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CITY OF LAMPASAS' NOTICE OF INTENT TO PROVIDE RETAIL WATER SERVICE TO THE 149-ACRE AREA IN LAMPASAS COUNTY DECERTIFIED FROM KEMPNER WATER SUPPLY CORPORATION	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

KEMPNER WATER SUPPLY CORPORATION'S

INITIAL BRIEF

Respectfully submitted,

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Dated: January 24, 2017

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COMES NOW, Kempner Water Supply Corporation (Kempner), and files this Initial Brief. In support thereof, Kempner would respectfully show as follows:

I. INTRODUCTION AND SUMMARY OF POSITION

Since its inception in 1977, Kempner has laid the groundwork to be able to serve reliable, quality drinking water to its service area.[1] Acting through its Board of Directors, Kempner has invested millions of dollars to secure raw water rights and build infrastructure to deliver water to its service area.[2] As the holder of a Certificate of Convenience and Necessity (CCN), Kempner has been obligated to provide water service to anyone in its certificated area since it obtained its CCN in 1979.[3]

Consistent with the idea that a CCN holder has the obligation to provide service within its certificated area, until recently, territory could be removed from a CCN only if the CCN holder refused or was unable to provide service.[4] Then, in 2005, the legislature created an alternative means by which areas within a CCN can be modified or revoked.[5] An "owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water or sewer service" may petition for "expedited release" of the area from a CCN "so that the area may

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[1] *See* Pre-filed Direct Testimony of Perry Steger at 4.

[2] *Id.* at 4-7.

[3] *Id.* at 5.

[4] Act of May 29, 2005, 79th Leg., R.S., ch. 1145, § 9, sec. 13.254(a–1), 2005 Tex. Gen. Laws 3771, 3775, codified at Tex. Water Code Ann. § 13.254(a–1).

[5] Id.

receive service from another retail public utility."[6]

Despite its ability and willingness to provide service,[7] Kempner was recently a victim of decertification under this alternative means provided for in TWC § 13.254(a-1).[8] In Docket No. 45778, at the request of the Lampasas Economic Development Corporation, the Commission decertified an approximately 149-acre tract of land from Kempner's CCN.[9] Now, the City of Lampasas ("Lampasas") seeks to provide water service to the decertified area.

In recognition that utilities are by nature monopolies in the areas they serve and that decertification can severely impact the decertified public utility's investments and expectations and amount to an unconstitutional taking, the legislature also dictated that, prior to rendering service in any way to the decertified area, the utility seeking to do so must compensate the decertified utility for any property that has been rendered useless or valueless to the decertified utility as a result of decertification.[10]

In this initial phase, the Commission's inquiry turns on the statutory construction of TWC § 13.254. TWC § 13.254(d) provides that:

> A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section without providing compensation for ***any*** **property** that the utility commission determines is rendered **useless** or **valueless** to the decertified retail public utility as a result of the decertification.[11]

The legislature did not define the terms property, useless, and valueless. The Texas Supreme Court and constitutional protections dictate that when left undefined, the word property must be construed in its broadest sense.[12] Plainly applied, the term "property" as utilized in TWC § 13.254 encompasses Kempner's right to divert water under various contracts, its' now

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[6] Id.

[7] *See* Pre-filed Direct Testimony of Perry Steger at 7-8.

[8] *Petition of the Lampasas Economic Development Corporation to Amend Kempner Water Supply Corporation's Certificate of Convenience and Necessity No. 10456 by Expedited Release in Lampasas County,* Docket No. 45778, Order (Jul. 7, 2016).

[9] Id.

[10] *See* Tex. Water Code §§ 13.001; 13.254.(TWC)

[11] TWC § 13.254(d) (emphasis added).

[12] *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (citations omitted).

oversized transmission lines, its' now oversized treatment plant, the lost economic opportunity to serve the decertified tract, and the money spent on professional and legal fees as part of the decertification in Docket No. 45778 and the present proceeding.

The word useless is defined as "having or being of no use."[13] Plainly applied, Kempner has no use for part of the aforementioned property as a result of decertification. Reading the statute as a whole illustrates that compensation is due *for any portion* of any property that is rendered useless or valueless. In section (g), the legislature set forth factors that must be considered in assessing the value of the property for which compensation is due; these factors indicate that the decertified utility should be compensated for **the part** of the debt, expenditures in planning, designing, or constructing service facilities, and the amount of contractual obligations **"allocable"** to the area in question.[14] The terms "service" and "facilities", which appear in the factors, are broadly defined terms in Chapter 13 of the Water Code and further support the conclusion that property that is rendered partially useless or valueless is compensable under TWC § 13.254.[15]

Additionally, even if Lampasas' construction of TWC §13.254 could be reconciled with all statutory language, because TWC § 13.254 is in essence a grant of eminent domain power, any doubt in its meaning must be strictly construed in favor of the property owner—Kempner.[16]

Finally, the legislative history illustrates that the language at issue was enacted under the assumption that the decertified utility had never begun providing service—and that nonetheless compensation would be due for any property rendered useless or valueless, including property such as debt incurred in reliance on one day serving the entire CCN.

II. PROCEDURAL HISTORY

On July 8, 2016, the City of Lampasas filed notice of its intent to provide retail water service to the approximately 149-acre-tract of land that was decertified from Kempner's CCN in

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[13] "Useless." *Merriam-Webster.com.* Merriam-Webster, 2016. http://www.merriam-webster.com/dictionary/useless (November 11, 2016).

[14] TWC § 13.254(g).

[15] TWC §§13.002; 13.254(g).

[16] *City of Blue Mound v. Sw. Water Co.*, 449 S.W.3d 678, 685–86 (Tex. App.—Fort Worth 2014, no writ)(*citing Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC*, 363 S.W.3d 192, 198 (Tex. 2012).

Docket No. 45778.[17] Lampasas' notice filing automatically initiated this proceeding for a determination of what compensation, if any, is owed to Kempner for property rendered useless or valueless.[18]

On July 20, 2016, Kempner moved to intervene in the case and notified the Commission Administrative Law Judge (ALJ) that Lampasas did not seek an agreement with Kempner on a single appraiser.[19] On August 30, 2016, the Commission referred this case to the State Office of Administrative Hearings (SOAH).[20] Commission Staff, Kempner, and Lampasas timely filed requested issues.[21]

On September 23, 2016, the ALJ issued a preliminary order setting for the process to be followed in order to satisfy the substantive requirements of TWC § 13.254 and 16 TAC § 24.113.[22] According to the Preliminary Order, the issue of whether Kempner is owed compensation as a result of the decertification is to be determined under a bifurcated process: In the first phase, the Commission is to determine what property of Kempner's, if any, has been rendered useless or valueless as a result of decertification.[23] Then, after issuing an interim order memorializing said initial determination, the Commission will conduct a determination of compensation due in the second phase of this proceeding.[24]

The Commission has jurisdiction over this matter pursuant to Texas Water Code Chapter 13.[25] SOAH has jurisdiction over this proceeding pursuant to Texas Government Code § 2003.049.

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[17] *Petition of the Lampasas Economic Development Corporation to Amend Kempner Water Supply Corporation's Certificate of Convenience and Necessity No. 10456 by Expedited Release in Lampasas County,* Docket No. 45778, Order (Jul. 7, 2016).

[18] TWC § 13.254(d); 16 TAC § 24.113(i).

[19] Kempner's Motion to Intervene (Jul. 20, 2016).

[20] Commission Order of Referral (August 30, 2016).

[21] Commission Staff's List of Issues (September 2, 2016); Kempner Water Supply Corporation's List of Issues (September 7, 2016); City of Lampasas List of Issues (September 8, 2016).

[22] Preliminary Order (September 23, 2016).

[23] Id.

[24] Id.

[25] TWC §13.254.

On September 28, 2016, Kempner was admitted as a party to this proceeding.[26] On December 21, 2016, Administrative Law Judge (ALJ) Meitra Farhadi held a hearing on the merits. At its conclusion, she ordered the parties to submit a proposed briefing schedule and outline. On December 30, 2016, ALJ Meitra Farhadi issued SOAH Order No. 3, adopting the proposed outline subject to some modifications.[27]

In accordance with the outline set forth by the ALJ in SOAH Order No. 3 and as part of the first phase in this proceeding, Kempner submits this initial brief setting forth which of its property has been rendered either useless or valueless as a result of decertification as contemplated by TWC § 13.254 and 16 TAC § 24.113(h).

III. WHAT KEMPNER PROPERTY HAS BEEN RENDERED USELESS OR VALUELESS BY THE DECERTIFICATION GRANTED IN DOCKET NO. 45778?

As set forth more fully below, decertification has resulted in the following of Kempner's personal property to be rendered partially useless or valueless: (1) Kempner secured the right to divert sufficient water to serve the entire area, has been paying, and will likely continue paying for a water reservation in excess of its projected growth—this excess water and sunk cost is useless to Kempner; (2) Kempner built a water treatment plant that was sized to serve its entire CCN and now has excess **and useless** capacity; (3) Kempner spent millions of dollars in constructing large transmission lines ranging in diameter from 36" to 20" that were sized to serve the entire CCN area and whose excess capacity is now partially useless to Kempner; (4) Kempner has lost the economic opportunity to serve the decertified tract and realize the income it expected to derive from its investments in the same; and (5) Kempner has incurred legal and professional fees in connection with the decertification proceeding as well as the present proceeding.

a. Property

i. What constitutes property under TWC § 13.254 and 16 TAC § 24.113(h)?

In this initial phase, the Commission's inquiry turns on the statutory construction of TWC § 13.254(d) and (g). In construing statutory language, courts "must enforce the statute as written"

[26] SOAH Order No. 1 (September 28, 2016).

[27] SOAH Order No. 3 (December 30, 2016).

and "refrain from rewriting text that lawmakers chose."[28] The court must limit its analysis to the words of the statute and apply the plain meaning of those words "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results."[29] While the court must consider the specific statutory language at issue, it must do so while looking to the statute as a whole, rather than as "isolated provisions."[30] Thus, we begin our analysis with the statute's words and then consider the apparent meaning of those words within their context.[31]

TWC 13.254(d) states:

> A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section without providing compensation for ***any*** **property** that the utility commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.[32]

Subsection (g) then goes on to instruct that, "[f]or the purpose of implementing [section d], the value of **real property** owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions **in eminent domain** and the value of **personal property** shall be determined according to the factors in this subsection. . . ."

The terms "property", "real property" and "personal property" are not defined anywhere in the Texas Water Code. "Undefined terms in a statute are typically given their ordinary meaning."[33] However, terms that have acquired a known and established legal meaning are generally construed in their legal sense.[34] The Texas Supreme Court has held that the term "property" must be applied in its broadest sense where no further definition is provided in the statute where used: "by its ordinary meaning, the term "property" extends to "every species of

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[28] *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 443 (Tex. 2009).

[29] *Molinet v. Kimbrell,* 356 S.W.3d 407, 411 (Tex. 2011).

[30] *TGS–NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 439 (Tex. 2011).

[31] *Jaster v. Comet II Const., Inc.,* 438 S.W.3d 556, 562 (Tex. 2014).

[32] TWC § 13.254(d) (emphasis added).

[33] *TGS-NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 439 (Tex. 2011) *(citing In re Hall,* 286 S.W.3d 925, 928–29 (Tex.2009).

[34] *Comperry v. State,* 375 S.W.3d 508, 514 (Tex. App. 2012) (*citing Medford v. State,* 13 S.W.3d 769, 771–72 (Tex. Crim. App. 2000)).

valuable right and interest."[35] 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 legislature is always presumed to legislate with full knowledge of existing law.[37] Accordingly, in enacting TWC § 13.254, the legislature left the term property undefined so that it would be construed in its broadest sense—any attempt to curtail the definition of property is contrary to the clear legislative intent expressed in TWC § 13.254(d).

ii. What property is at issue here?

1. Kempner Now Owns, has Been Paying for, and will Continue to Pay for the Right to Divert Water that was Intended to Serve the Decertified Area.

The groundwater in Kempner's service area and within a reasonable distance from Kempner's service area is of limited availability.[38] Accordingly, since 1980, Kempner has entered into various contracts with the Brazos River Authority ("BRA") for the right to divert surface water from the Stillhouse Reservoir.[39] Under these various contracts, Kempner has secured the right to divert up to 9,150 acre-feet per year of surface water.[40] Kempner's members, through regular water bills, have been making annual payments to the BRA to maintain these water rights for over 30 years.[41] Today, Kempner uses just over 2,700 acre-feet per year of raw water, leaving the balance to serve customers as growth occurs within the service area.[42] Kempner reserved this volume of water from BRA because water suppliers needing water from BRA, such as Kempner, cannot ask for additional water reservations on an as-needed basis, but instead, from time to time as BRA develops water supply projects, it gives potential users a limited opportunity to commit to the water that is available.[43] The commitment requires the users to pay

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[35] *State v. Public Utility Commission of Texas*, 883 S.W.2d 190, 199-200 (Tex. 1994) (emphasis in original) (citations omitted).

[36] *Id.*

[37] *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

[38] Pre-filed Direct Testimony of Perry Steger at 5.

[39] Id.

[40] Id.

[41] Id.

[42] Id. at 5-6.

[43] Id. at 6.

for the reservation of the water on a "take-or-pay" basis, regardless of whether any water is actually diverted.[44] If a user doesn't commit to the water, the user may not have another opportunity to increase the volume of water available from BRA.[45]

Thus, in order to satisfy **its obligation** to supply water within its certificated service area and based upon the then-existing assurance[46] that territory would not be removed from Kempner's service barring unlikely factors such as Kempner's refusal to provide service, Kempner's existing water customers have been paying for the water reservation. If the growth is delayed, such as by the loss of service area near the two cities adjacent to Kempner's service area, the length of time and the cost of this reservation increases.[47]

The term property, as utilized in TWC § 13.254 encompasses Kempner's contractual rights and obligations with BRA. Black's Law Dictionary defines property as:

> "1. Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a "bundle of rights." These rights include the **right to possess and use**, the right to exclude, and the right to transfer . . . 2. Any external thing over which the rights of possession, use, and enjoyment are exercised."[48]

Pursuant to its contracts with the BRA, Kempner has acquired the right to use, enjoy, and possess up to 9,150 acre-feet of water from the Stillhouse Reservoir.[49] The rights of use, enjoyment, and possession are several property rights one can hold as part of the "bundle of sticks."[50] Additionally, the Texas Tax Code defines **intangible** personal property as follows:

> A claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document. It includes a stock, bond, note or account receivable, franchise, license or permit, demand or time deposit, certificate of deposit, share account, share certificate account, share

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[44] Id.

[45] Id.

[46] Until 2005, a CCN Holder's service area would not be modified unless the certificate holder was unable or unwilling to provide service. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1145, § 9, sec. 13.254(a-1), 2005 Tex. Gen. Laws 3771, 3775, codified at Tex. Water Code Ann. § 13.254(a-1).

[47] *See* Pre-filed Direct Testimony of Perry Steger at 6.

[48] PROPERTY, Black's Law Dictionary (10th ed. 2014).

[49] *See* Pre-filed Direct Testimony of Perry Steger at 6.

[50] See PROPERTY, Black's Law Dictionary (10th ed. 2014).

deposit account, insurance policy, annuity, pension, cause of action, **contract**, and goodwill.[51]

Thus, the conclusion that Kempner's contractual rights and payments thereunder constitute an intangible property right is supported not only by Texas jurisprudence, but also by the various legal definitions set forth *supra*.

2. *Kempner Sized its Water Treatment Plant to Serve Its Entire CCN, Including the Now Decertified Area.*

Kempner is responsible for constructing the requisite withdrawal facilities that will enable it to divert water from Stillhouse Hollow Lake, treat it, and deliver it to its customers.[52] In 2006, Kempner embarked on a program to replace inadequate capacity in the aging Central Texas WSC water treatment plant with a new state-of-the-art water treatment facility on Stillhouse Hollow Lake.[53] Kempner borrowed $38 million from the Texas Water Development Board to construct new facilities, including a raw water intake structure on Stillhouse Hollow Lake, water treatment plant, 11 miles of 36" transmission main, and to purchase existing facilities and refinance existing debt under more favorable terms.[54] These facilities were sized in anticipation of future growth and designed to ultimately be able to treat and deliver all 9,150 acre feet per year of raw water to existing and future Kempner members.[55] As a result of the decertification of a crucial part of its CCN, Kempner's water treatment plant is now oversized for its projected growth.[56]

Kempner's water treatment plant constitutes tangible personal property within the meaning of TWC § 13.254(d). Tangible personal property is defined in the Texas Tax Code as "personal property that can be seen, weighed, measured, felt, or otherwise perceived by the senses," excluding perceptible objects such as documents that "constitute evidence, of a valuable interest, claim, or right and has negligible or no intrinsic value."[57] Plainly applied, Kempner's

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[51] Tex. Tax Code (TTC) § 1.04(6).

[52] *See* Pre-filed Direct Testimony of Perry Steger at 6.

[53] *See* id.

[54] *See* Id. at 6-7.

[55] *See* Id. at 7.

[56] *See* id.

[57] TTC § 1.04(5); PROPERTY; Black's Law Dictionary.

water treatment plant constitutes tangible personal property capable of being rendered partially useless or valueless as contemplated by TWC §13.254(d).

3. *Kempner Sized its Main Transmission Lines To Serve Its Entire Service Area.*

The Kempner Board of Directors had the foresight in the early 1980's to finance and construct a major drinking water infrastructure to be able to transport drinking water from Stillhouse Hollow Lake into and throughout its service area.[58] In particular, Kempner WSC owns and operates 39.3 miles of large water transmission lines, ranging in diameter from 36" to 20", from Stillhouse Hollow Lake to within 2.4 miles of the decertified tract.[59] The size of these transmission lines was determined in accordance with the projected future needs of the entire service area.[60] This system represents millions of dollars in infrastructure that the members of Kempner have been funding for decades.[61] Because of the decertification at issue here, the capacity of these transmission mains is now in excess of the capacity that Kempner will ever need to serve its remaining service area.[62]

Just like its water treatment plant, Kempner's main transmission lines constitute tangible personal property capable of being rendered useless or valueless with the meaning of TWC 13.254(d). Its' transmission lines can be seen, measured, weighed and felt and fall squarely within the definition of personal property capable of being rendered useless or valueless within the meaning of TWC § 13.254(d).[63]

4. *Lost Economic Opportunity*

Kempner's lost economic opportunity to serve the decertified tract constitutes intangible property capable of being rendered useless or valueless within the meaning of TWC § 13.254.[64] Intangible personal property includes anything "that has value but cannot be seen, felt, weighed,

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[58] *See* Id. at 7.

[59] Id.

[60] Id.

[61] Id.

[62] Id. at 9.

[63] TTC § 1.04(5).

[64] *See* TTC § 1.04(6).

measured, or otherwise perceived by the senses."[65] There is value in being the sole service provider to the LEDC tract—particularly when the decertified tract allegedly projected a demand of 560 gpm.[66] Thus, Kempner's lost economic opportunity constitutes property within the meaning of TWC § 13.254(d).

5. Legal and Professional Fees

Finally, legal and professional fees incurred as a result of the decertification in Docket No. 45778 and the present proceeding constitute intangible personal property within the meaning of TWC § 13.254.[67] Additionally, the factors in subsection (g) expressly include "necessary and reasonable legal expenses and professional fees", evidencing that the legislature intended for these fees to be considered compensable property under TWC § 13.254.[68]

In sum, by leaving the term undefined, the legislature intended for the term "property" to be construed in its broadest sense. Here, the term "property" extends to Kempner's rights under various contracts, its transmission lines, its treatment plant, its lost economic opportunity, and its professional and legal fees incurred in connection with the decertification in Docket No. 45778 as well as in the present proceeding.

b. Useless or Valueless

Kempner is owed compensation for the portions of its property that have become useless or valueless as a result of decertification. First, reading the statute as a whole makes clear that the legislature intended for utilities to be compensated for ***any*** property loss ***that is allocable*** to losing part of its certificated area. Second, because TWC § 13.254 is a grant of eminent domain power, any doubt in the language must be strictly construed in favor of Kempner. Third, the legislative history illustrates that the language in TWC 13.254 was intended to provide compensation for all property to the decertified utility—even debt incurred in reliance on one day serving the entire certificated area.

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[65] Id.

[66] *See* Pre-filed Testimony of Perry Steger, Exhibit PS-1.

[67] *See* TTC § 1.04(6).

[68] TWC § 13.254(g)

i. What does it mean for property to be rendered useless or valueless?

In construing statutory language, all terms must be read in context by reading the statute as a whole, rather than looking at the words as "isolated provisions."[69] Here the legislature has provided that compensation is due for ***"any"*** property that is rendered useless or valueless as a result of decertification.[70] The legislature left the terms "useless" and "valueless" undefined and their plain meaning must be applied.[71] "Useless" means "having or being of no use."[72] "Value" in relevant context means "the monetary worth of something" and "valueless" would mean without same.[73]

Applying the plain meaning of the word "useless" to the case at bar leads to the conclusion that **part** of Kempner's property has been rendered useless: Kempner secured the right to divert sufficient water to serve the entire area and have been paying for water in excess of its projected growth—this excess water is useless to Kempner; When it built a new water treatment plant in 2006, Kempner sized it to serve its entire CCN and now has excess **and useless** capacity; Kempner spent millions of dollars in constructing large transmission lines ranging in diameter from 36" to 20" that were sized to serve the entire CCN area and whose excess capacity is now useless to Kempner.

Because of the monopolistic nature of retail public utilities, Kempner cannot simply take this excess capacity, excess water rights, and oversized transmission lines and use them elsewhere—Kempner is confined by Texas law to serve only existing and future customers within its CCN—customers which until recently included the now decertified tract.[74] "All statutes are presumed to be enacted by the legislature with full knowledge of the existing

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[69] *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013); *see also TGS-NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 439 (Tex. 2011).

[70] TWC § 13.254(d).

[71] *Tarlton v. State*, 93 S.W.3d 168, 174 (Tex. App.—Houston [14th] 2002, pet. ref'd).

[72] "Useless." *Merriam-Webster.corn.* Merriam-Webster, 2016. http://www.merriam-webster.com/dictionary/useless (November 11, 2016).

[73] "Valueless." *Merriam-Webstercom.* Merriam-Webster, 2016. http://www.merriam-webSter.com/dictionary/ valueless (November 11, 2016).

[74] *See* TWC § 13.252.

condition of the law and with reference to it."[75] Here, TWC § 13.254 must be construed in light of the comprehensive scheme that governs retail public utilities and recognizes that they are by nature "monopolies in the areas they serve."[76] Thus, it makes perfect sense that in enacting TWC § 13.254 the legislature would recognize not only the possibility, but the likelihood, that a utility's property would be rendered **partially** useless or valueless as a result of a decertification proceeding and that just compensation should be paid.

This construction is also supported by section (g), in which the legislature set forth the factors that are to be employed in determining the amount of compensation due for personal property that has been rendered useless or valueless.[77] These factors make evident that the legislature intended for compensation to be due if *any portion* of *any property* is rendered useless or valueless.[78] Section (g) states, in relevant part:

> For the purpose of implementing [subsection d] . . . the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall include: the amount of the retail public utility's debt ***allocable*** for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of ***service facilities*** that are ***allocable*** to service to the area in question; the amount of the retail public utility's contractual obligations ***allocable*** to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors.[79]

"Service" and "facilities" are defined terms in Chapter 13 of the TWC. "Service" is defined broadly 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, as well as the interchange of

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[75] *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

[76] TWC § 13.001.

[77] TWC § 13.254(g).

[78] Id.

[79] Id. emphasis added).

facilities between two or more retail public utilities.[80] "Facilities" is broadly defined as "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."[81] As these expansive definitions illustrate, the legislature intended for utilities in Kempner's position to be paid compensation for any of their property that is rendered useless or valueless.

Additionally, the legislature's use of the word "allocable" is telling—"allocable" is defined in Merriam-Webster's Dictionary as "capable of being allocated," and "allocate" is defined as "to apportion for a specific purpose or to particular persons or things."[82] Thus, allocable recognizes that only a portion of the property can be rendered useless or valueless.[83] Here, through expert testimony, Kempner can demonstrate what portion of its transmission lines, treatment plant, and excess water rights will go unused as a result of decertification. Thus, the extent to which these various property rights have been rendered useless is capable of being allocated within the meaning of the statute.

Nonetheless, Lampasas' expert, Jack Stowe, contends in this proceeding that for property to be rendered useless or valueless, one of two things must be true: either the property must be within the decertified tract, or the property must be a "stranded facility specifically constructed and designated for the decertified area that would no longer be useful or have value."[84] Mr. Stowe has not always required such a limited reading of TWC § 13.254—in fact, as an expert for an almost identical proceeding just last year, Mr. Stowe included off-site facilities in his analysis—these off site facilities were neither stranded nor on the decertified tract.[85] In that proceeding, Mr. Stowe concluded that no compensation was due because the off-site assets were

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[80] TWC § 13.002(21).

[81] TWC § 13.002(9).

[82] "Allocable." *Merriam-Webster.com.* Merriam-Webster, 2016. https://www.merriam-webster.com/dictionary/allocable (November 11, 2016).

[83] *See* id.

[84] Pre-filed Direct Testimony of Jack Stowe at 9.

[85] *See City of Tyler's Notice of Intent to Provide Sewer Service to Area Decertified from Tall Timbers Utility Company, Inc. in Smith County,* (Docket No. 44555), City of Tyler Appraisal (May 18, 2015), attached hereto as Exhibit A.

operating at capacity.[86] Here, since Kempner can demonstrate that its water treatment plant, water rights, and transmission lines have excess capacity that was intended to serve the decertified tract, Mr. Stowe must construe the statute more narrowly to reach his client's desired conclusion.

Not only is his new construction at odds with his expert opinion rendered last year, it also fails to give effect to all of the statutory language.[87] Under either of Jack Stowe's scenarios, property will always be rendered **completely** useless to the decertified utility, whether it be because it is stranded or because it is located on the decertified tract. What, then, is the meaning of the word allocable as utilized in TWC § 13.254? Furthermore, Lampasas' proposed construction wholly ignores the fact that property includes *intangible* personal property (such as contractual obligations), which by its intangible nature is incapable of being physically on the decertified tract or "stranded" as a result of decertification.

In an effort to deprive Kempner once again of compensation that is rightfully owed, Lampasas attempts to give TWC § 13.254 a very narrow construction—one that is neither required nor reasonable in light of the words chosen by the legislature, the purpose behind the statute, and constitutional protections.

Additionally, because TWC § 13.254 is in essence a grant of eminent domain power, any doubt in the language must be strictly construed in favor of Kempner. The Texas and United States Constitutions prohibit takings by the government without adequate compensation.[88] Section 13.254(d) exists to ensure that the decertified utility is adequately compensated. *See e.g.* TWC § 13.254(g)("the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, **governing actions in eminent domain**"). Importantly, the legislative grant of eminent-

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[86] Id.

[87] *Phillips v. Bramlett,* 288 S.W.3d 876 (Tex. 2009); *Badgett v. State*, 42 S.W.3d 136 (Tex. Crim. App. 2001)(Statutes are to be construed, if at all possible, so as to give effect to all of its parts and so that no part is to be construed as void or redundant).

[88] 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 . .").

domain power is strictly construed.[89] In instances of doubt as to the scope of the power, the statute granting such power is "strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith."[90] By the rule of strict construction, "it is not meant that the statute shall be stingingly or even narrowly construed, **but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used.**"[91] Here, even assuming that Lampasas' construction can be reconciled with every other word in TWC § 13.254, which it cannot, such a construction is not a necessary construction—nothing in TWC § 13.254 dictates such a limited reading. Thus, if there is room for disagreement in the language at issue in this case, it must be resolved in favor of Kempner.

Finally, the legislative history of TWC § 13.254 also supports the conclusion that Kempner's property that has been rendered useless or valueless is compensable. The language in TWC § 13.254(d) first originated in TWC §13.255 through H.B. 2035 in 1987 before its incorporation into the TWC §13.254 decertification provisions.[92] TWC §13.255 addresses a very similar situation to the one presented in this case. TWC § 13.255 provides for compensation to certain retail public utilities when, as a result of municipal annexation, a city's CCN expands into that retail public utility's certificated area and results in decertification.[93] In presenting the bill, the House Sponsor of H.B. 2035, Representative Hinojosa, explained that many times the certificated utility was unable to provide service to the rapidly expanding municipality, but was also unwilling to release the territory from its CCN because it needed the future income to meet

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[89] *City of Blue Mound v. Sw. Water Co.*, 449 S.W.3d 678, 685–86 (Tex. App.—Fort Worth 2014, no writ)(*citing Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC*, 363 S.W.3d 192, 198 (Tex.2012)).

[90] *Id.*

[91] *Id.(citing Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 523 (Tex. App.—Fort Worth 2012, pet. denied) (quoting Norman J. Singer & J.D. Shambie Singer, 3 Statutes and Statutory Construction, § 58:2, at 110 (7th ed. 2008))).

[92] *See* Exhibit "B" (Partial transcript of the Senate Committee on Intergovernmental Relations hearing on May, 28, 1987, 70th Leg. R. S. The audio of the full hearing is available at https://www.tsl.texas.gov/ref/senaterecordings/70thR.S./700795a/index.html.)

[93] *See* TWC § 13.255.

its debt obligations.[94] As a result, many homes would go without water service while the utilities litigated the issue.[95] The bill, as presented, constituted an agreement between the municipalities and the retail public utilities—it provided a method for resolving their differences by allowing the municipality to go in and serve while ensuring that the then-certificated retail public utility was compensated for "any bonded indebtedness that it may have or *for any other property that it may lose because the City is going into the certified area and providing water.*[96]

As the legislative history illustrates, the legislature enacted this provision with the knowledge that in most, if not all instances, decertification will occur precisely because the certified utility **has not begun providing service to the tract in question.**[97] Necessarily then, there would seldom, if ever, be a situation in which the decertified utility has land or pipes on the decertified tract that are rendered useless or valueless. Rather, because a CCN holder has the obligation to service the area, a CCN holder will often have planned ahead in securing water rights and in building the requisite infrastructure and facilities to provide adequate service when the time comes. Thus, contract rights, excess capacity, **and even indebtedness,** were intended to be compensable.[98]

ii. What property was rendered useless or valueless as a result of the decertification in Docket No. 45778?

1. Kempner's Investment in Reserving Sufficient Water to Serve the Decertified Tract Has Been Rendered Useless and Valueless.

Kempner now owns, has been paying for, and will likely continue to pay for the right to divert water that was intended to serve the decertified area. Kempner's members, through regular water bills, have been making annual payments to the BRA to maintain the various water rights discussed supra for over 30 years.[99] Kempner's customers have been paying for this

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[94] *See* Exhibit "B" (Partial transcript of the Senate Committee on Intergovernmental Relations hearing on May, 28, 1987, 70th Leg. R. S. The audio of the full hearing is available at https://www.tsl.texas.gov/ref/senaterecordings/70thR.S./700795a/index.html.)

[95] *See* id.

[96] *See* id.

[97] *See* id.

[98] *See* id.

[99] Id.

reservation of water so that when additional customers came into existence Kempner could fulfill its obligation to provide service.[100]

Kempner's service area is located between two cities, Copperas Cove on the east and Lampasas on the west.[101] Additionally, the service area straddles the major highway between these two urban areas, Highway 190.[102] Because of its proximity to two cities, Kempner's projected new customers will not be evenly spaced throughout the service area, but the higher density, and less costly customer base, will occur near the two cities and along the highway.[103] This is exactly the area where the decertified tract is located. Stated differently, the decertified tract was expected to develop sooner and have a less costly customer base than most of Kempner's remaining service area.[104]

Since 2005, pursuant to TWC § 13.254's decertification provisions, these expected new customers can now be taken from a CCN holder without much notice to the decertified utility.[105] That is precisely what has happened here. Had Kempner known this was a possibility, it would not have reserved that capacity at the outset.[106] Thus, part of the cost of the reservation has become useless and valueless to Kempner and is compensable under TWC § 13.254.[107]

2. Kempner's Water Treatment Plant Has Excess Capacity That is Useless to Kempner as a Result of the Decertification.

Kempner's water treatment plant was sized in anticipation of future growth and designed to ultimately be able to treat and deliver all 9,150 acre feet per year of raw water to existing and future Kempner members.[108] As a result of decertification of a crucial part of its CCN, Kempner's water treatment plant is now oversized for its projected growth.[109] Stated differently,

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[100] Hearing on the Merits at 66, lines 15-21 (December 21, 2016).

[101] *See* Pre-filed Direct Testimony of Perry Steger at 5.

[102] Id.

[103] Id.

[104] Id.

[105] Act of May 29, 2005, 79th Leg., R.S., ch. 1145, § 9, sec. 13.254(a–1), 2005 Tex. Gen. Laws 3771, 3775, codified at Tex. Water Code Ann. § 13.254(a–1).

[106] Hearing on the Merits at 66, lines 15-21 (December 21, 2016).

[107] Id. at 56, lines 10-19.

[108] *See* id. at 7.

[109] *See* id.

a part of the oversizing is now useless and valueless.[110] Thus, part of the treatment plant's capacity has been rendered useless.

3. Various Transmission Mains Are Now Oversized for Both Present and Future Needs.

Various transmission mains' capacity is now in excess of Kempner's current *and future* needs.[111] Kempner's "backbone" facilities were built to serve the entire CCN—including the area decertified in Docket No. 45778.[112] Kempner's expert, Mr. Perry Steger, has determined that various transmission mains will have stranded capacity as a result of the decertification.[113] These transmission mains are more specifically identified in Exhibit PS-1 to Mr. Steger's Pre-filed direct testimony, which is incorporated here by reference. Thus, the excess capacity identified in Mr. Steger's report has been rendered useless to Kempner.

4. Legal and Professional Fees would not Have Been Incurred but for the Decertification and the Present Proceeding.

As a result of the decertification in Docket No. 45778 and the present proceeding, Kempner has incurred reasonable and necessary professional fees.[114]. These fees constitute an additional and otherwise unnecessary expense that, absent compensation, must be bore by Kempner's customers.

IV. IS KEMPNER ENTITLED TO RECOVER FOR ANY LOST ECONOMIC OPPORTUNITY AS A RESULT OF THE DECERTIFICATION IN DOCKET NO. 45778?

Kempner is entitled to recover for the lost economic opportunity to serve the decertified tract. As originally enacted, TWC § 13.254(g) expressly included that a decertified utility should be compensated for "the taking, damaging, or loss of personal property, **including the retail public utility's business.**"[115] In 2005, when the legislature added the new decertification procedures that led

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[110] Pre-filed Direct Testimony of Perry Steger at 9.

[111] *See* Pre-filed Direct Testimony of Perry Steger at 9-10.

[112] Id.

[113] Id.

[114] *See* Pre-filed Direct Testimony of Perry Steger at 10-11.

[115] Tex. S.B. 1, 75th Leg., R.S. (1997) (adopting first version of what is now TWC §13.254(g); The statute also previously specifically required consideration of "the impact on future revenues and expenses of the retail public utility". *Id.*

Kempner here, the legislature removed this particular sentence. In its place, the legislature put the ball in the Commission's court by adding that "the Commission shall adopt rules governing the evaluation of these factors."[116] As currently written, nothing in either the statute or in the Commission's rules prevents Kempner from recovering for its lost economic opportunity.[117] Rather, both the statute and rule state that in assessing compensation, the Commission may consider "other relevant factors."[118] Many of the factors in the statute speak directly to Kempner's lost economic opportunity and further support Kempner's right to recover for the lost opportunity to serve the decertified tract.

More importantly, Kempner's right to recover for its lost economic opportunity is not a matter of statutory construction, but rather a matter of constitutional protection.[119] Our legislature is not the first to recognize that public utilities are unique in that they are monopolies in the areas they serve—the United States Supreme Court has also recognized that public utilities warrant special treatment. As a general rule under takings jurisprudence, damage, if any, to the going concern of a business on the condemned real property is generally not compensable because such damages are related to the business conducted on the property and not to the real property taken.[120] That is, the going-concern element of the property owner's business is usually not taken by the condemnation of real property on which the business is located **because the property owner is free to move his business to another location.**[121]

The United States Supreme Court has recognized, however, that utility systems are an exception to the above-stated general rule.[122] The Supreme Court has held that when a governmental entity condemns an entire utility system for the purpose of taking it over and continuing its operation by the governmental entity, then the utility owner is entitled to be

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[116] Act of May 29, 2005, 79th Leg., R.S., ch. 1145, § 9, sec. 13.254(g), 2005 Tex. Gen. Laws 3771, 3775, codified at Tex. Water Code Ann. § 13.254(g).

[117] TWC § 13.254(g); 16 TAC § 24.113(k).

[118] *See* Id.

[119] 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 . .").

[120] *City of Blue Mound,* 449 S.W.3d at 683–84 (internal citation omitted).

[121] *Id. citing Kimball Laundry Co v. U.S..,* 338 U.S 1, 11–12 (1949).

[122] *Id. citing Kimball Laundry Co.,* 338 U.S., at 12–15.

compensated for loss of the going-concern value of the utility system.[123] The rationale behind the exception is as follows: because utilities usually operate as a monopoly, after condemnation, a privately owned utility company cannot simply move to another location and reopen its utility business on a different parcel of real property.[124] Here, Lampasas will acquire the right to be the sole service provider to the LEDC tract. Kempner, on the other hand, cannot simply pick up and set up shop elsewhere—Kempner can only provide service within its CCN.[125] Accordingly, Kempner is due compensation for the lost economic opportunity to provide service to the LEDC on the now decertified tract.

V. CONCLUSION & PRAYER

WHEREFORE, PREMISES CONSIDERED, Kempner respectfully requests the Honorable Administrative Law Judges find and recommend that the Commission determine: (1) all property items described above are property and were rendered useless or valueless to Kempner within the meaning of TWC § 13.254 by the decertification in Docket No. 45778; (2) prior to providing service in any way to the decertified tract, Lampasas must provide just and adequate compensation to Kempner for its property; and (3) the parties must proceed to the second phase of this bifurcated process to determine the amount of compensation due to Kempner.

Respectfully submitted,
DAVIDSON, TROILO, REAM & GARZA, P.C.
601 NW Loop 410, Suite 100
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Telephone: (210) 349-6484
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By: Norma E. Figueroa w/permission
Patrick W. Lindner
State Bar No. 12367850
plindner@dtrglaw.com
ATTORNEY FOR KEMPNER WATER SUPPLY CORPORATION

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[123] *Id.*

[124] *City of Blue Mound*, 449 S.W.3d at 684–85.

[125] TWC § 13.250.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2017, a true and correct copy of the above and foregoing document was served by hand delivery, email, facsimile or First Class Mail to the following:

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EXHIBIT "A"

NewGen Strategies & Solutions

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Fax: (512) 479-7905

May 6, 2015

Mr. Joe Freeland
Mathews & Freeland, L.L.P
327 Congress Ave., Ste. 300
Austin, Texas 78701

Subject: Analysis and Opinion of Previously Decertified CCN from Tall Timbers Utility

Dear Mr. Freeland:

NewGen Strategies & Solutions, LLC ("NewGen") has completed our review of the area, which is the subject of Tyler Oak Creek Development LLC's ("Landowner") approved petition for expedited release, previously decertified from the Tall Timbers Utility Company's ("TTUC" or "Liberty") Service Area Certificate of Convenience and Necessity ("CCN") No. 20694 in PUC Docket No. 42893. Based on our understanding, per Public Utility Commission ("PUC") Substantive Rule § 24.113(l), the City of Tyler ("City") must make a determination of the monetary amount of compensation due to TTUC for the decertified area now that the City has indicated its intent on providing sewer service in the decertified area.

Specifically, PUC Substantive Rule § 24.113(h) states:

> "A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section unless the retail public utility, or a petitioner under subsection (r) of this section, provides compensation for any property that the commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification." (emphasis added)

In performing this analysis, NewGen must first determine if there is any property that has been rendered useless and valueless as a result of the decertification in PUC Docket No. 42893. In the event this determination finds such property, then compensation must be determined under PUC Substantive Rule § 24.113(j).

As part of our analysis, the following documents were reviewed and relied on:

- Tyler Oak Creek Development, LLC's July 29, 2014 "Petition from Tyler Oak Creek Development To Decertify a Portion of CCN No. 20694 of Tall Timbers Utility Company, Inc. in Smith County, Texas" letter to the Texas Commission on Environmental Quality ("TCEQ")
- TTUC 2014 Utilities Annual Report filed at PUC
- Final Order, PUC Docket No. 42893-13 "Petition of Tyler Oak Creek Development, LLC to Amend Tall Timbers Utility Company, Inc.'s Sewer Certificate of Necessity by Expedited Release in Smith County"
- TCEQ Investigative Report, July 8, 2014 Inv. # - 1191301
- Historical DMR Report Data, Regulated Entity RN101519981, Permit No. WQ0013000001

Based on our review of the available documentation, NewGen presents the following findings:

- Based on available documentation, there does not appear to be any facilities and/or customers within the area in question;
- Based on the review of available documentation, NewGen has found no evidence of plans in place and/or funding committed related to Tall Timber's provision of service to the area in question.
- Our analysis and review of TTUC's wastewater system reveals the off-site improvements that could potentially serve this area, were the infrastructure available, are already at flow capacity and cannot be used to serve the area. In the 2014 investigative report prepared by the TCEQ and included here as Attachment A, it is noted that TTUC average flow has already exceeded 75/90 percent of the final phase flow permitted for future capacity and the plant met 75/90 percent from September 2013 through August 2014. NewGen is unaware of any additional capacity investments that have been made which would enable TTUC to serve the area in question with its existing treatment infrastructure..

Conclusion

Based upon the above findings, and in compliance with PUC Substantive Rule § 24.113(h), it is our conclusion that there is no property that has been rendered useless and valueless as a result of decertification by the TCEQ and the provision of service by the City to the area in question. As such, no determination of monetary compensation is necessary under the rules.

However, if a monetary compensation determination were to be made, it is our opinion that the compensation to be provided is $0.00 based on the following:

- There are no facilities in the area in question;
- There is no debt that has been used to fund facilities to serve the area in question;
- TTUC has not demonstrated the expenditure of any funds associated with planning, designing, or constructing facilities associated with the area in question;
- To our knowledge, TTUC has no contractual obligations associated with the area in question;
- Given that TTUC does not currently incur cost associated with the area, have facilities within the area, and off-site assets are already at capacity, there is no demonstrated impairment or foreseeable costs increases to existing customers that will result from the decertification;
- Given that there are no customers in the area in question, TTUC will not experience a loss in revenues associated with the loss of the area in question; and,
- NewGen is not aware, of any legal or professional fees incurred by TTUC associated with the decertification of the area in question.

After review of this Letter Report, if you have any questions or require additional information, please feel free to contact Mr. Jack Stowe at jstowe@newgenstrategies.net or call 512.479.7900.

Sincerely,

NewGen Strategies and Solutions, LLC

Jack E. Stowe, Jr.
Director

EXHIBIT "B"

28:50

Parmer: Now I am going to go back to the start of the order of business, members, and lay out HB 2035 and recognize its House Sponsor, Representative Hinojosa.

Hinojosa: Thank you Mr. Chairman and Committee Members. HB 2035 deals with a problem that is not only unique to South Texas, but is probably in many municipalities throughout the State where they continue to grow they run into a problem of a water supply corporations have been given a certification over a certain area to provide water services. Unfortunately as the city grows, many times the water supply corporations are unable to provide the necessary services, necessary water to the new residents as the territory that is being annexed by the city. And many times they cannot work out their differences, and they end up in court. What this bill does, it allows for the city to provide water in those areas, and provides a procedure where the water supply corporation and the city can work out their differences and at the same time have the water supply corporation compensated for any bond indebtedness that it may have or for any other property that it may lose because the City going into the certified area and provided water.

That is basically what this bill does Mr. Chairman and Committee Members. And I have an amendment basically to exempt your retail public utilities. I would be glad to answer any questions that anyone might have.

Parmer: Are there any questions for Mr. Hinjosa? Senator Barrientos?

Barrientos: Um, I want to point out the amendment. I want to ask you to go over that again.

Hinjosa: Let me be more specific, Senator Barrientos. The City of McAllen, for example, is one of the fastest growing cities in the State of Texas, and as we continues to grow, we run into problems in that where a certain water supply corporation has been given a certification in large area to provide water services. However, they do not have the capability to

provide those water services. So that we have many people who have homes without water. And some of those homes, when they catch fire, there's no water to put out the fire. Because of the inability of the water supply corporation to provide that water. And the City of McAllen has the ability, has the capital to provide those water services, but because that area has been certified to the water supply corporation, City of McAllen cannot go in there and lay the water lines and provide the water services. Consequently, usually you have to file a lawsuit and end up with the Court through long proceedings that can take 3 or 4 or 5 years. I'll give you an example, it took me 5 years to get water in an area that was certified to the water, to Sharlett Water Supply Corporation.

Barrientos: Why?

Hinojosa: Because that area was certified to the Sharlett Water Supply Corporation.

Barrientos: And the City had the ability to provide that water?

Hinojosa: That is correct.

Barrientos: But did not do it.

Hinojosa: They couldn't. Because by law that area is certified to the water supply corporation and not the City of McAllen.

Barrientos: Only by law...

Hinojosa: And the water supply corporation refused to allow the City of McAllen to go in there and provide those services. So the City of McAllen had to file a lawsuit. And, what this bill does, it has been worked out, it is an agreement. It's an agreed bill between the municipalities and the water supply corporation association to put in place a procedures to work out this type of problem. And now in those areas where the City is certified to provide water to the same areas as the water supply corporation it provides for proper, proper compensation to the water supply corporation for any amount of indebtedness that they might have.

Barrientos: Do you foresee, in any way shape or form any more amendments coming to this bill?

Hiniojosa: I hope not, but you know it is kind of hard to predict what is going to happen up here.

Barrientos: I understand things go bonkers in the last week, but in your considered opinion will there be any coming?

Hinojosa: No sir.

Barrientos: Alright, do you want to lay this out?

Hinojosa: Please.

Parmer: Senator, you have an amendment? Senator Barrientos sends up committee amendment number one. He will explain the amendment.

Barrientos: What he just said Mr. Chairman, you want to do it again?

Parmer: No

Barrientos: Section only applies in case where the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is not a public water supply.

Parmer: Is there objection to adoption of the amendment? The Chair hears none. The amendment is adopted. Members are there any other questions for Representative Hinojosa? Senator Armbrister?

Armbrister: Representative Hinojosa, isn't there now, or hasn't there recently been a 5th Circuit Federal Court Opinion on the cities' authority to annex rural water corporations as you are proposing to do, and they ruled against this?

Hinojosa: I am not aware of that, Senator Armbrister. I do know that most of the rural water supply corporations are non-profit and receive federal funds to expand their capabilities. So that may have been a factor. So what

happens is they have to be compensated for bond indebtedness to any debt that they might have to the federal government. I would imagine that if the cities could annex the water supply corporation it would be the main reason, and the federal monies that are involved in the investment of the water supply corporation.

Armbrister: As I understand, I am trying to get the whole gist of your bill. If you've got a rural water supply corporation out there, and the City annexes that area, what happens in effect to that rural water supply corporation?

Hinojosa: Well, the problem is that many times the area that is annexed even though it is certified to the water supply corporation, it's not being supplied with water because the water supply corporation does not have the capability of doing so. So that area that is annexed goes without water, and basically stops the growth of that particular city. And then the city goes to try and negotiate with the water supply corporation, and quite frankly, you have a lot of rural water supply corporations who do not wish to negotiate or cooperate with the municipality in trying to resolve this problem. And they end up in court. And what this bill does it tries to provide for an orderly, logical procedure for them to work out their differences and for the water supply corporation to get compensated for any of its debt or any of its property through a neutral party, and that is the Water Commission.

Parmer: Mr. Hinojosa, I think, as I understand it, this is a bill that you and Senator Uribe have been working on to try and deal with, in part, the Colonias problem down in your part of the State. Is that, is that correct?

Hinojosa: That's correct, Senator Parmer.

Parmer: These are the areas, I don't know how many of the Committee members have been to South Texas and have visited some of these developments where there is no water, there are no streets, there is no sewage, and people are trying to bring their kids up in probably the most abject conditions that exist in the State of Texas today, and I have had opportunity to, opportunity, if that is the right word, to make that trip, and I commend you for your effort in trying to deal with what is really a serious problem in the Texas.

?????? Senator, the Natural Resources Committee did have a hearing on this. We did not go down there, but we did go over, very thoroughly, and it is certainly a problem.

Parmer: Are there um, any other questions set for Representative Hinojosa?

End 37:00