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APPLICATION OF THE CITY OF §
CIBOLO 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 STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 7
GRANTING IN PART AND DENYING IN PART
THE CITY OF CIBOLO'S MOTION FOR PARTIAL SUMMARY DECISION

In its Supplemental Preliminary Order, the Public Utility Commission of Texas (Commission) identified three issues to be addressed in this case:

9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding? -TWC [Texas Water Code] § 13.254(c).
10. What property of Green Valley, if any, has Cibolo requested be transferred to it? TWC § 13.254(c).
11. Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification and the property that Cibolo has requested be transferred?¹

As the parties stipulated, this case is bifurcated and the first stage (Stage I) addresses only Issues 9-11.²

On November 8, 2016, the City of Cibolo (Cibolo or the City) filed a motion for partial summary decision (Cibolo's Motion) regarding Issues 9 and 10.³ On December 2, 2016, the

¹ Supplemental Preliminary Order (Jul. 20, 2016) at 4-5. The above references in that order to TWC § 13.254 are typographical errors and should refer to § 13.255.

² SOAH Order No. 2 (Aug. 22, 2016) at 1.

³ City of Cibolo's Motion for Partial Summary Decision (Nov. 8, 2016).

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Commission staff (Staff) filed a reply (Staff's Reply).⁴ On December 5, 2016, Green Valley Special Utility District (Green Valley) filed its response to Cibolo's Motion and Staff's Reply (Green Valley's Response).⁵ On December 7, 2016, Staff filed a sur-reply to Green Valley's Response and Green Valley filed a response to Staff's sur-reply.⁶ The ALJs have not considered the December 7, 2016 filings because Commission rules and orders in this case do not provide for them.

I. CIBOLO'S MOTION REGARDING ISSUE 10

Green Valley does not oppose Cibolo's Motion regarding Issue 10 and stipulates that Cibolo has not requested Green Valley to transfer any Green Valley property to Cibolo. The parties' pleadings regarding Cibolo's Motion indicate that point is uncontested. Cibolo's Motion regarding Issue 10 is thus **GRANTED**. The Proposal for Decision will include a finding of fact that Cibolo has not requested Green Valley to transfer any Green Valley property to Cibolo. As discussed below, the ALJs deny Cibolo's Motion regarding Issue 9. The remaining issues in Stage I of this case thus are:

9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding? TWC § 13.255(c)~~13.254(e)~~.
11. Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification ~~and the property that Cibolo has requested be transferred?~~

⁴ Commission Staff's Reply to Cibolo's Motion for Partial Summary Decision (Dec. 2, 2016).

⁵ Green Valley SUD's Response to City of Cibolo's Motion for Partial Summary Decision and Commission Staff's Reply to Cibolo's Motion (Dec. 5, 2016). Green Valley's Response was timely. SOAH Order No. 4 (Nov. 14, 2016).

⁶ Commission Staff's Sur-Reply to Green Valley SUD's Response to City of Cibolo's Motion for Partial Summary Decision (Dec. 7, 2016); Green Valley SUD's Response to Staff's Sur-Reply to Cibolo's Motion for Partial Summary Decision (Dec. 7, 2016).

II. CIBOLO'S MOTION REGARDING ISSUE 9

A. Legal Standard For Summary Decision

In ruling on Cibolo's Motion, the ALJs apply the Commission's rule and case law relating to summary decision. The ALJs "may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion."⁷ The movant has the burden to demonstrate that this standard has been met.⁸ The motion "shall specifically describe the facts upon which the request for summary decision is based, the information and materials that demonstrate those facts, and the laws or legal theories that entitle the movant to summary decision."⁹ A party opposing the motion "shall show, by affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record, that there is a genuine issue of material fact for determination at the hearing, or that summary decision is inappropriate as a matter of law."¹⁰ A movant that conclusively negates at least one essential element of a claim is entitled to summary decision on that claim.¹¹ The ALJs take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor.¹²

⁷ 16 Tex. Admin. Code (TAC) § 22.182(a).

⁸ 16 TAC § 22.182(b).

⁹ 16 TAC § 22.182(b).

¹⁰ 16 TAC § 22.182(c).

¹¹ *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

¹² *Southwestern Elec. Power Co.*, 73 S.W.3d at 215.

B. ALJs' Analysis of Cibolo's Motion Regarding Issue 9

For reasons discussed below, Cibolo's Motion regarding Issue 9 is **DENIED**. Cibolo has not met its burden to show that, as a matter of law, Green Valley does not have property that the decertification sought by Cibolo will render useless or valueless to Green Valley. Cibolo's Motion asserts two grounds for summary decision regarding Issue 9—that, as a matter of law:

- On March 8, 2016, Green Valley did not have “property” as that term relates to Issue 9; and
- The decertification sought by Cibolo did not render any property of Green Valley useless or valueless to Green Valley because, pursuant to a Texas Commission of Environmental Quality (TCEQ) rule, it had no use or value anyway.

Before addressing those two grounds, the ALJs discuss three threshold issues raised by the pleadings regarding Cibolo's Motion.

1. Threshold Issues

Argument that Cibolo's Motion is Premature. Green Valley's interpretation that the Commission's summary decision rule precludes consideration of Cibolo's Motion before the hearing is unpersuasive. Green Valley has been able to conduct discovery for approximately 7½ months, since its April 22, 2016 motion to intervene.¹³ The parties have prefiled their direct cases; the ALJs have ruled on objections to them; and the hearing is set for January 17-18, 2017, barely a month from now. Green Valley has had ample time to submit pleadings, affidavits, materials obtained by discovery or otherwise, admissions, and prefiled testimony, and to request official notice of matters, for the ALJs to consider in ruling on Cibolo's Motion. In addition, that the Commission's summary decision rule includes “evidence of record” in its list of materials parties may submit allows a party to seek summary decision at or after the hearing based on evidence of record. The rule does not prohibit summary decision from being granted before the

¹³ 16 TAC § 22.104(c).

hearing. If it did, there would be no reason for it to list affidavits, discovery, and other materials (in addition to evidence of record) as materials that may be considered in ruling on a motion for summary decision. Moreover, Green Valley's interpretation would deprive the summary decision procedure of much of its value, which is to curtail litigation of an issue as soon as it is clear that an issue can be decided as a matter of law.

Burden of Production. Cibolo and Staff complain about Green Valley's failure to make various showings regarding its property. Those matters are discussed later in this order in rejecting the first ground of Cibolo's Motion regarding Issue 9. The ALJs discuss generally below the burden of production applicable to issues addressed at the hearing.

SOAH Order No. 2 states:

The parties also provided argument regarding assignment of the burden of proof in this matter. Based on the argument of the parties, 16 Texas Administrative Code § 24.12, and 1 Texas Administrative Code § 155.427 the Administrative Law Judge (ALJ) assigns the burden of proof in both stages of this case to the City, because it is the applicant in this proceeding.¹⁴

As SOAH Order No. 2 indicates, as the applicant, Cibolo has the burden of persuasion, which never shifts. Cibolo also has the initial burden of production. If Cibolo makes a *prima facie* case that Green Valley has no property that the decertification will render useless or valueless to Green Valley, the burden of production shifts to Green Valley to show that it has such property.¹⁵

In that regard, the following definitions apply:

¹⁴ SOAH Order No. 2 (Aug. 19, 2016) at 1.

¹⁵ See, e.g., *Complaint of Harris County Hospital District against Southwestern Bell Telephone, LP d/b/a AT&T Texas*, SOAH Docket No. 473-09-5914, PUC Docket No. 36361, Order No. 21 (Sep. 27, 2010) (*Complaint of Harris County Order No. 21*). Two factors listed in 1 TAC § 155.427 are "the parties' relative access to and control over information pertinent to the merits of the case" and "whether a party would be required to prove a negative." Compared to Cibolo, Green Valley has greater access to and control over information relating to Green Valley's property. In addition, the legal principle that, if Cibolo makes a *prima facie* case, the burden of production shifts to Green Valley to show it has property that the decertification will render useless or valueless avoids requiring Cibolo to prove a negative.

- “Burden of persuasion” means a party’s duty to persuade the fact finder by a preponderance of the credible evidence to make findings favorable to that party.¹⁶
- “Burden of production” (also referred to as the “burden of going forward with evidence”) means a party’s duty to introduce evidence into the record.¹⁷
- “*Prima facie* case” means the minimum amount of evidence sufficient to support a claim until contradicted and overcome by other evidence.¹⁸

Date as of which Green Valley Must Have Property for It to be Considered Regarding Issue 9. As discussed below, Green Valley admits that on March 8, 2016, it had no existing sewer infrastructure within its sewer certificated area. Cibolo’s Motion states: “The March 8, 2016 date is significant because that was the date that the City filed the Application with the Commission.”¹⁹ The ALJs request that the parties confer about whether the date on which Green Valley must have owned “property” for it to be considered in deciding Issue 9 is a contested issue. If it is, they should include legal argument on it in their initial post-hearing briefs. If it is not, they should file a stipulation on it before the hearing.

2. Asserted Ground for Summary Decision Relating to the Definition of “Property”

The parties agree that Green Valley’s certificate of convenience and necessity is not “property” within the meaning of Issue 9. The ALJs concur.

¹⁶ *Complaint of Harris County* Order No. 21, citing Black’s Law Dictionary, 8th Ed. (2004).

¹⁷ *Complaint of Harris County* Order No. 21, citing Black’s Law Dictionary, 8th Ed. (2004).

¹⁸ *Complaint of Harris County* Order No. 21, citing *Town of Fairview v. City of McKinney*, 271 S.W.3d 461, 467 (Tex. App. – Dallas 2008, pet. denied); *Complaint of Intellicall, Inc. et al Against Private Coin Phone Rates and Practices of Southwestern Bell Telephone Company*, 12 P.U.C. Bulletin 1585, P.U.C. Docket Nos. 7122, 7123, 7124, and 7125, Order on Appeal of Order No. 6 (Dec. 9, 1986).

¹⁹ Cibolo’s Motion at 5.

Green Valley states that its appraisal filed June 18, 2016, includes all of its real and personal property that the decertification would render useless or valueless.²⁰ Cibolo's Motion and Staff's Reply seek summary decision regarding Issue 9 based on Green Valley admissions that:

- On March 8, 2016, Green Valley had no existing sewer infrastructure in the area to be decertificated.²¹
- On March 8, 2016, Green Valley had not entered into any agreements regarding the design or construction of sewer infrastructure within the area to be decertificated.²²
- The only wastewater asset Green Valley identified that is in the area to be decertificated or that supports identified wastewater facilities is 65 acres of land Green Valley purchased to construct a regional treatment facility, which is outside the area to be decertificated. Green Valley admits that the land will not be rendered useless and valueless upon decertification.²³
- Green Valley does not currently operate a sewer system anywhere.²⁴

Green Valley argues that Issue 9 is not appropriate for summary decision, noting that the Commission's Supplemental Preliminary Order in this case refers to that issue as "factually intensive, lending itself to the contested-case process at SOAH."²⁵ Green Valley observes that the prefiled testimony of its witness Joshua Korman discusses Green Valley property that it contends the decertification would render useless or valueless.²⁶ Green Valley cites a Texas Supreme Court holding that:

²⁰ Response to Cibolo's Request for Information (Green Valley's RFI Response) 2-22.

²¹ Green Valley's Admission 1-4. Cibolo states that the area to be decertificated is shown in a map attached to Cibolo's Motion as Exh. City-MSD-1.

²² Green Valley's Admission 2-24.

²³ Green Valley's RFI Responses 1-10, 2-27; Green Valley's Admission 2-10.

²⁴ Green Valley's Admissions 1-1, 1-3, 1-4; Green Valley's RFI Response 2-15.

²⁵ Supplemental Preliminary Order at 2.

²⁶ Direct Testimony and Exhibits of Joshua M. Korman (Nov. 2, 2016).

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 which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal."²⁷

Green Valley quotes TWC provisions discussed below and cites the legislative history of TWC § 13.255, about which the bill's sponsor, Representative Hinojosa, explained:

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.²⁸

After review of the materials and legal authorities cited or supplied in the pleadings regarding Cibolo's Motion, the ALJs conclude that the definition of a retail public utility's "property" that decertification would render useless or valueless is sufficiently broad that, with respect to the first ground for summary decision regarding Issue 9, there remains a genuine issue as to a material fact and Cibolo is not entitled to a decision in its favor as a matter of law. TWC § 13.255 provisions relevant to that definition include the following:

The utility commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. . . .²⁹

For the purpose of implementing this section, 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; the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the

²⁷ *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 200 (citations omitted).

²⁸ Green Valley Response Att. B (Senate Committee Meeting on HB 2035 (70th Leg., R.S. 1987)).

²⁹ TWC § 13.255(c). *See also* 16 TAC § 24.120(c).

compensation to a retail public utility is just and adequate, shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt, 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 outside the incorporated or annexed area 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 single certification, the impact on future revenues lost from existing customers, necessary and reasonable legal expenses and professional fees, factors relevant to maintaining the current financial integrity of the retail public utility, and other relevant factors.³⁰

TWC § 13.002 contains this definition:

“Facilities” means 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

In determining the meaning of “property” for purposes of Issue 9, the ALJs considered the principles of statutory construction. For example, words and phrases are read in context and construed according to the rules of grammar and common usage; the word “shall” imposes a duty; and a statute is construed with the presumption that the Legislature intended the entire statute to be effective.³² Although Phase I of this case does not include determining the amount, if any, of compensation owed, for the Commission to fulfill its duties under TWC § 13.255, “property” must be construed broadly enough to include items the statute lists as compensable if other requirements (such as that decertification renders them useless or valueless) are met. The ALJs also took into account that the precise meanings of “property,” “useless,” and “valueless” are not yet clear and the Commission will likely clarify them after further development of the issues in cases like this.

³⁰ TWC § 13.255(g). *See also* 16 TAC § 24.120(g).

³¹ TWC § 13.002(9). *See also* 16 TAC § 24.3(26).

³² Tex. Gov’t Code chapter 311 (Code Construction Act), §§ 311.011(a), 311.016(2), 311.021(2).

3. Asserted Ground for Summary Decision Relating to Effect of the Decertification

The second ground for summary decision regarding Issue 9 is Cibolo's contention that, as a matter of law, 30 TAC chapter 351, subchapter F prohibits Green Valley from collecting, transporting, treating, and disposing of/discharging wastewater generated within the area to be decertificated. 30 TAC § 351.62 states: "The Cibolo Creek Municipal Authority [CCMA] is designated the governmental entity to develop a regional sewerage system in that area of Cibolo Creek Watershed, in the vicinity of the cities of Cibolo, Schertz, Universal City, Selma, Bracken, and Randolph Air Force Base."³³ Cibolo concludes that any Green Valley property that is or pertains to a regional sewerage system to collect, transport, treat, or discharge wastewater from the portion of the Cibolo Creek Watershed in Cibolo's vicinity (CCMA Regional Area) cannot be rendered useless or valueless to Green Valley due to the decertification because it cannot be used for such purposes in the CCMA Regional Area.

As support for that contention, Cibolo cites the prefiled direct testimony of its witness Rudolph (Rudy) Klein, IV, P.E. Cibolo argues that there is no summary decision proof contradicting his conclusions that the area to be decertificated is within the Cibolo Creek Watershed, in the vicinity of Cibolo, and within Cibolo's corporate limits, and thus that CCMA is the sole TCEQ-regional wastewater entity for the area to be decertificated.³⁴ Cibolo cites a Green Valley admission that a small part of the area to be decertificated is within the Cibolo Creek Watershed and most is within the Santa Clara Watershed.³⁵ Cibolo submitted a map from the Texas Parks and Wildlife Department website as indicating that the Santa Clara Creek Watershed is a smaller portion of the Cibolo Creek Watershed.³⁶ Cibolo concludes that "as a matter of law, any property related to developing a 'sewerage system' in the area to be

³³ Cibolo Motion Exh. City-MSD-3.

³⁴ Cibolo Motion Exh. City-MSD-4 at Bates 36-38 (Direct Testimony of Rudolph "Rudy" F. Klein, IV, P.E., on Behalf of City of Cibolo (Oct 19, 2016)).

³⁵ Green Valley's RFI Response 2-20.

³⁶ Cibolo Motion Exh. City-MSD-4 at Bates 39.

decertified cannot be rendered useless or valueless by the decertification because it was never useful or valuable to begin with.”³⁷

The ALJs find unconvincing Green Valley’s argument that the Commission lacks jurisdiction to address Cibolo’s second ground for summary decision. The Legislature imposed on the Commission a duty to determine what Green Valley property, if any, the decertification will render useless or valueless to Green Valley. The Commission thus has authority to decide whether developments at TCEQ, rather than the decertification, render Green Valley property useless or valueless.

Regarding the merits of Cibolo’s second ground for summary decision, Green Valley discusses its application pending at TCEQ.³⁸ Green Valley states that since August 2015, Cibolo has argued in that proceeding that CCMA is the only entity that may provide service in the area to be decertified. According to Green Valley, TCEQ’s Executive Director (ED) recommended rejecting that argument. For example, the ED stated:

CCMA commented that Green Valley SUD’s application violates title 30, chapter 351, subchapter F of the Texas Administrative Code because Green Valley SUD seeks to obtain a permit to discharge domestic wastewater effluent within area where only CCMA is authorized to obtain a permit related to discharging domestic wastewater effluent. The cities of Cibolo and Schertz supported this comment . . .

CCMA’s questions regarding the proposed permit suggest that if a facility’s service area overlaps its own service area, then chapter 351 applies. Assuming what CCMA refers to as its service area is the Cibolo Creek regional area as that area is defined in chapter 351, the ED disagrees that the service area’s location is the appropriate method for determining if chapter 351 applies. . . . Therefore, the location of the discharge point is what determines if chapter 351 applies, not the location of the proposed service area. . . .

³⁷ Cibolo Motion at 7.

³⁸ *Application from Green Valley Special Utility District (SUD) for New Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ1536001*, TCEQ Docket No. 2016-1876-MWD (pending).

Green Valley SUD intends to discharge into Santa Clara Creek, not Mid Cibolo Creek. Therefore, chapter 351, subchapter F does not apply to this application.³⁹

The ED also characterized as "a mixed issue of fact and law" whether 30 TAC title 30, chapter 351, subchapter F prohibits TCEQ from issuing the proposed permit and recommended referring that issue to SOAH for hearing.⁴⁰ While conceding that TCEQ might not adopt the ED's position, Green Valley argues that the issue is not as cut and dried as Cibolo contends.

After review of the materials and legal authorities cited or supplied in the pleadings regarding Cibolo's Motion, the ALJs conclude that, regarding Cibolo's second ground for summary decision regarding Issue 9, there remains a genuine issue as to a material fact and Cibolo is not entitled to a decision in its favor as a matter of law.

SIGNED December 9, 2016.



ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

³⁹ Green Valley Response, Att. A (ED's Response to Public Comment at 3, 5-6).

⁴⁰ Green Valley Response, Att. A (ED's Response to Hearing Requests and Request for Reconsideration at 7).