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DECERTIFY PORTIONS OF GREEN §  
VALLEY SPECIAL UTILITY DISTRICT'S §  
SEWER CERTIFICATE OF §  
CONVENIENCE AND NECESSITY IN §  
GUADALUPE COUNTY §

PUBLIC UTILITY COMMISSION

OF TEXAS

**CITY OF CIBOLO'S REPLY TO GREEN VALLEY SPECIAL UTILITY DISTRICT'S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION OF PHASE 2**

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**CITY OF CIBOLO'S REPLY TO GREEN VALLEY SPECIAL UTILITY DISTRICT'S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION OF PHASE 2**

TO: THE HONORABLE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION  
OF TEXAS

The City of Cibolo (the "City") submits this Reply to Green Valley Special Utility District's ("GVSUD") Exceptions to the Proposal for Decision of Phase 2 (the "Reply"), responding to GVSUD's Exceptions ("Exceptions") in the above-referenced matter.<sup>1</sup> This Reply is timely filed pursuant to the Public Utility Commission ("Commission") Advising and Docket Management memorandum filed in this Docket, which established deadlines for filing exceptions and replies to exceptions to the Administrative Law Judge's ("ALJ") November 27, 2017, Proposal for Decision of Phase 2 (the "PFD") in this matter.

**I. INTRODUCTION**

GVSUD's Exceptions to the contested issues that are the subject of Phase 2 of this proceeding (the "Contested Issues") should be rejected, because (i) the City's notice of intent (the "Notice"), dated August 18, 2015, for its application for single certification of a portion of GVSUD's sewer certificate of convenience and necessity ("CCN") No. 20973 (the

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<sup>1</sup> On December 4, 2017, Commission Staff informed the Commission that Staff supported the City's Exceptions and would not be filing exceptions to the Proposal for Decision, so this Reply is limited to GVSUD's Exceptions to the PFD of Phase 2.

“Application”) was proper and (ii) the City demonstrated that its public drinking water system met the criteria of Texas Water Code (“TWC”) § 13.255(m) and 16 Texas Administrative Code (“TAC”) § 24.120. As to the Exceptions concerning the adequacy of the City’s Notice, the ALJ’s thorough evaluation of the evidence in the record correctly determined that it was issued in accordance with applicable law and Commission rule. As explained in the PFD, as well as in the City and Commission Staff’s September 22, 2017 Initial Briefs and September 29, 2017 Response Briefs, which the City incorporates herein by reference, the City’s Notice accurately and clearly described the portions of GVSUD’s sewer CCN that would be served by the City and would be decertified by the Application (Issue No. 2).<sup>2</sup> GVSUD failed to substantiate how such requirements were not met, instead relying exclusively on a meritless and contradictory adage that additional information in the map attached to the Notice rendered GVSUD incapable of knowing what areas were subject to the Application. Thus, since the Notice was proper, and contrary to the Exceptions, the City did wait the requisite 180 days after providing the Notice before filing the Application (Issue No. 3) and the subsequent Application was correctly found to be administratively complete (Issue No. 4). Next, although GVSUD has conceded that the City’s water system meets the Texas Commission on Environmental Quality’s (“TCEQ”) minimum requirements for drinking water systems (Issue No. 5), GVSUD’s contention that the Commission only consider whether there were active violations at the time the application was filed is unsupported by both applicable laws and regulations.

Therefore, the City continues to fully support the ALJ’s well-supported ultimate finding that the City has met its burden of proof in this matter and recommendations that (1) the Notice meets all applicable requirements, (2) the City waited the requisite 180 days before filing the

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<sup>2</sup> Initial Brief of City of Cibolo (September 22, 2017), at 6-8; Reply Brief of City of Cibolo (September 29, 2017), at 4-7.

Application, (3) the Application is administratively complete, and (4) the City meets TCEQ's minimum requirements for drinking water systems. GVSUD's Exceptions should be rejected and not incorporated into the Findings of Fact, Conclusions of Law, or Ordering provisions that were recommended by the ALJ in the PFD.

## **II. PROCEDURAL HISTORY AND JURISDICTION**

GVSUD's Exceptions requesting additional procedural items relating to its failed Pleas to the Jurisdiction in this Docket are untimely, inappropriate, and not at issue in the Phase 2 proceeding. The Commission has already addressed whether the Application should be dismissed based on 7 U.S.C. § 1926(b), holding that it does not have the authority to determine the applicability of § 1926(b) to this proceeding and whether § 1926(b) preempts this proceeding.<sup>3</sup> When the same issue was raised again by GVSUD, the Commission declined to make a determination over which it does not agree it has the authority by allowing GVSUD's Interim Appeal on the matter to be overruled by operation of law.<sup>4</sup> Because this matter has already been addressed by the Commission, the Exceptions are an untimely and procedurally inappropriate mechanism through which to raise the issue once more. Moreover, whether the Commission has jurisdiction to determine whether § 1926(b) preempts the decertification sought by this proceeding is not an issue referred to SOAH in this Docket.<sup>5</sup> As such, the consideration of § 1926(b) matters are irrelevant to a determination on the Phase 2 issues and should not be incorporated into the final order.

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<sup>3</sup> Preliminary Order (June 30, 2016), at 2-4.

<sup>4</sup> GVSUD's Interim Appeal of SOAH Order No. 12 (Aug. 21, 2017).

<sup>5</sup> See Preliminary Order (June 30, 2016), at 2-4.

### **III. SUMMARY OF ALJ'S RECOMMENDATIONS ON PHASE 2 ISSUES**

GVSUD's Exceptions to the ALJ's summary of recommendations on the Phase 2 issues should be rejected in their entirety, for the reasons set forth herein and in the City's Exceptions. Again, the Notice was not defective due the map accompanying the notice letter. GVSUD intentionally mischaracterizes the nature of the land identified therein and thereby urges a defect that simply does not exist. As discussed in more detail, herein, the map is clear in its own right, and it accurately depicts the areas described in the narrative portion (letter) of the Notice. Because the map does not render the Notice defective, the City waited the required 180 days to submit the Application, and the Application could be deemed administratively complete. Moreover, GVSUD has conceded that the City meets the City's minimum drinking water requirements. The concession—although correct—is premised exclusively on the resolution of the active notices of violation; such limitation on the ways in which the City may demonstrate compliance is misplaced.

### **IV. RESOLVED ISSUES 1, 4a, 4b, AND 6-8**

GVSUD's untimely attacks on the issues that were resolved by the Commission on the Phase 1 issues are dubious and should be rejected outright. Because the Commission has already taken action to resolve the legal and factual bases of the Phase 1 issues, and because those issues were expressly excluded from being reconsidered in Phase 2,<sup>6</sup> attempting to modify those conclusions in the Phase 2 PFD is procedurally inappropriate. Moreover, as the ALJ and Commission have already determined after a hearing, extensive briefing, and a Phase 1 PFD and

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<sup>6</sup> Interim Order (June 29, 2017), at 4-5.

Interim Order, GVSUD's attacks thereon lack merit.<sup>7</sup> Therefore, GVSUD's renewed objections relating to Phase 1 matters should be disregarded entirely.

**V. CONTESTED ISSUES NOS. 2-4: SUFFICIENCY OF NOTICE OF INTENT, TIMING OF APPLICATION FILING, AND ADMINISTRATIVE COMPLETENESS**

The entirety of GVSUD's Exceptions to the Contested Issues in Phase 2 should be rejected because they are premised on GVSUD's claims of the inadequacy of the Notice, which lack legal and factual merit. Therefore, GVSUD's Exceptions to the Contested Issues should be denied outright.

**A. Issue 2: Sufficiency of the Notice of Intent**

As the City has repeatedly demonstrated and maintained throughout its Phase 2 filings, which is also supported by Commission Staff and the ALJ, the Notice meets all relevant and applicable statutory and regulatory requirements and is not defective.<sup>8</sup> GVSUD's attempt to discredit the ALJ's plain interpretation of the operative law (TWC § 13.255 and 16 TAC § 24.120 (2014)) regarding the Notice lacks legal merit. The requirements for issuing notice that existed at the time the Application was filed were that the City needed to identify the "the incorporated or annexed area."<sup>9</sup> Neither the applicable law or regulation says how. Neither provision precludes other information from being incorporated into the notice. Neither notice requires a map.

Yet, GVSUD reads more into this language than what is actually there. GVSUD's argument that the identification on the map of additional tracts of land in a *separate* color that

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<sup>7</sup> *Id.*

<sup>8</sup> Initial Brief of City of Cibolo at 6-8; Reply Brief of City of Cibolo at 4-8; PFD at 6-8 and Findings of Fact Nos. 58-60; *see also* Commission Staff's December 4, 2017 letter to the Commission Advising & Docket Management (stating that "Staff supports the exceptions filed by the City of Cibolo on December 4, 2017.").

<sup>9</sup> TWC § 13.255(b) (West 2017); 30 TAC § 24.120(b) (2014).

also *could* be negotiated for decertification<sup>10</sup> does not somehow negate the other portions of the Notice and map clearly identifying the areas that *will* be decertified by the Application. In any event, GVSUD has failed to credibly or sufficiently refute the following bases for the ultimate determination that the Notice is adequate:

- Neither TWC § 13.255(b) nor 16 TAC § 24.120(b) require a map depicting the areas intended to be decertified; they only require written notice of the City's intent to provide service to the incorporated or annexed area;
- The written description of the City's Notice unambiguously explains what areas the City seeks to be singly certificated to the City, which is limited to those areas that have been annexed;
- By using multiple colors, the map accompanying the Notice identifies the specific areas that the City seeks to be singly certificated to the City;
- GVSUD did not seek clarification upon receipt of the Notice; and
- GVSUD's own filings in this matter pertaining to the alleged compensation issues in this proceeding precisely identify the total acreage of the tracts that the City seeks to be singly certified, which is consistent with the Application and Notice.

GVSUD's Exceptions are reassertions of prior, failed arguments, and they shed no new credible light to challenge the adequacy of the City's Notice. Further, GVSUD's argument amounts to a bad faith attempt to ignore the City's clear explanation in the Notice of what land the City intends to serve under TWC § 13.255 and 16 TAC § 24.120. Like a horse with blinders

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<sup>10</sup> GVSUD attempts to mischaracterize the nature of the additional areas of land that could be negotiated for decertification. GVSUD Exceptions, at 4, 6. GVSUD suggests that the City intended to seek decertification of the additional tracts with the Application that was ultimately filed. The City included those additional tracts only as a tool for negotiating with GVSUD in the intervening 180-day period. That intent was made perfectly clear to GVSUD in text of the letter included in the Notice. Thus, the argument that the lands intended to be decertified with the Application is inconsistent in the Notice and the Application is belied by the Notice on its face. GVSUD Exceptions, at 6.



on, GVSUD ignores the credible ways in which the statutory and regulatory notice requirements were satisfied by the clarity of the City's Notice. GVSUD's inadequate legal and factual challenges to the sufficiency of the Notice should therefore be denied and none of its Exceptions relating thereto be incorporated.

**B. Issue 3: 180-Day Waiting Period between Notice of Intent and Filing of Application**

It is undisputed that the City waited more than 180 days from providing the Notice to filing the Application, as required by 16 TAC § 24.120.<sup>11</sup> GVSUD's Exceptions relating to the 180-day waiting period is premised on a determination that the Notice was defective.<sup>12</sup> As explained hereinabove in Section V.A, the Notice is not defective, and, thus, the 180-day period was satisfied.

Moreover, GVSUD has provided no legal basis for the assertion that the newly-adopted Commission rules should now be applied against the City, which is in direct contradiction of established statutory law.<sup>13</sup> Plus, even if GVSUD's legally incorrect argument was considered, Commission Rule 24.1(d), which was in effect before 16 TAC § 24.120 was amended in 2017 (and is still effective today), explicitly states that applications must only conform to those rules in effect on the date that the application was received by the Commission.<sup>14</sup> Thus, even under GVSUD's flawed legal argument, 16 TAC § 24.120, as in effect when the Commission received the Application, is the applicable version of the rule in this matter. As such, GVSUD's Exceptions relating to the 180-day period should be rejected in their entirety.

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<sup>11</sup> Joint Agreed Stipulations Concerning Remaining Referred Issues (Sept. 15, 2017), at 2-3.

<sup>12</sup> GVSUD Exceptions, at 6-7.

<sup>13</sup> PFD, at 9, 19 (citing Tex. Gov't Code §§ 311.002, 311.031(a)(1)-(2); TWC § 1.002(a)).

<sup>14</sup> 16 TAC § 24.1(d). Section 24.1(d) was adopted by the Commission after the Application was filed, but before the most recent rule change in May of 2017, in which § 24.120 was revised. *Compare* 39 Tex. Reg. 5903, 5920 (Aug. 1, 2014), *with* 41 Tex. Reg. 9895, 9905 (Dec. 16, 2016), *and* 42 Tex. Reg. 2703 (May 19, 2017).

**C. Issue 4: Administrative Completeness of the Application under 16 Texas Administrative Code § 24.8.**

The Application meets all applicable statutory and regulatory requirements, and, as the Commission Staff has recommended, the Application is administratively complete.<sup>15</sup> Particularly, as the City has explained throughout Phase 2, the Notice—as well as the entire Application—meets all requirements of 16 TAC § 24.8, as the Notice properly identifies the areas the City seeks to be singly certificated to the City.

GVSUD's Exceptions, however, continue to insist that inapplicable rules should govern this matter and, without justification or authority, takes it upon itself to tell the Commission what it can and cannot accept as satisfying the very rules that it created.<sup>16</sup> Irrespective of how the Commission has clarified the notice requirements since the Application was filed, the City has repeatedly demonstrated and Commission Staff have affirmatively determined that the only rules that matter are satisfied. GVSUD's far-fetched attempts to impose requirements that do not exist should be rejected, and all of GVSUD's Exceptions relating thereto should be denied accordingly.

**VI. CONTESTED ISSUE 5: PUBLIC DRINKING WATER SYSTEM COMPLIANCE**

Consistent with the City and Staff, GVSUD does not except to the PFD's recommended finding that the City has demonstrated compliance with the requirement that the City has met TCEQ's minimum requirements for public drinking water systems.<sup>17</sup> However, GVSUD's artificial and baseless limitation on that recommendation to the fact that the City has no outstanding violations should be rejected.

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<sup>15</sup> Commission Staff's Initial Brief (September 22, 2017), at 5-6.

<sup>16</sup> GVSUD Exceptions, at 7.

<sup>17</sup> *Id.*, at 8.

GVSUD asserts, without substantiation, that the designation as a “superior public water system” and the City’s past compliance history are irrelevant. However, as explained in the PFD, there is regulatory support for considering such a designation and the compliance history; GVSUD has not even attempted to refute these rules or the ALJ’s application thereof.<sup>18</sup> In short, GVSUD merely provides its preferred method for demonstrating compliance with drinking water requirements; it does not negate that all of the justifications listed in the PFD are alternative means for finding that the City meets the minimum drinking water system requirements. Therefore, although GVSUD’s ultimate conclusion on this issue should be upheld, its limited justification should not.

## **VII. RECOMMENDATION**

For the reasons set forth herein, GVSUD’s Exceptions regarding the Phase 2 issues should be denied. Moreover, GVSUD’s Exceptions to the Phase 1 issues should be summarily rejected.

## **VIII. EXCEPTIONS TO FINDINGS OF FACT**

For each change and addition to the Findings of Fact (“FOF”) proposed by GVSUD in its Exceptions, the City provides the well-supported basis to reject such request, as follows:

- 58. Section V.A, above;
- 60. Section V.A, above;
- 61. Sections V.A and V.B, above;
- 62. Sections V.A and V.C, above;
- 63. Sections II and IV, above;
- 68. Section VI, above;
- 71. Sections II and IV, above;

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<sup>18</sup> PFD, at 13-14.

- 20A. Sections II and IV, above;
- 35B.1 Sections II and IV, above;
- 35C.1 Sections II and IV, above;
- 35C.2 Sections II and IV, above; and
- 35D.3 Sections II and IV, above.

#### **IX. EXCEPTIONS TO CONCLUSIONS OF LAW**

For each change and addition to the Conclusions of Law (“COL”) proposed by GVSUD in its Exceptions, the City provides the well-supported basis to reject such request, as follows:

- 24. Section V.A, above;
- 25. Sections V.A and V.B, above;
- 26. Sections II and IV, above;
- 27. Sections II and IV, above;
- 28. Sections V.A and V.C, above;
- 32. Sections I-V, above; and
- 33. Sections V.A, II, and IV, above.

#### **X. EXCEPTIONS TO PROPOSED ORDERING PARAGRAPHS**

For the requested Exception to Ordering Paragraph No. 1, the City provides the well-supported basis to reject such request in Section V and VI, above.

#### **XI. CONCLUSION AND PRAYER**

The City of Cibolo respectfully requests that the Commission (i) make only the requested edits to the Findings of Fact, Conclusions of Law, and Ordering Provisions of the Proposal for Decision proposed by the City of Cibolo (as supported by Commission Staff), (ii) reject the changes to the Findings of Fact, Conclusions of Law, and Ordering Provisions for the Proposal

for Decision requested by Green Valley Special Utility District, and (iii) grant any other relief to the City of Cibolo to which it may be entitled.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF CIBOLO

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, hand-delivery and/or regular, first class mail on this 7th day of December, 2017 to the parties of record in accordance with 16 Tex. Admin. Code § 22.74.

  
David J. Klein