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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
PUBLIC UTILITY COMMISSION
FILING CLERK

OF

ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 12
MEMORIALIZING PREHEARING CONFERENCE; DENYING MOTION
TO DISMISS OR ABATE; ADOPTING PROCEDURAL SCHEDULE;
AND STATING RECORD CLOSE DATE

On June 29, 2017, the Public Utility Commission of Texas (Commission) issued an Interim Order ruling on first-phase issues in this case and referring second-phase issues to the State Office of Administrative Hearings (SOAH). On August 10, 2017, the Administrative Law Judge (ALJ) convened a prehearing conference, at which all parties appeared through their attorneys. This order relates to matters discussed at the prehearing conference.

I. DENYING MOTION TO DISMISS OR ABATE

On August 3, 2017, in response to SOAH Order Nos. 10 and 11, the parties filed a Joint List of Issues. Their filing quotes Issue Nos. 1-8 listed in the Commission's June 30, 2016 Preliminary Order in this case, and further states that:

- The City of Cibolo (Cibolo) and the Commission staff (Staff) take the position that no other issues should be addressed in this second phase; but
- Green Valley Special Utility District (Green Valley) takes the position that the ALJ should also consider whether the Commission has jurisdiction over Cibolo's application, if Green Valley has a loan with the United States Department of Agriculture under 7 U.S.C. § 1926. Cibolo opposes that position.

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On August 9, 2017, Green Valley filed a Supplemental Plea to the Jurisdiction, Motion to Dismiss, and, in the Alternative, Motion to Abate (Motion). Exhibit A to the Motion is an opinion the Fifth Circuit issued on August 2, 2017, in *Green Valley Special Utility District v. City of Cibolo*, Cause No. 16-51282.

The Motion and attached Fifth Circuit opinion are related to an issue on which the Commission ruled in this case after briefing by the parties. The Commission's Preliminary Order states at 4:

At issue in this proceeding is the Legislature's explicit directive to the Commission that it "*shall* grant single certification to the municipality" that applies for single certification of an area that has been incorporated or annexed by the municipality. [Citing Texas Water Code (TWC) § 13.235(c); italics in the Preliminary Order]

...

Green Valley is seeking a federal district court ruling on whether § 1926(b) of the Federal Consolidated Farm and Rural Development Act bars Cibolo from applying to this Commission for single certification to provide sewer service in a portion of Green Valley's service area. Unlike the Commission, that forum has the authority to determine whether federal law preempts a statute enacted by the Legislature. Unless Cibolo withdraws its application here—**or a court orders otherwise**—the Commission must comply with the statutory duties and timelines mandated by the Legislature.

Consistent with the discussion above, the Commission concludes that it does not have authority to determine whether § 1926(b) of the Federal Consolidated Farm and Rural Development Act federally preempts TWC § 13.255. Therefore the Commission may not deny an application under TWC § 13.255 solely on the basis that a retail public utility that holds a [certificate of convenience and necessity] for all or part of the requested service is also a holder of a federal loan made under section 1926(a) of the federal act.

Citing the phrase to which the ALJ added boldface above, Green Valley argues that the issue should be re-examined in light of the recent Fifth Circuit opinion attached to its Motion.

The Preliminary Order further states at 7:

The Commission's discussion and conclusions in this Order regarding threshold legal and policy issues should be considered dispositive of those matters. Questions, if any, regarding threshold legal and policy issues may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary

At the prehearing conference, the ALJ concluded she lacks jurisdiction to rule on the merits of issues raised in the Motion because they are outside the scope of the issues the Commission referred to SOAH.¹ For that reason, the ALJ **DENIES** the Motion. The ALJ also notes that at the prehearing conference, the parties agreed she should adopt their agreed procedural schedule and not abate the case pending a Commission decision relating to the Motion.

II. ADOPTING PROCEDURAL SCHEDULE

At the prehearing conference, the parties stated that: (1) they expect to resolve most of Issue Nos. 1-8 by stipulation; (2) the non-stipulated issues do not require additional evidence; and (3) no hearing on the merits is needed to address the second-phase issues. The following agreed procedural schedule is **ADOPTED**:

¹ After the ALJ stated that she lacks jurisdiction to rule on the merits of issues in the Motion, Cibolo argued she should issue an order denying the Motion on that basis, which Green Valley could appeal to the Commission; Green Valley argued she should instead certify the issue to the Commission; and Staff had no position on that point. The ALJ initially thought she should certify the issue, but on further reflection, concludes that certification is not necessary and that issuing an order Green Valley can appeal to the Commission is the more appropriate procedure in this instance.

Date/Deadline	Event
August 24, 2017	Staff files its recommendation on the sufficiency of Cibolo's application and the sufficiency of notice.
September 8, 2017	The parties jointly file a stipulation for each of Preliminary Order Issue Nos. 1-8 that are stipulated, and any related evidence.
September 15, 2017	The parties file their initial briefs regarding any Preliminary Order Issue Nos. 1-8 that are not stipulated.
September 22, 2017	The parties file their response briefs regarding any Preliminary Order Issue Nos. 1-8 that are not stipulated. The record closes.

SIGNED August 14, 2017.



ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS