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# State Office of Administrative Hearings



Lesli G. Ginn  
Chief Administrative Law Judge

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May 30, 2017

TO: Stephen Journeay, Director  
Commission Advising and Docket Management  
William B. Travis State Office Building  
1701 N. Congress, 7th Floor  
Austin, Texas 78701

VIA FACSIMILE 512/936-7209

RE: SOAH Docket No. 473-16-5296.WS  
PUC Docket No. 45702

*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*

On April 28, 2017, the undersigned Administrative Law Judge (ALJ) issued the Proposal for Decision (PFD) in this case. On May 12, 2017, the City of Cibolo (Cibolo) and Green Valley Special Utility District (Green Valley) filed exceptions to the PFD. On May 22, 2017, Cibolo, Green Valley, and the Public Utility Commission of Texas (Commission) staff (Staff) filed replies to exceptions. All filings were timely.

After reading the exceptions and replies to exceptions, the ALJ makes a few minor changes and additions to the PFD's Findings of Fact (FFs) and Conclusions of Law (CLs). To the extent this letter does not mention a party's exceptions, they are not adopted because the ALJ considered them in writing the PFD, which adequately supports the ALJ's recommendation.

## Cibolo's Exceptions

In discussing FFs, CLs, and ordering paragraphs (OPs) that Cibolo proposes be added, this letter uses the numbering in Cibolo's exceptions.<sup>1</sup>

<sup>1</sup> The Commission might prefer to add a letter (e.g., 54A instead of 54) to place the added FF, CL, or OP where it belongs and to avoid renumbering.

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### *FFs*

The ALJ agrees with Cibolo's proposed changes correcting errors in FF Nos. 18 and 51. (Green Valley's exceptions at 2 n. 2 note the same error in FF No. 18.)

The ALJ agrees with Cibolo's proposed FF No. 57, which is supported by the evidence and provides additional support for the ALJ's recommendation.

The ALJ agrees with adding the first sentence of Cibolo's proposed FF No. 58, but the second sentence duplicates FF Nos. 51-53.

The ALJ does not oppose adding Cibolo's proposed FF Nos. 54 and 56 if they are modified to read as follows, to better fit what the evidence cited in those exceptions proves:

54. Green Valley is not a party to any wholesale wastewater treatment agreements that are currently in effect.<sup>2</sup>
56. Green Valley has not submitted to TCEQ designs for a wastewater treatment facility or wastewater collection system and does not have final approval from TCEQ for such a facility or system.<sup>3</sup>

The ALJ does not accept the following FFs proposed by Cibolo:

- FF No. 55, because "infrastructure" was not clearly defined and, as discussed in the PFD, the ALJ rejects Cibolo's argument that "property" is limited to infrastructure;
- FF Nos. 59 and 60, because they relate to a Cibelo argument—that a special utility district (SUD) cannot be compensated for lost net revenues because they are profits, which SUDs are not allowed to make from their customers—that was not the basis for the ALJ's recommendation; and
- FF Nos. 61 and 62, because potential wastewater customers can always use septic systems instead of the wastewater utility's service—Green Valley is not unusual in that regard—and the FFs already address Green Valley's lack of existing wastewater customers.<sup>4</sup>

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<sup>2</sup> Request for Information Response Nos. 1-11, which Cibolo cites as supporting this FF, is in Cibolo Ex. 1 at 563.

<sup>3</sup> Request for Admission Response Nos. 2-4 to 2-9, which Cibolo cites as supporting this FF, are in Cibolo Ex. 1 at 573-74.

<sup>4</sup> Cibolo's proposed FF Nos. 59-62 are also phrased broadly enough that they might be interpreted as precluding compensation under facts not present in this case. The ALJ recommends deciding this case on the narrower grounds recommended in the PFD.

### *CLs*

The ALJ agrees with Cibolo's proposed change to CL No. 11 and does not oppose Cibolo's proposed addition to CL No. 14.

The ALJ agrees with Cibolo's proposed CL No. 20 but, to conform to the other FFs and CLs, would rephrase it to read: "Green Valley's expenditures to purchase the Land are not property. TWC § 13.255(c); *Celina* Order Conclusion of Law No. 7A."

The ALJ agrees with Green Valley, however, that Cibolo's proposed CL No. 21 is an FF, not a CL. Its subject matter is already addressed in FF Nos. 28 and 54.

### *OPs*

Cibolo's proposed OPs seem to contemplate that the Commission will issue a final order upon completion of this phase. The PFD's proposed OPs assume instead that the Commission will issue a final order after all phases are completed. Which procedure to use, and some of the subject matter in Cibolo's proposed OPs, were not issues referred to the State Office of Administrative Hearings (SOAH) and thus are not addressed here.

The ALJ agrees with Green Valley that Cibolo's proposed OP No. 5 is not an OP. Its subject matter is already addressed in PFD FF Nos. 28 and 54.

Regarding Cibolo's proposed OP No. 8, there is no need to remand Preliminary Order Issue Nos. 1-8 to the Commission because they were never referred to SOAH.

### **Green Valley's Exceptions**

As stated above, Green Valley's exceptions at 2 n. 2 point out an error also raised in Cibolo's exceptions, which the ALJ recommends be corrected. The ALJ makes no other changes to the PFD in response to Green Valley's exceptions. Most of those exceptions are not mentioned here because the PFD addresses them adequately. On some issues, Green Valley's exceptions ignore or mischaracterize some bases for the ALJ's conclusions, which are instead those stated in the PFD. Green Valley's exceptions that are beyond the scope of the first-phase issues referred to SOAH are also not discussed here. Regarding Green Valley's exceptions, the ALJ makes a few comments below.

Green Valley's exceptions at 1 assert that "the PFD offers very little analysis of the merits of the record evidence . . . ." The ALJ disagrees. If Green Valley is referring to its experts' views on the law, as the PFD states, none of the parties' expert witnesses was an attorney; their testimony discussing law relevant to this case was not admitted as testimony of a legal expert; and the PFD's key recommendations are based on the ALJ's application of the law to uncontested facts.

Green Valley's exceptions at 5 state that the PFD relies virtually exclusively on the Commission's order in *Celina*.<sup>5</sup> The PFD cites a number of legal and factual bases and arguments by the parties here in reaching its conclusions. As Staff notes in its reply to exceptions, Green Valley cites no legal authority showing that, until the rehearing period has expired, an order signed by the Commissioners must be denied any precedential effect. If the Commission on rehearing reverses its order in *Celina*, the Commission may rule in this case in a manner consistent with such reversal.

Green Valley's exceptions at 10 object to "the PFD's discussion to the extent it could be read to preclude legislative history from being used as a tool to inform the meaning of the statutory language." The ALJ considered all applicable principles of statutory construction. As discussed in the PFD, Green Valley cited remarks by one legislator (the bill sponsor) that did not address how to define "property" but instead used that term and did not define it.

Green Valley's exceptions at 1 state: "Nor does the statute, constitutional provisions or applicable precedent prohibit allocated partial property losses, which losses will constitute the overwhelming majority of takings requiring compensation under the statutory decertification scheme." Green Valley's exceptions at 11 state: "The practical effect of such a standard would be no compensation in virtually every imaginary scenario, and the effect here is an unconstitutional taking." The PFD's conclusions are based on this case's facts. For example, Green Valley has no existing wastewater customers, wastewater treatment facilities, or wastewater collection systems, and the items at issue are not real property and are intangible items that lack the attributes of property.

Finally, the ALJ did not find, as stated in Green Valley's exceptions at 10-11, that a 2.2% reduction of the usefulness and value of the items listed by Green Valley is "insufficient to meet some unknown and unspecified threshold that triggers compensation." For a variety of reasons (some item-specific) discussed in the PFD, the ALJ found the evidence does not show that any of the items would be rendered useless or valueless to Green Valley because of the decertification.

With the changes discussed above, the PFD is ready for your consideration.

Sincerely,



Elizabeth Drews  
Administrative Law Judge

xc: All Parties of Record

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<sup>5</sup> *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, PUC Docket No. 45848, SOAH Docket No. 473-16-5011.WS, Order (Apr. 13, 2017).