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**PUC DOCKET NO. 45702
SOAH DOCKET NO. 473-16-5296.WS**

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APPLICATION OF CITY OF CIBOLO	§	BEFORE THE PUBLIC UTILITY
FOR SINGLE CERTIFICATION IN	§	
INCORPORATED AREA AND TO	§	COMMISSION OF TEXAS
DECERTIFY PORTIONS OF GREEN	§	
VALLEY SPECIAL UTILITY	§	
DISTRICT'S SEWER CERTIFICATE	§	
OF CONVENIENCE AND NECESSITY	§	
IN GUADALUPE COUNTY	§	

**GREEN VALLEY'S INITIAL BRIEF ON
CONTESTED SECOND PHASE HEARING ISSUES**

COMES NOW Green Valley Special Utility District ("Green Valley" or "GVSUD") and submits this Initial Brief on Contested Second Phase Issues. Pursuant to SOAH Order No. 13, this Initial Brief is timely filed.¹ In support, Green Valley shows as follows.

I. SUMMARY OF ARGUMENT

With limited exceptions, Green Valley, the City of Cibolo ("Cibolo") and Commission Staff ("Staff") have stipulated to the remaining Preliminary Order issues reserved to the second phase of this proceeding as urged by the ALJ.² Green Valley does not stipulate to the issues of:

- (a) whether Cibolo's August 18, 2015 "notice of intent" letter was sufficient to provide accurate information to Green Valley of the precise area that Cibolo seeks to decertify (Preliminary Order Issue No. 2);
- (b) whether the map accompanying both the City's "notice of intent" letter and its Application notice were sufficient to support a presiding officer determination of administrative completeness (Preliminary Order Issue No. 4); or

¹ SOAH Order No. 13 Granting Motion for Extension of Deadlines (Sep. 11, 2017).

² Joint Agreed Stipulations Concerning Remaining Referred Issues (Sep. 15, 2017). Green Valley clarifies that its stipulations as well as its entire participation in this docket is subject to and without waiving its June 22, 2016 Plea to the Jurisdiction and Motion to Dismiss (Docket Item No. 45) and its August 9, 2017 Supplemental Plea to the Jurisdiction, Motion to Dismiss, and, in the Alternative, Motion to Abate (Docket Item No. 146) based on federal grounds. Green Valley's interim appeal of SOAH Order No. 12 was denied by the Commission on August 31, 2017 by the Commission's failure to set the appeal for an open meeting agenda within the prescribed time set forth in PUC PROC. R. 22.123(b)(6)(A). For the record, Green Valley notes that shortly after the Commission's denial, the Fifth Circuit denied Cibolo's Petition for Rehearing En Banc. See September 1, 2017 Order on Petition for Rehearing En Banc in Cause No. 16-51282, *Green Valley Special Utility District v. City of Cibolo, Texas*, ("No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.").

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- (c) whether Cibolo has demonstrated that its public-drinking-water systems comply with the Texas Commission on Environmental Quality's ("TCEQ") minimum requirements for public-drinking-water systems (Preliminary Order Issue No. 5).

Green Valley respectfully submits that both Cibolo's 180-day notice of intent and its notice of Application were defective by virtue of the insufficient maps provided as part of both notices, and, as a result, Cibolo's application cannot be deemed either administratively complete or filed. With respect to Cibolo's compliance status with the TCEQ's minimum drinking water standards, Cibolo has yet to produce evidence establishing its compliance. Until it does so, Cibolo's Application must be denied pursuant to the plain wording of TWC § 13.255 and 16 TAC § 24.120.

II. ARGUMENT

A. Cibolo's Inaccurate and Misleading Maps Render both its Notice of Intent and Notice of Application Insufficient to Support a Finding of Administrative Completeness (Preliminary Order Issue Nos. 2 and 4).

Green Valley briefed its position regarding the adequacy of Cibolo's 180-day notice letter and Notice of Application in Green Valley's August 31, 2017 Response to Staff's August 24, 2017 Recommendation on Administrative Completeness.³ Green Valley incorporates herein its August 31, 2017 Response and accompanying exhibits for all purposes. To summarize Green Valley's position, both Cibolo's pre-Application 180-day notice and Application notices were deficient and should not be found administratively complete or filed as the result of an inaccurate and misleading map made part of both required notices.⁴ Because notice is jurisdictional,⁵ the Application should

³ Green Valley Response to Staff Recommendation on Administrative Completeness (Aug. 31, 2017) (Docket Item No. 155).

⁴ P.U.C. SUBST. R. 24.8(b), (d).

⁵ *Appeal of Pelican Bay Util. Co. from the Rate Ordinance of the City of Pelican Bay*, 11 PUC Bull. 704 (Sep. 1985) ("Under Texas law, when a statute requires notice, the requirement is jurisdictional, and lack of notice renders an order void.") (citing *Kerrville Bus Co. v. Continental Bus System*, 208 S.W.2d 586, 589 (Tex. Civ. App. – Austin 1947, writ ref'd n.r.e.)).

be subject to the same heightened scrutiny as other Commission CCN applications.⁶ Further, the Commission should not condone the City's presented maps as sufficient here, particularly in light of the Commission's recognition of the importance of clearly identifying the requested area reflected in its recent amendment of PUC SUBST. R. 24.120.⁷ Similarly, for the application itself, 16 TAC § 24.120(G)-(I) now includes very specific mapping and identification requirements for requested area(s). The Commission should require Cibolo to restart the Application process by providing sufficient, accurate notice of intent to decertify specific portions of Green Valley's wastewater CCN service area, followed by a corresponding application map after the required 180-day period. Until that happens, Cibolo's Application may not reasonably be declared administratively complete or "filed."⁸

B. Green Valley Cannot Stipulate that Cibolo Has Met its Burden of Proof to Establish its Compliance with TCEQ Minimum Drinking Water Requirements.

Texas Water Code § 13.255(m) mandates that "[t]he utility commission *shall* deny an application for single certification by a municipality that fails to demonstrate compliance with the commission's minimum requirements for public drinking water systems." (emphasis added). In turn, the TWC Chapter 13 Definitions provide that: (1) "Commission means the Texas Commission on Environmental Quality"⁹ and (2) "Utility Commission means the Public Utility Commission of Texas."¹⁰ Thus, a plain reading of TWC § 13.255(m) imposes a requirement that the PUC deny an application for certification if the municipality has failed to demonstrate compliance with the TCEQ minimum public drinking water system requirements. Importantly,

⁶ See 16 TAC § 24.119.

⁷ See 16 TAC § 24.120(c)(1).

⁸ 16 TAC § 24.8(d).

⁹ TEX. WATER CODE § 13.002(5) (internal quotations omitted).

¹⁰ *Id.* at § 13.002(22-a) (internal quotations omitted).

such compliance must be determined by the TCEQ and not the PUC as this request does not pertain in any way to an applicant municipality's compliance with PUC rules. The applicant is either compliant with TCEQ rules or it is not according to the TCEQ.

The Commission recognized the mandatory nature of this requirement in its Preliminary Order,¹¹ in which it considered the parties brief on threshold legal and policy questions. Noting that the TWC § 13.255(m) mandate “is not limited by any other language in the section,”¹² and adopting as “the better argument” that “the Legislature intended to protect the public interest by requiring a municipality to show it is in compliance with public-drinking-water requirements before the municipality is entitled to expand any of its services areas,”¹³ the Commission designated the following Preliminary Order Issue:

5. Has Cibolo demonstrated that its public-drinking-water systems comply with TCEQ's minimum requirements for public-drinking-water systems? TWC § 13.255(m) and 16 TAC § 24.120(n).¹⁴

The then-effective 16 TAC § 24.120(n) required:

[t]he commission shall deny an application for single certification by a municipality that *fails to obtain a finding from TCEQ* that it is [sic] will demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems, pursuant to 30 TAC Chapter 290, Subchapter D (relating to Rules and Regulations for Public Water Systems). (emphasis added).

To date, Cibolo has “failed to obtain a finding from TCEQ,” or at the very least has not provided the required finding to the parties or submitted such as evidence in this docket as required under the version of 16 TAC § 24.120 in effect at the time Cibolo submitted its application and the Commission issued its Preliminary Order. Nor has Cibolo complied with the recently-adopted revised 16 TAC § 24.120(e), which requires in pertinent part:

¹¹ Preliminary Order (June 30, 2016) (Docket Item No. 53).

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ Preliminary Order at 6.

The application shall include all of the information listed in this paragraph.... (E) The application *shall demonstrate compliance* with the TCEQ's minimum requirements for public drinking water systems if the municipality owns a public drinking water system." (emphasis added)¹⁵

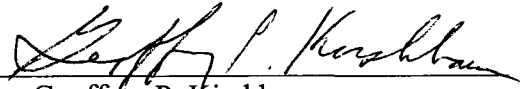
As of the date of this Initial Brief, Cibolo has failed to offer evidence of its TCEQ water-system compliance applying either standard and has thus not met its burden of proof. Based solely on this lack of evidence to date, Green Valley is unable to stipulate as to Cibolo's compliance. Further doubt as to Cibolo's compliance is raised by publicly-posted outstanding violations of TCEQ drinking water standards. As reflected in **Exhibit A**, a true and correct printout of the TCEQ Central Registry for the City of Cibolo's public water system as of September 21, 2017, Cibolo appears to have three outstanding violations. While Green Valley anticipates that Cibolo will argue that these violations are resolved, Cibolo bears the burden of proof on these issues as reflected in TWC § 13.255 and PUC rules. If Cibolo fails to meet its burden, the plain, mandatory language of TWC § 13.255 and 16 TAC § 24.120 must be applied and Cibolo's application denied.

II. CONCLUSION AND PRAYER

Green Valley SUD respectfully requests the Honorable Administrative Law Judge issue a Proposal for Decision on Second Phase issues recommending that Cibolo's application be rejected as administratively incomplete and/or denied because: (1) Cibolo's 180-day notice of intent and notice of application are inadequate, precluding the Application from being found administratively incomplete and, therefore, not even "filed"; and (2) Cibolo has failed to meet its burden of proof to establish that it is in compliance with the TCEQ state minimum requirements for public-drinking-water systems. Green Valley SUD further requests that it be granted all other relief to which it is justly entitled.

¹⁵ The current version of 16 TAC § 24.120 became effective May 28, 2017.

Respectfully submitted,

By: 

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**ATTORNEYS FOR GREEN VALLEY SPECIAL
UTILITY DISTRICT**

CERTIFICATE OF SERVICE

I hereby CERTIFY that on September 22, 2017, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

David Klein
Christie Dickenson
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Austin, Texas 78701

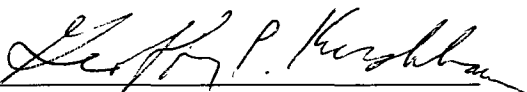
via fax to: (512) 472-0532

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ATTORNEY FOR COMMISSION STAFF


Geoffrey P. Kirshbaum



Central Registry

The Customer Name displayed may be different than the Customer Name associated to the Additional IDs related to the customer. This name may be different due to ownership changes, legal name changes, or other administrative changes.

Detail of: **Public Water System/Supply Registration 0940018**

For: **CITY OF CIBOLO (RN101278455)**

FM 78 4 MILES E OF FM1604

Registration Status: **ACTIVE**

Held by: **City of Cibolo (CN600705719)** View 'Issued To' History
N/A

Mailing Address: Not on file

EXHIBIT

A

Notice of Violations Current TCEQ Rules

NOV Date	Status	Citation/Requirement Provision	Allegation	Classification	Self Reporting Indicator
04/27/2017	ACTIVE	30 TAC Chapter 290, SubChapter D 290.42(l) (Not applicable to CH)	Failure to provide a plant operations manual.	MODERATE	NO
04/27/2017	ACTIVE	30 TAC Chapter 290, SubChapter D 290.45(f)(1) (Not applicable to CH)	Failure to provide an adequate purchase water contract.	MODERATE	NO
04/27/2017	ACTIVE	30 TAC Chapter 290, SubChapter D 290.46(n)(1) ; 30 TAC Chapter 290, SubChapter D 290.46(n)(3) (Not applicable to CH)	Failure to provide as-built plans or record drawings and specifications and well completion data for the public water supply.	MODERATE	NO

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