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FAX COVER SHEET**DATE:** June 8, 2015**TOTAL PAGES:** 5**TO:** County Judge Ramon Garcia- Via: Fax: (956) 318-2699Commissioner A.C. Cuellar, Jr., Precinct 1- Via: Fax: (956) 969-1417Commissioner Eduardo "Eddie" Cantu, Precinct 2- Via: Fax: (956) 787-4683Commissioner Joseph M. Flores, Precinct 3- Via: Fax: (956) 585-2375Commissioner Joseph Palacios, Precinct 4- Via: Fax: (956) 381-5905Ms. Monica Badillo- Via: Fax: (956) 292-7034**RE:** Agenda Item No. 7 B from June 2, 2015 Meeting of Hidalgo County Commissioners Court regarding presentation of Texas Gas Service in connection with January 24, 2012 Order ("Order") abandoning roadway located in North Hidalgo County at request of MVP Properties, LLC**FROM:** Millard A. Johnson**MESSAGE:** Please see attached correspondence.

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Ms. Monica Badillo
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Re: Agenda Item No. 7 B from June 2, 2015 Meeting of Hidalgo County Commissioners Court regarding presentation of Texas Gas Service in connection with January 24, 2012 Order ("Abandonment Order") abandoning roadway located in North Hidalgo County at request of MVP Properties, LLC

Dear Judge Garcia and the Honorable Commissioners of Hidalgo County:

On behalf of Texas Gas Service, thank you again for the opportunity to be heard on this important issue that ultimately affects all citizens of Hidalgo County. This letter is a follow up of our presentation on behalf of Texas Gas Services on Tuesday, June 2, 2015, and a clarification of several points that were left open.

First, it is the preference of Texas Gas Service that the Commissioners Court simply vacate the prior Abandonment Order since the Commissioners were not made aware of Texas Gas Service's pipeline and thus did not have all the information needed to render a decision. The

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need for the Abandonment Order to be vacated is highlighted by the fact that *MVP utilized the Abandonment Order to argue to the State District Court that Texas Gas Service is a trespasser*, when Texas Gas Service did not even know of or have the opportunity to appear at the hearing. *MVP has even entered the Abandonment Order into evidence in the State District Court arguing that it establishes that Texas Gas Service is trespassing.*

Texas Gas Service believes the Abandonment Order should be vacated, however, as we indicated in our final presentation slide, if the Commissioners believe it more appropriate, and, in the alternative, Texas Gas Service would appreciate a clarification of the Abandonment Order to reflect that nothing in the Abandonment Order was intended to, or does affect, the subsurface rights of Texas Gas Service.

In that regard, several comments were made that had the possibility of confusing rather than clarifying issues. One argument was raised that the Commissioners cannot undo a prior order given the amount of time that has passed, or because the road has simply been abandoned. This issue was specifically addressed to Mr. Steve Crain who deferred the issue pending additional research. We also performed research on this issue and offer the following to assist Mr. Crain and the Commissioners Court.

The County Commissioners can modify, vacate or amend their prior Abandonment Order because the Abandonment Order is a legislative or administrative act. The pertinent case law establishes that the County Commissioners can amend, modify or vacate prior orders if the function exercised is an administrative or ministerial act. See *August A. Busch & Co. v. Caulfield*, 135 S.W. 244, 246 (Tex. Civ. App. 1911, writ refused) (“On the question of rescission of such orders generally and *at subsequent terms*, it is said in 11 Cyc. p. 403: ‘Where a county board or court exercises functions which are *administrative or ministerial in their nature, and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time or manner, it may modify or repeal its action.*’”). (Emphasis added.)

An administrative agency, such as this Commissioners Court, acts in a legislative [i.e., administrative] capacity when it addresses broad questions of public policy and promulgates rules for future application “to all or some part of those subject to its power.” *Key Western Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 350 S.W.2d 839, 847; see *Scott v. Texas State Bd. of Med. Exam'rs*, 384 S.W.2d 686, 691 (Tex.1964)[citation omitted]. A judicial inquiry, on the other hand, typically involves an investigation of present or past facts and a determination of liability based on laws already in existence. See *Key W. Life*, 350 S.W.2d at 847; *Scott*, 384 S.W.2d at 691. In determining whether an administrative agency was acting in a legislative or judicial capacity, we ask whether the administrative action implements broad public policy or concerns only the parties immediately affected.”

Here, the abandonment of a public road is an administrative act. The abandonment statute provides that “(1) “Abandon” means to relinquish the *public’s* right of way in and use of

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the road.” Thus, the Commissioner’s actions affect the public as a whole. In addition, case law provides that condemnation is legislative in nature. See e.g. *Whittington v. City of Austin*, 174 S.W.3d 889, 899-900 (Tex. App.—Austin 2005, pet. denied) (“Consistent with these limitations, when the State—through the legislature—delegates general eminent domain power to municipalities, it may impose limitations on the grant of power. See Tex. Loc. Gov’t Code Ann. § 251.001(a) (West 2013) (setting forth requirements for exercise of eminent domain by municipality); *Whittington*, 384 S.W.3d at 772 (recognizing the public use requirement and the necessity requirement legislatively imposed on municipalities via local government code section 251.001). Thus, the legislative grant of eminent-domain power is strictly construed in two regards. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Tex., LLC*, 363 S.W.3d 192, 198 (Tex.2012).

Ultimately, all citizens of Hidalgo County are potentially impacted by the resulting economic cost of correcting this situation. MVP’s argument is fallacious that the County has no interest in the abandoned roadway because the County has no intention of ever building a road and certainly has no interest in maintaining that easement. Hidalgo County has a significant interest in the continued delivery of natural gas throughout the County – to its residents, businesses and jails. The easement granted by the dedication is for public use. It matters not that it was to “Allendale Township” as opposed to Hidalgo County or the City of Edinburg – it is a public roadway dedication. If the County never builds a road, there is nothing to “maintain”; however, as long as Texas Gas operates Texas Gas’ pipeline in that dedicated space, it has a duty to maintain the easement. Thus, Hidalgo County gets all of the benefits of the dedication with none of the obligations. Exactly what did Hidalgo County receive from MVP Properties, LLC for the abandonment? It may lose gas service as a result, or its residents may suffer increased cost of service for it.

The Commissioners’ consideration of MVP’s request was not a court proceeding. This body acts legislatively and it can vacate a prior order. In that regard, the Commissioners have a right to all the information necessary to make an informed decision. Since the Commissioners were not given this information by MVP, the Commissioners have a right to take whatever action it deems necessary, including vacating or modifying the Abandonment Order, to ensure that its administrative decision was an informed one.

Finally, MVP continually makes the assertion that neither the County, nor MVP owed any duty to Texas Gas Service as it is a “trespasser.” However, MVP’s justification for not telling this Court about Texas Gas Service’s pipeline is because it alleges Texas Gas Service is a trespasser *even though there was no finding* as such. Incredibly, MVP later utilized the Abandonment Order *to argue to the State District Court that Texas Gas Service was a trespasser*. In fact, Texas Gas Service has a number of legal bases for its occupation of the subsurface of the roadway easement across MVP’s land. Some of these were explained in Texas Gas Service’s presentation on Tuesday, but because of time constraints, not all were discussed. Texas Gas Service’s rights exist from the Dedication, from the Franchise Agreement and, in part,

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from the express easement across a portion of MVP's property. In addition, Texas Gas Service also has existing rights under the legal doctrines of easement by implied grant and easement by estoppel.

MVP cannot legitimately complain if the Abandonment Order is vacated or modified. MVP failed to disclose to the Commissioners Court the existence of the Pipeline. It submitted a survey that hid the existence of the pipeline even though MVP knew full well of its presence, and by later seeking to justify its behavior by arguing it "owed no duty to a trespasser". Texas Gas was not trespassing, but MVP owed a duty nevertheless to this Commissioners Court to be open, transparent and forthright. The information Texas Gas provided in its presentation clearly demonstrates that MVP did not live up to its obligations in this regard.

In closing, Texas Gas Service respectfully requests that the Commissioners vacate or modify the Abandonment Order, or, at the very least, clarify the Abandonment Order to reflect that nothing in the Abandonment Order was intended to, or does affect, the subsurface rights of Texas Gas Service.

Texas Gas Service is appreciative of this opportunity to be heard, and looks forward to meeting with the Commissioners on June 9, 2105. As a long time provider to Hidalgo County, and itself a taxpayer which employs a number of employees in Hidalgo County and many throughout the Rio Grande Valley, Texas Gas Service values its relationship with this Commissioners Court.

Sincerely,



Millard A. Johnson

Enclosures

cc: Mr. Raul Medina

Via Email

Mr. Steve Crain

Via Facsimile: (956) 686-6109