Korman Direct) at 8, lines 6-9, Exhibit GVSUD-1 (also Ex. 22). Mr. Korman's appraisal specifically identifies Green Valley's property interests that will be rendered useless or valueless as including investment dollars related to planning and design costs, legal and professional expenses and lost economic opportunity interests and allocated those dollar amounts so that only the small portions commensurate with the impact of decertification are sought.

[17] Ex. 56 (Korman Direct) at 9-16.

[18] *Id.* at 16.

[19] TWC §13.255(l); 16 TAC §24.120(m). Unlike the City of Schertz's Appraisal (Ex. 23), the Green Valley Appraisal Report prepared by Mr. Korman relied on his appraisal experience, combined with the extensive information provided by Green Valley, *and* consideration of he Texas Water Code compensation factors, as evidenced by the testimonies of

were unqualified to identify property that is rendered useless or valueless. Mr. Stowe's appraisal was not prepared using USPAP.[20] This is important because, as the PFD acknowledges, Schertz bears the burden of proof in this proceeding.[21]

Thus, the ALJ's failure to sustain Green Valley's objections and strike the designated Schertz testimony and exhibits results in the PFD's erroneous inclusion of proposed findings of fact and conclusions of law that are either irrelevant to the referred issues or consist of unsupported legal conclusions by unqualified Schertz witnesses.[22] Because the PFD relies on these findings and conclusions in reaching its determination that no Green Valley property will be rendered useless or valueless on decertification, the PFD's recommended decision is based on legal error.

IV. PROCEDURAL HISTORY

Green Valley does not except to the PFD's description of the procedural history in this docket.

V. APPLICABLE LAW

While Green Valley generally agrees with the PFD's description of the applicable law in this docket, GreenValley excepts to the PFD's failure to adopt the broad interpretation of "property" mandated by the Supreme Court of Texas in *State v. Public Utility Commission.*[23] This definition was accepted in the *Celina* docket upon which the PFD here repeatedly relies.[24] However, as

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Mr. Korman, Mr. Allen and Mr. Montgomery. Ex. 56 (Korman Direct) at 9-10; Ex. 58 (Allen Direct) at 6-7; Ex. 57 (Montgomery Direct) at 5-6, 18, 20-22; *see also* Ex. 56 (Korman Direct) at Exhibit GVSUD-1 (also Ex. 22) (Green Valley Appraisal Report).

[20] Ex. 56 (Korman Direct) at 16.

[21] PFD at 4, CoL No. 6.

[22] Ex. 54; Ex. 72.

[23] *State v. Public Util. Comm'n*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

[24] Docket No. 45848, Order (April 13, 2017).

discussed elsewhere herein, Green Valley adamantly disagrees with, and excepts to, the PFD's adoption of the conflicting determinations in *Celina* that money, once spent, somehow loses its property status as to the CCN holder and that "property" must be defined without any reference to the statutory factors that require compensation for such property. Neither the PFD nor the *Celina* order cites to any applicable statutory provision for this proposition. Neither the PFD nor the *Celina* order cites to any legal precedent to support this determination. The Commission must recognize that the money held by a CCN holder is property that can be rendered useless or valueless to its initial holder even after it is spent, in whole or partial amounts, by a CCN decertification. The TWC Chapter 13 compensation factors make this clear, recognizing that the vast majoirty, if not all, CCN decertifications will be for portions of a CCN possessor's service area rather than all of it.[25]

VI. NO TRANSFER OF PROPERTY IS REQUESTED

Green Valley does not except to the PFD's statement that Schertz has not requested that any Green Valley property be transferred to it. Green Valley does not except to the PFD's grant of summary decision as to Preliminary Order Issue No. 9.

VII. NO PROPERTY OF GVSUD WOULD BE RENDERED USELESS OR VALUELESS TO GVSUD IF THE APPLICATION IS APPROVED

Green Valley vigorously excepts both to the conclusion that no Green Valley property will be rendered useless or valueless upon decertification and the factual analysis upon which it is based.[26] On page 15 of the PFD, six bulleted grounds are set forth as the basis for reaching this conclusion.[27] Each of these six stated grounds is either irrelevant to the nature of the personal

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[25] TWC § 13.254(g); TWC § 13.255(g).

[26] PFD at 12-15.

[27] PFD at 15.

intangible property interests that Green Valley identified as property for this phase of the proceeding or simply incorrect.

The first stated basis for the PFD's erroneous conclusion that no property will be rendered useless or valueless is that Green Valley "is not providing sewer service to anyone in its CCN area."[28] This finding is both irrelevant and incorrect. This stated ground for concluding that Green Valley has no compensable property is irrelevant because the statute does not impose the described standard as a prerequisite to finding that property will be rendered useless or valueless by decertification. But this statement is also incorrect because Green Valley's identified property includes *investments* in planning and designing a wastewater treatment system, obtaining necessary permits, and the retention of legal counsel and professional appraisal services to defend its property interests here, which all constitute decertification area service.[29] The PFD's statement here is wrong because, as proposed, finding and relying on lack of "service" requires adoption of an unsupportably narrow definition of the term that is inconsistent with the applicable statutory definition. "Service" is specifically defined in both TWC §13.002(21) and PUC SUBST. R. 24.3(62) as:

> *any act performed*, anything furnished or supplied, and *any facilities* or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public. . .[30]

In turn, both TWC § 13.002(9) and PUC SUBST. R. 24.3(26) define "facilities" as meaning:

> 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.[31]

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[28] PFD at 15.

[29] Ex. 56 at 6-14, Ex. GVSUD-1 (also Ex. 22) at 200002-200007.

[30] Emphasis added.

[31] Emphasis added.

This means that intangible assets may be used in furtherance of "service," which include a variety of items reflected in the definition.

Combined, these definitions show that Green Valley's investments in design, planning and permitting, as well as its legal and professional expenditures here, constitute "service" provision as a matter of law without the need to have physical facilities in place at the time of decertification. It follows that the ALJ's reliance on a finding that no Green Valley active service is taking place as a basis for finding no compensable property is misplaced; the presence of active service or physical facilities should not matter.

The second alleged ground for the PFD's incorrect conclusion that no Green Valley property will be rendered useless or valueless is the fact that Green Valley has no current *service* contract."[32] Again, this factual finding is irrelevant. There is no statutory prerequisite that Green Valley have contracts in place to receive compensation for property rendered useless or valueless. Moreover, the PFD's reliance on absence of a contract to determine whether Green Valley has "property" equates to relying on one of the *factors* to determine property identification in direct contravention of the Commission's *Celina* determination that the factors do not identify property.[33] It is difficult to fault the PFD for doing so, because, as discussed further herein, the Commission's determination that the factors may not be used to identify property interests is illogical and violates basic tenets of statutory interpretation.

The third alleged ground relied upon in the PFD is that Green Valley is "not currently capable of providing *service*."[34] This alleged basis is both irrelevant and wrong. The types of property

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[32] PFD at 15 (emphasis added).

[33] *See* Docket No. 45848, Order at CoL 8A.

[34] PFD at 15 (emphasis added).

interests for which Green Valley seeks compensation consist of expenditures that are *prerequisites* to making active retail public wastewater services available. Not only is this PFD finding irrelevant, but it is also wrong because, as with the PFD's first basis for its property conclusion, it assumes a limited definition of "service" that is contrary to the applicable Texas Water Code and Commission Rules definition. There is no statutory prerequisite to having active physical infrastructure in place to receiving compensation for decertification. Consistent with the statutory definitions of "service" and "facilities" discussed above, Green Valley's planning efforts and expenditures constitute actual service acts.

Fourth, the PFD erroneously concludes that no property will be rendered useless or valueless based on a finding that Green Valley "owns no property in the Decertificated Area."[35] This finding is simply wrong because it is illogical. *State v. Public Utility Commission of Texas* provides that:

> 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."[36]

The property interests for which Green Valley seeks compensation meet the Texas Supreme Court's required definition of property where the term is not otherwise statutorily defined. Green Valley's property interests that will be appropriated through decertification are dollars which are "intangible," "invisible," "incorporeal,""personal," and cannot be physically located within specific decertification areas. As such, the statement that Green Valley "owns no property in the Decertificated Area" is irrelevant and is wrong given the nature of Green Valley's property interests. Physical property is not required under the statutory scheme.

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[35] PFD at 15.

[36] *State v. Public Util. Comm'n*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

Fifth, the PFD relies incorrectly on a finding that "Green Valley has no personal property outside the Decertificated Area that it might use to provide service there," which again combines the PFD's unsupportably restrictive definition of "service" with its illogical construct of intangible personal property as somehow being tied to a physical location. As a result, the PFD's fifth finding to support the recommended conclusion that Green Valley has no personal property that can be used to provide service is false and dependent on complete disregard of Green Valley's record evidence. Green Valley supported its monetary investments in permitting, planning, and design activities, its litigation activities in this docket, and its lost net income rights, through extensive testimony and documentary support as evidenced in the testimony of Mr. Allen, Mr. Montgomery, and Mr. Korman, as well as the Green Valley Appraisal Report and its addenda.[37] Yet, the PFD simply ignores this evidence.

Sixth, the PFD incorrectly concludes that no Green Valley property will be rendered useless and valueless because "the 65 acres that GVSUD owns outside the Decertificated Area where it hopes to build a wastewater treatment plant would not be rendered useless or valueless to GVSUD if the Decertificated Area is removed from its CCN."[38] Green Valley excepts to this finding as contrary to substantial record evidence. All of Green Valley's investments in planning and design for the entire wastewater CCN area, including its permitting activities, and its real property investment, constitute intangible property assets belonging to Green Valley, a portion of which will be stranded upon decertification.[39] Moreover, the PFD's sixth ground reflects a fundamental

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[37] Ex. 58 (Allen Direct) at 6-7, 10-17; Ex. 57 (Montgomery Direct) at 6, 9-19; Ex. 56 (Korman Direct) at 8 12-13, 15-16, GVSUD-1 (also Ex. 22) at GVSUD 200244-200341 (Wastewater Master Plan, GVSUD 200458-200594 (TPDES permit application), GVSUD 200595-200620 (TCEQ domestic wastewater permit application), GVSUD 200645-200667 (warranty deeds for 65-acre parcel), GVSUD-200668-200670 (invoices), GVSUD-200007 (legal costs estimate).

[38] PFD at 15.

[39] Ex. 56 (Korman Direct) at 12-13, Ex. GVSUD-1 (also Ex. 22) at GVSUD 200004-200005.

misunderstanding on this point as to the nature of Green Valley's property rendered useless and valueless. Green Valley is not claiming that some portion of the real property will be rendered useless and valueless. Rather, Green Valley's testimony is that a portion of the funds expended to obtain the wastewater treatment plant location will be rendered useless or valueless based on the percentage of the purchase cost allocable to the area that Schertz seeks to decertify.[40]

Implicit in the PFD's reliance on these six grounds for reaching its erroneous conclusion is the false and unsupportable notion, also reflected in the *Celina* decision, that: (1) invested dollars do not constitute property for purposes of decertification compensation under TWC § 13.255(c) and (g);[41] (2) physical infrastructure within the area subject to decertification is a necessary predicate to compensation;[42] and (3) that the factors listed in TWC § 13.255(g) must be read in isolation from the Commission's role in identifying property.[43] Green Valley addresses each of these baseless findings in its exceptions herein to Section VIII of the PFD and also incorporates these arguments by reference here.

VIII. OTHER ITEMS IN GVSUD'S APPRAISAL ARE NOT PROPERTY

Green Valley excepts to the PFD's determination that none of the items identified in Green Valley's appraisal report are property.[44] In reaching this determination, the PFD relies exclusively on the Commission's recent decision in *Celina*. Indeed, the *only* legal authority cited to in the entirety of Section VIII of the PFD consists of five citations to the *Celina* decision. The *only* Schertz

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[40] Ex. 22 at GVSUD 200004 ("Below is the calculation of the *allocable costs* associated with the purchase of the land to the decertified area. . .") (emphasis added).

[41] Docket No. 45848, Order (Apr. 13, 2017) at 7-9.

[42] *Id.* at 1, FoF Nos. 23, 27,32.

[43] *Id.* at 6, CoL 8A.

[44] PFD at 16.

evidence relied upon in Section VIII of the PFD completely misstates the evidence and is in error:[45] the PFD wrongly asserts, relying on Green Valley discovery responses, that "GVSUD has no existing loans or other debt obligations secured to or related to the design or construction of sewer infrastructure."[46] This leaves the PFD as supported only by the *Celina* decision. For each of the following reasons, the PFD was wrong to rely on the *Celina* decision.

A. The *Celina* Decision is Not Final.

As a fundamental premise of administrative law, the PFD is wrong to rely on *Celina* because it is not a final order under the explicit requirements of Section 2001.144 of the Administrative Procedure Act.[47] The *Celina* decision is subject to rehearing and appeal to the courts, should the Commission fail to reverse its decision. The affected CCN holder in that case has timely filed a motion for rehearing.[48] Thus, the PFD's reliance on *Celina* is inappropriate and cannot serve as the basis for the PFD recommendations.

B. The *Celina* Determination that Investments in Planning for a Wastewater System are Not Compensable Property Items is Legally Unsupportable.

Green Valley excepts to the PFD's adoption of the determination in *Celina* that money, once spent, somehow loses its property status as to the CCN holder, and to the implicit adoption of Schertz's theory, consistent with *Celina,* that physical infrastructure is a prerequisite to compensation

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[45] PFD at 18 (citing to Ex. 53 at ex. G (GVSUD's response to Schertz RFA Nos. 1-7, 1-8)).

[46] *Id.* Green Valley's response to Schertz RFA No. 1-8, cited as the authority for the ALJ's statement, *denies* "that on May 1, 2016, GVSUD did not have any existing loans or other debt obligations relating to the design or construction of sewer infrastructure." Thus, the cited reference not only fails to support the PFD's finding, but completely contradicts the finding.

[47] TEX. GOV'T CODE § 2001.144(a) provides: "A decision or order in a contested case is final: (1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing; (2) if a motion for rehearing is filed on time, on the date: (A) the order overruling the motion for rehearing is signed; or (B) the motion is overruled by operation of law." None of the enumerated circumstances has occurred in the *Celina* docket.

[48] Docket No. 45848, Aqua Texas, Inc.'s Motion for Rehearing (May 8, 2017).

under the statute.[49] Neither the PFD nor the *Celina* order cites to any applicable statutory provision for this proposition. Neither the PFD nor the *Celina* order cites to any legal precedent to support this determination. Further, the PFD is wrong to rely on *Celina* because it is not a final order.[50]

In its motion for rehearing in *Celina*, Aqua Texas has challenged the order on several grounds, including that the Commission determinations on "spent money" adopted here in the PFD are incorrect, legally unsupported,[51] and simply make no sense.[52] The ALJs in the *Celina* docket correctly found that such a theory would require spent money to enter "*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."[53] The *Celina* ALJs found "no support for such a strained and narrow reading" of the statute.[54] Green Valley agrees with the *Celina* ALJs' analysis. The Commission's decision in *Celina* was wrong. The ALJ's reliance here on the "spent money" theory, disregarding competent evidence submitted by Green Valley, and wholesale adoption of Schertz's largely irrelevant proposed fact findings constitutes legal error.

C. The *Celina* Determination that the Definition of Property Must be Read in Isolation from the Factors that the Commission Must Consider in Calculating Compensation for the Taking of Property is Legally Insupportable.

Green Valley excepts to the PFD's adoption of the Commission's determination in *Celina* to preclude the factors enumerated in TWC § 13.255(g) from informing the identification of property

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[49] PFD at 19, FoF Nos. 16-18, CoL Nos. 20-28.

[50] TEX. GOV'T CODE § 2001.144(a).

[51] The "legal" basis on which the Commission determined in *Celina* that spent money was no longer property consisted solely of its statement that it "disagrees with the [*Celina*] ALJs." Docket No. 45848, Order at 7.

[52] Docket No. 45848, Motion for Rehearing at 6.

[53] *Id.*, Proposal for Decision (Jan. 27, 2017) at 19.

[54] *Id.*

interests. The *Celina* decision is not final and is therefore inappropriately relied upon in the PFD here, but, regardless, the *Celina* decision's imposition of an artificial barrier between property identification and quantification is simply unsupported by the plain language of TWC § 13.255(g). The statute requires the Commission to consider, "*at a minimum*," "the amount of expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are allocable to the area in question" *and* "any demonstrated impairment of service or increase of cost to consumers to the retail public utility" *and* "necessary and reasonable legal expenses and professional fees" *and* "other relevant factors."[55] The ALJs in *Celina* 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.[56] The *Celina* ALJs properly rejected arguments to the contrary as "insupportably narrow"[57] and "incompatible with *State v. Public Utility Commission of Texas*."[58]

The *Celina* decision's interpretation of the statute as requiring identification and valuation to be conducted in mutual isolation leads to absurd results. As just one example, under the third factor, this approach would *require* compensation for items that are not property at all under the Commission's "spent money is not property" theory. The Commission's interpretation would impose the requirement that planning and design expenditures allocable to the decertificated area be compensated *even though* such expenditures are not property. The *Celina* approach makes no sense when applied to the plain words in the statute and frustrates its overall purpose.

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[55] TWC § 13.255(g) (emphasis added).

[56] Docket No. 45848, Proposal for Decision at 17; *see also State v. Public Util. Comm'n*, 883 S.W.2d 190, 200 (Tex. 1994).

[57] Docket No. 45848, Proposal for Decision at 17, 20.

[58] *Id.* at 21.

Moreover, there is nothing new about the presence of the factors in the statutory scheme that would require a new, untenable, Commission interpretation. Green Valley expert witness Stephen Blackhurst has extensive real-world experience interpreting, applying and enforcing the statutory decertification scheme reflected in TWC § 13.255 as a former director of the water and wastewater utility oversight programs for the Commission, the Texas Water Commission, and the Texas Natural Resource Conservation Commission.[59] Mr. Blackhurst testified that many of the factors were present in TWC § 13.255 as far back as 1987, with the other factors being added in 1995.[60] There is no basis for adding a new strained interpretation and bifurcated hearing process when the factors have existed and been reasonably applied for as long as thirty years. To summarize, the PFD should not have relied upon the improper and illogical interpretations proffered in the *Celina* decision.

D. The PFD, If Adopted by the Commission, Will Result in an Unconstitutional Taking Without Adequate Compensation.

While Green Valley generally agrees with the PFD's recommendation that the plain meaning of the term "property," should be utilized in ascertaining its meaning,[61] the term must also be construed in a manner that gives plain meaning to the governing purpose of TWC § 13.255(c) and (g), which is to ensure that retail public utilities such as Green Valley are provided just and adequate compensation for property that will be lost upon decertification.[62] By failing to do so, the PFD, if

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[59] Ex. 59 (Blackhurst Direct) at 4-7, 10, 11.

[60] *Id.* at 8-10

[61] PFD at 11. While the PFD gives lip service to a broad meaning of property, if fails to include the Supreme Court of Texas mandate that property be given its broadest possible meaning. *State v. Public Utility Commission*, 883 S.W.2d at 200.

[62] *City of Blue Mound v. Southwest Water Co.*,449 S.W.3d 678, 681-690 (Tex. App. – Fort Worth, no pet.) (discussing *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799-806 (Tex. 1936) and its application in *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996) and *Texas Building Owners and Mgrs. Assoc. v. Public Util. Comm'n*, 110 S.W.3d 524 (Tex. App.– Austin 2003, pet. denied).

adopted by the Commission, will result in an unlawful regulatory taking, damaging, or destruction of property for public use in violation of the Texas and U.S. Constitutions.[63]

Green Valley witness Joshua Korman correctly testified that eminent domain principles apply to personal property.[64] In *Horne v. Department of Agriculture*, the U.S. Supreme Court addressed the precise issue of a partial taking in the context of personal property, holding that the federal government's requirement that raisin growers set aside as a reserve a percentage of their raisins, allegedly for the public good, without providing just and adequate compensation constituted a taking under the Fifth Amendment of the U.S. Constitution.[65] Addressing the requirement that constitutional protections against takings apply equally in the context of personal property, such as Green Valley's investments here, the Court in *Horne* found that "[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[66] The same holds true when the Government takes your money.[67] The Commission is thus constitutionally bound to interpret the statute in such a way that provides compensation to a broad array of property interests, including the intangible personal property identified by Green Valley in this proceeding.

The PFD's adoption of the *Celina* decision's narrow and restrictive *de facto* determination that physical infrastructure is a prerequisite to compensation under the statute disregards this

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[63] 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...").

[64] Ex. 56 (Korman Testimony) at 14-15.

[65] *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

[66] *Id.* at 2422.

[67] Money is property. Docket No. 45848, Proposal for Decision (Jan. 27, 2017) at 8-9, 16-17, 21.

constitutional mandate. Green Valley is requesting only that the Commission fulfill its mandate under the Code Construction Act that it interpret the *statute* in a manner that is consistent with the plain mandate of the state and federal constitutions,[68] which gives effect to the entire statute and presumes "a just and reasonable result is intended."[69] The PFD's adoption of the *Celina* decision's restrictive reading of the TWC § 13.255 statutory framework to preclude compensation for Green Valley's identified property interests frustrates the statute's intended just and reasonable result.

E. The PFD's Determination that Green Valley's Identified Property Items Do Not Constitute Property Rendered Useless or Valueless is in Error.

1. *Investments in Planning, Permitting and Real Property.*

Green Valley excepts to the PFD's recommended determinations that no dollars invested in engineering and planning, the permitting process, or the purchase of real property to implement the 2006 wastewater master plan were rendered useless or valueless.[70] The PFD's recommended determinations are based solely on the incorrect theory adopted in *Celina* that "expenditures are not property."[71] Green Valley has addressed the absence of any statutory or constitutional support for these erroneous propositions in its Exceptions to Sections VIII of the PFD and hereby incorporates that discussion by reference here.

The record evidence also fails to support the PFD's recommended determinations. Green Valley supported its monetary investments in permitting, planning, and design activities through extensive testimony and documentary support as evidenced in the testimony of Mr. Allen, Mr.

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

[69] *Id.* at § 311.021(2) and (3).

[70] PFD at 19.

[71] *Id.*

Montgomery, and Mr. Korman, as well as the Green Valley Appraisal Report and its addenda.[72] An allocable portion of these dollar investments will be stranded upon decertification.[73] The PFD reflects total disregard of this substantial record evidence. The PFD should be rejected as contrary to law and the evidentiary record.

Green Valley further excepts to the PFD's recommended finding that no dollars invested in Green Valley's acquisition of real property constitutes property that will be rendered useless or valueless.[74] While the PFD does not explicitly rely on *Celina* in reaching this determination, it is clear based on the PFD's reliance on Schertz's proposed findings on lack of current infrastructure that the PFD has implicitly adopted *Celina's de facto* determinations that such is required for compensation and, further, that something more than the physical treatment plant site is required for compensation. All of Green Valley's investments in planning and design for the entire wastewater CCN area, including its permitting activities, and its real property investment for its plant site, constitute intangible property assets belonging to Green Valley, a portion of which will be stranded upon decertification.[75]

2. *Legal and Professional Fees.*

The PFD's recommendation that Green Valley is not entitled to compensation for necessary and reasonable legal and professional expenses is premised on the same legally unsupported positions adopted in the *Celina* decision that spent money does not constitute property and that

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[72] Ex. 58 (Allen Direct) at 6-7, 10-17; Ex. 57 (Montgomery Direct) at 6, 9-19; Ex. 56 (Korman Direct) at 8 12-13, 15-16, GVSUD-1 (also Ex. 22) at GVSUD 200244-200341 (Wastewater Master Plan, GVSUD 200458-200594 (TPDES permit application), GVSUD 200595-200620 (TCEQ domestic wastewater permit application), GVSUD 200645-200667 (warranty deeds for 65-acre parcel), GVSUD-200668-200670 (invoices), GVSUD-200007 (legal costs estimate).

[73] Ex. 56 (Korman Direct) at 13 ("Monetary assets are a type of property interest that may be devalued by the decertification for reasons that have no use to GVSUD."), Ex. GVSUD-1 (also Ex. 22) at GVSUD 200005-200006.

[74] PFD at 15.

[75] Ex. 56 (Korman Direct) at 12-13, Ex. GVSUD-1 (also Ex. 22) at GVSUD 200005-200006.

property must be considered as divisible from its value, notwithstanding the plain wording of the statutorily mandated factors and absence of statutory direction.[76] Green Valley addressed the legal shortcomings in the PFD's analysis, including the PFD's improper reliance on the incorrect statutory interpretations from the *Celina* decision, elsewhere in its Exceptions discussion of Section VIII of the PFD, and hereby incorporates that discussion by reference here.

Green Valley did not initiate this proceeding and would not have spent its money on legal expenses or professional fees if it had not been compelled to defend its property interests in light of Schertz's position that Green Valley was not entitled to *any* compensation for its property interests that will be rendered useless or valueless. Green Valley had a reasonable expectation that it would be providing service to the area, and presented substantial evidence supporting the fact that the legal and professional fees that were incurred were necessary and that they have continued to mount.[77]

If adopted in its present form, the PFD will have failed to give plain meaning to the governing purpose of TWC § 13.255(c) and (g), which together require just and adequate compensation in single certification decertification matters. The PFD will result in an unlawful taking, damaging, or destruction of property for public use in violation of the state and federal constitutions if adopted by the Commission.[78]

3. *Net Lost Revenues.*

Green Valley excepts to the PFD's recommendation that expected lost net revenues do not constitute property rendered useless or valueless upon decertification.[79] The PFD incorrectly relies

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[76] PFD at 19 (citing Docket No. 45848, Order at 7-9, 15).

[77] Ex. 58 (Allen Direct) at 16; Ex. 56 (Korman Direct) at 13, Ex. GVSUD-1 (also Ex. 22) at GVSUD 200007, GVSUD 2000668; Ex. 59 (Blackhurst Direct) at 15. The precise amount of this Green Valley compensation component is a second phase hearing issue.

[78] *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.–Fort Worth 2014, no pet.).

[79] PFD at 18-19.

on: (1) the Commission's legally-insufficient reasoning in *Celina*; and (2) an unduly narrow statutory interpretation of the statutory scheme, which together would result in the taking of Green Valley's property interests without adequate and just compensation as required by the statute and the state and federal constitutions. The evidentiary record shows that if the PFD is adopted and if Schertz's application is eventually granted, Green Valley will lose the economic opportunity to recoup its expenditures from inside the decertificated area, while its costs to serve that area will simultaneously increase as the direct result of Schertz's checkerboard approach to decertification.[80] The right to these lost net revenues are a relevant intangible personal property interest and therefore compensable under the statute which requires consideration of "other relevant factors" in its non-exclusive list of compensation factors.[81]

The PFD adopts an unduly restrictive reading of the statute to prohibit consideration of lost revenues from future customers.[82] This undermines the stated purpose of the analysis, which is to ensure just and adequate compensation for all property interests lost. Specifically, the PFD's recommended determination depends on effectively reading the terms "at a minimum" and "other relevant factors" out of the statute. A plain reading of these provisions directs that the Commission's approach must ensure that the CCN holder is made whole upon decertification. Such an approach is mandated by constitutional requirements[83] and is consistent with compensation for partial takings in other contexts, such as eminent domain proceedings.

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[80] Ex.57 (Montgomery Direct) at 21-23; Ex. 56 (Korman Direct) at Ex. GVSUD-1 (also Ex. 22) at GVSUD 200004-200005.

[81] *Id.* at 13, Ex. GVSUD-1 at 200004-200005.

[82] PFD at 18-19.

[83] 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 . . ."); *Horne v. Dep't of Agric.*, 135 S. Ct. at 2426, 2428-2429; *Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980).

4. *Net Increased Costs.*

Green Valley does not contend that the net increased costs to customers reflected in its appraisal constitutes "property." However, such increased customer costs are compensable under the plain language of TWC § 13.255(g) without regard to whether they are considered "property" for the purpose of this limited initial phase of the hearing. Green Valley is a political subdivision and has an obligation for the benefit of its constituents to keep its fees reasonable consistent with the Commission's obligation to ensure just and reasonable rates.[84] Green Valley took a reasonable approach to measuring this impact to the remaining parcels should Schertz's piecemeal decertification approach be approved.[85] These increased costs are the direct result of Schertz's questionable checkerboarding approach to decertification,[86] regardless of whether they constitute property interests for purpose of this hearing phase. Thus, while Green Valley does not disagree with the PFD's finding that these increased future costs are not technically property, Green Valley contends that they should be considered as second phase issues in this proceeding.

IX. RECOMMENDATION

Consistent with its Exceptions to Sections III, V, VII, VIII, X and XI of the PFD, Green Valley excepts to the PFD's recommended conclusion that no Green Valley property will be rendered useless or valueless to Green Valley by the decertification sought by Schertz, as well as the PFD's recommended conclusion that Issue No. 10 is rendered moot. Green Valley does not except to the PFD's recommendation regarding Preliminary Order Issue No. 9.

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[84] Ex. 58 (Allen Direct) at 10; TWC §13.001(3). Green Valley's retail rates are potentially appealable to the Commission under TWC § 13.043(b).

[85] Ex. 57 (Montgomery Direct) at 21-23.

[86] *Id.* at 23.

X. FINDINGS OF FACT

Green Valley excepts to the proposed Findings of Fact in the PFD to the extent that they are inconsistent with Green Valley's Exceptions described above.[87] Further, and without waiving its exceptions to any other Proposed Findings of Fact, Green Valley specifically excepts to the following proposed Findings of Fact:

- **Finding of Fact Nos. 8 through 10:** Green Valley excepts to these proposed findings to the extent that they characterize the report submitted by Schertz witness Jack Stowe as an "appraisal." Mr. Stowe is not a licensed appraiser or an engineer, and is singularly unqualified to support the identification of Green Valley property that will be rendered useless or valueless. Green Valley herein incorporates its Objections to and Motion to Strike the Direct and Rebuttal Testimony of Messrs. Adams and Stowe.[88] The ALJ wrongly admitted their respective testimony and exhibits,[89] and, thus, Schertz failed to satisfy its burden of proof in this proceeding.

  Finding of Fact No. 15: Green Valley excepts to the proposed finding that Green Valley does not own any personal property in the Decertificated Area. Green Valley incorporates herein by reference its exceptions elsewhere regarding the PFD's unduly narrow and restrictive definition of "property." Moreover, the proposed finding makes no sense because it wrongly assumes that intangible personal property can somehow be confined to a geographic location such as the Decertificated Area.

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[87] The ALJ did not authorize or direct Green Valley to file proposed findings of fact and conclusions of law. *See* PUC SUBST. R. 22.261(c). Green Valley would welcome the opportunity to do so if the Commission agrees with Green Valley's position herein.

[88] Ex. 54; Ex. 72.

[89] Ex. 77 (SOAH Order No. 4).

Finding of Fact Nos. 17 and 18: Green Valley excepts to these proposed findings to the extent that they incorporate a standard that property must consist of physical "infrastructure" to be rendered useless or valueless under TWC § 13.255(c) and (g) where no such restriction is imposed by the statute. Green Valley incorporates herein its exceptions addressing the imposition of standards that are unsupported by the plain wording of the statute. Moreover, these proposed findings are simply wrong. Proposed Finding of Fact No. 17 directly contradicts the record evidence wherein Green Valley *denied* a request for admission on this very issue.[90] Proposed Finding of Fact No. 17 also disregards the existence of the real property purchased by Green Valley to site its wastewater treatment plant.[91]

Finding of Fact Nos. 22 and 23: Green Valley excepts to these findings regarding lack of TCEQ approval of wastewater system designs on the ground that they are irrelevant and misleading. As the PFD recognizes elsewhere, Green Valley has applied for a TPDES permit, which is a prerequisite to TCEQ approval of the items listed in proposed Finding of Fact Nos. 22 and 23. In fact, Green Valley applied for the TPDES permit more than two years ago and would certainly have the permit in hand but for Schertz's vigorous opposition in the TCEQ administrative process and contested case hearing.[92]

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[90] Ex. 24 at RFA No. 1-2.

[91] Ex. 56 at GVSUD 200004, 200645-200667 (warranty deeds).

[92] *See In re Green Valley Special Utility District*, TCEQ Docket No. 2016-1876-MWD, SOAH Docket No. 582-17-1850 (pending). In that matter, on September 22, 2016, there was a preliminary decision by the TCEQ Executive Director to approve a wastewater permit for Green Valley over Schertz's objections. Ex. 57, at GVSUD-4 (200766-200791) and GVSUD-5 (200792-200797).

Finding of Fact Nos. 27 through 29: Green Valley excepts to these proposed findings because they are simply wrong. As the result of the ALJ's grant of summary decision, Green Valley was denied the ability to cross-examine and otherwise test the Schertz testimony on which these erroneous findings of fact were based. Had it been afforded that opportunity, Green Valley would have established that there is no prohibition to siting a wastewater facility inside the 100-year floodplain.[93] Indeed, such siting is not uncommon as wastewater treatment facilities are often sited in a low-lying location to facilitate wastewater collection by gravity and a short distance to the discharge point. The TCEQ rules specifically authorize construction of wastewater treatment facilities in the 100-year floodplain where certain other conditions are met.[94] In short, Green Valley's proposed siting is both feasible and prudent.

- **Finding of Fact Nos. 36 and 37:** Green Valley excepts to these proposed findings regarding the nature of Green Valley's debt obligations because they are wholly unsupported by record evidence. Inclusion of these findings would amount to a *de facto* determination of issues that go to the heart of the very issues regarding the effect of Green Valley's federal debt obligations that the Commission decided it was without authority to determine.[95] Schertz is attempting through proposed inclusion of these findings to mount a collateral attack on pending federal court litigation surrounding the preclusive effect of Green Valley's existing debt on attempted

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[93] *See* 30 TAC § 217.35 (setting forth the "One Hundred Year Flood Plain Requirements" in TCEQ wastewater treatment facility design requirement rules).

[94] *See id.*

[95] Ex. 36 at 5.

municipal decertifications.[96] Moreover, Green Valley specifically *denied* that it " did not have any existing loans or other debt obligations relating to the design or construction of sewer infrastructure."[97] These proposed findings must be stricken.

Finding of Fact Nos. 59 and 61: Green Valley excepts to the conclusions that no property will be rendered useless or valueless upon decertification as to Preliminary Order Issue No. 8 and that, therefore, Preliminary Order Issue No. 10 is therefore rendered moot. Green Valley incorporates its Exceptions to Sections III, V, VII and VIII of the PFD by reference here.

XI. CONCLUSIONS OF LAW

Green Valley excepts to the proposed Conclusions of Law in the PFD to the extent that they are inconsistent with Green Valley's Exceptions described above.[98] Moreover, without waiving its exceptions to any other Proposed Conclusions of Law, Green Valley specifically excepts to the following proposed Conclusions of Law:

- **Conclusion of Law Nos. 16 and 17:** Green Valley excepts to these conclusions because they do not incorporate the broad definition of property mandated by the Supreme Court of Texas in *State v. Public Utility Commission*, which provides:

> 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."[99]

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[96] *Green Valley Special Utility District v. City of Cibolo, Texas*, Cause No. 16-51282 in the United Stated Court of Appeals for the Fifth Circuit (pending).

[97] Ex. 24 at RFA 1-8.

[98] As stated above with regard to proposed findings of fact, Green Valley would welcome the opportunity to submit proposed conclusions of law if the Commission agrees with Green Valley's legal positions herein.

[99] *State v. Public Util. Comm'n*, 883 S.W.2d at 199-200 (emphasis in original) (citations omitted).

Conclusion of Law No. 18: Green Valley excepts to the PFD's incorrect adoption of the *Celina* determination that the factors in TWC § 13.255(g) are merely compensation factors and are precluded from consideration in identifying property rendered useless or valueless for the reasons discussed elsewhere in these Exceptions and incorporated by reference here.

Conclusion of Law No. 20: Green Valley excepts to the proposed conclusion that there is no genuine issue as to any fact material to Issue No. 8. As asserted elsewhere in these Exceptions, and incorporated herein by reference, the ALJ's grant of summary decision was improper and unsupported by the record evidence. Schertz failed to meet its burden of proof.[100] Moreover, the PFD's reliance on *Celina* is inappropriate given that the *Celina* decision is not final and that the *Celina* decision was wrongly decided.

Conclusion of Law Nos. 21 through 28: Green Valley excepts to the proposed conclusions that none of Green Valley's identified property interests constitutes property that will be rendered useless or valueless upon decertification. As asserted elsewhere in these Exceptions, and incorporated herein by reference, the ALJ's grant of summary decision was improper and unsupported by the record evidence. Schertz failed to meet its burden of proof.[101] Moreover, the PFD's reliance on *Celina* is inappropriate given that the *Celina* decision is not final and was wrongly decided.

Conclusion of Law No. 30: Green Valley excepts to the proposed conclusion that Preliminary Order Issue No. 10 is moot because, as asserted elsewhere in these

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[100] PFD at 4, CoL No. 6.

[101] *Id.*

Exceptions, and incorporated herein by reference, the conclusion is based on the incorrect, legally and factually unsupported premise that Green Valley has no property that will be rendered useless or valueless upon decertification.

XII. CONCLUSION

Green Valley respectfully requests that the Commission decline to adopt the Proposal for Decision's analysis, findings of fact, conclusions of law and ordering paragraphs that are inconsistent with these Exceptions. Green Valley further requests that the Commission adopt an order finding that the following Green Valley property will be rendered useless and valueless by Schertz's proposed decertification:

1. Dollars expended by Green Valley for engineering and planning to implement Green Valley's 2006 Wastewater Master Plan allocable to the proposed decertification area;

2. Dollars expended by Green Valley to obtain a Texas Pollutant Discharge Elimination System permit from the Texas Commission on Environmental Quality allocable to the proposed decertification area;

3. Dollars expended by Green Valley to purchase an approximate 65 acre tract of land allocable to the proposed decertification area;

4. Dollars expended by GVSUD for legal fees and appraiser expenses in this docket; and

5. Lost expected net revenues allocable to the proposed decertification area.

Green Valley further requests that the Commission's order find and conclude that a second hearing must be held to determine the just and adequate compensation owed to Green Valley by Schertz in the event that decertification is granted and other referred issues. Green Valley further requests that the Commission grant such other relief to which Green Valley is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on May 25, 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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