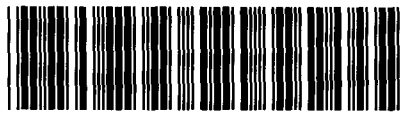
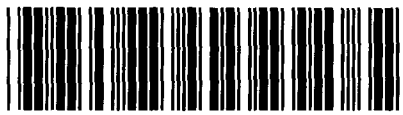


Control Number: 45702



Item Number: 183

Addendum StartPage: 0

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	**§**	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

GREEN VALLEY SPECIAL UTILITY DISTRICT'S MOTION FOR REHEARING

TABLE OF CONTENTS

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	§ § § § § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

GREEN VALLEY SPECIAL UTILITY DISTRICT'S MOTION FOR REHEARING

COMES NOW Green Valley Special Utility District ("Green Valley" or "GVSUD") and timely files this Motion for Rehearing, and in support would show as follows.[1]

I. SUMMARY OF ARGUMENT

The Commission's January 10, 2018 Order, if allowed to stand, is premised on legal error. The Commission erred by failing to acknowledge that Green Valley's sewer Certificate of Convenience and Necessity ("CCN") area is protected from curtailment pursuant to federal law by virtue of Green Valley's outstanding federal loan issued by the United States Department of Agriculture, Rural Development,[2] and by failing to find that the City of Cibolo's ("Cibolo" or the "City") application must therefore be rejected. The Commission erroneously concluded that it does not have authority to comply with federal law, stating"the Commission may not deny an application under TWC§ 13.255 solely on the basis that a retail public utility that holds a CCN for all or part of the requested service area is also a holder of a federal loan made under § 1926(a) of the federal act."[3] While the Commission's Preliminary Order directive was couched in terms to give the appearance

---

[1] Pursuant to PUC PROC. R. 22.264(a), motions for rehearing shall be governed by the Administrative Procedure Act ("APA"), which provides that "[a] motion for rehearing in a contested case must be filed by a party not later than the 25th day after the date the decision or order that is the subject of the motion is signed. TEX. GOV'T CODE § 2001.146(a). The Order for which Green Valley seeks rehearing was signed on January 10, 2018. This Motion for Rehearing is timely filed.

[2] 7 U.S.C. § 1926(b).

[3] Preliminary Order (June 30, 2016) at 4.

that the Commission is simply abstaining from consideration of the preemption issue, the Commission's decision was a *de facto* determination that state law trumps contravening federal statutes. This error is particularly glaring given the fact that, unlike TWC § 13.254, there is no express prohibition on considering federal protection in TWC § 13.255, the operative provision in this docket.

If the Commission determines not to reverse course and honor federal supremacy, the Commission should issue an Order on Rehearing clearly reflecting its determinations on Green Valley's jurisdictional pleas based on federal preemption. As it stands, the Order is silent on the issue other than its referral to Green Valley's pleas to the jurisdiction and motion to abate in the Order's recitation of the procedural history.[4] Even this recitation is woefully incomplete.[5]

The Commission further erred by finding that no property of Green Valley will be rendered useless or valueless upon decertification, that Green Valley is not entitled to any compensation resulting from decertification, and by granting the application without adequate compensation.[6] In reaching this conclusion, the Commission relies on the notion, unsupported by any legal authority, that while money may constitute property under TWC § 13.255, once that money is invested in planning and design activities directed toward the provision of utility service, it somehow loses its status as property until facilities have been constructed inside the area that is then decertified or in

---

[4] FoF 7; 11, 13, 14, 18.

[5] The Order makes no reference to the ALJ's denial of Green Valley's August 9, 2017 Supplemental Plea to the Jurisdiction, Motion to Dismiss, and, in the Alternative Motion to Abate, based on the 5th Circuit Court of Appeals' decision in Cause No. 16-51282, *Green Valley Special Util. Dist. v. City of Cibolo*. Nor does the Order reference: (1) SOAH Order No. 12 (Aug. 14, 2017) denying Green Valley's Supplemental Plea; (2) Green Valley's Interim Appeal of SOAH Order No. 12 (Aug. 21, 2017); or (3) the Commission's August 31, 2017 decision not to add Green Valley's Interim Appeal to an open meeting agenda.

[6] Order (Jan. 10, 2017) at 4-5; FoF 52, 53; 56; 63 71; CoL 10, 12-19, 20, 26, 2759, 61A, 61B; CoL 18, 20-23, 26-31, 33; Ordering Paragraphs 1-6.

the CCN area.[7] There is simply no legal basis for such a determination and none is presented in the Commission's Order. Further, in reaching its erroneous determination that Green Valley had no property that would be rendered useless or valueless on decertification, the Commission disregarded established principles of statutory construction by failing to give statutory terms their "plain meaning" while reading into the statute words that are not present, and by casting aside the findings of Green Valley's eminently qualified independent appraiser.[8] In so doing, the Order eviscerates the overriding purpose of the TWC § 13.255 compensation provisions: to provide"adequate and just" compensation to a CCN holder faced with a forced decertification of its service territory in favor of replacement with service from a municipality. Without compensation, the Commission's order results in an unconstitutional taking.

The Commission's errors are amplified by its implementation of an unworkable bifurcated hearing process, developed on an *ad hoc* basis during the course of this and related proceedings. The hearing process required Green Valley to retain and compensate an independent appraiser and participate in a nearly two-year long contested case proceeding only to be presented with *ad hoc* evidentiary standards mid-hearing to support the Commission's conclusions that none of Green Valley's investments or expenditures are compensable; not even legal fees incurred to defend its service area from Cibolo's encroachment. The Commission's new procedural mechanism did not even result in an administrative completeness finding for Cibolo's application until the very end of the two-year hearing process.

---

[7] CoL 10, 12-15, 20 (relying on its prior unsupported decision in *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 (Apr. 13, 2017) to support each of these erroneous conclusions of law).

[8] CoL 10, 18, 19.

The Commission further erred in determining that Cibolo's notice of intent—specifically, the map included in Cibolo's notice—was adequate to notify Green Valley of the specific area subject to its notice in compliance with TWC § 13.255(b) and then-effective 16 TAC § 24.120(b).[9] The map included additional tracts that were not the subject of Cibolo's requested decertification in a blatant attempt to bypass the 180-day notice of intent requirement for a future potential decertification application for additional tracts. As a result of the defective notice of intent, Cibolo did not wait the required 180 days following the provision of accurate notice of the specific areas Cibolo intended to decertify and the application was therefore improperly deemed administratively complete.[10]

II. ARGUMENT

The Commission's Order constitutes legal error for the following reasons:

Point of Error No. 1

The Commission Erred in Failing to Deny Green Valley's Application on the Ground that Green Valley's Sewer CCN is Protected from Municipal Encroachment under Federal Law Due to its Outstanding Federal Indebtedness.

The Commission erred by failing to acknowledge that Green Valley's sewer Certificate of Convenience and Necessity ("CCN") area is protected from curtailment pursuant to federal law by virtue of Green Valley's outstanding federal loan issued by the United States Department of Agriculture, Rural Development,[11] and by failing to deny Cibolo's application on that basis. The Commission never directly ruled on Green Valley's initial plea to the jurisdiction and subsequent

[9] FoF 60, 62; CoL 24.

[10] Order at FoF 61 and 62 and CoL 24, 25, and 28 therefore constitute legal error.

[11] 7 U.S.C. § 1926(b).

briefing on the issue.[12] Instead, the Commission simply determined that it does not have authority to determine whether § 1926(b) of the Federal Consolidated Farm and rural Development act [sic] federally preempts TWC § 13.255,"[13] and then subsequently declined to consider the issue once a federal appeals court determined that Green Valley's CCN service area is protected as a result of its outstanding federal debt.[14] The Commission previously stated that a court order would trigger reconsideration of its decision to follow state law and ignore contravening federal law.[15]

Green Valley's Interim Appeal was precipitated by the Fifth Circuit's determination that Green Valley's sewer CCN service area is protected from municipal encroachment under 7 U.S.C. § 1926(b).[16] Commission Staff recognized the significance of the Fifth Circuit's ruling, stating in response to Green Valley's Interim Appeal that "[t]he Fifth Circuit's interpretation makes it clear that 7 U.S.C.A § 1926(b) *prohibits the decertification of Green Valley's sewer CCN.*"[17] Immediately after the Commission denied Green Valley's Interim Appeal, the Fifth Circuit denied a Petition for

---

[12] Green Valley's Plea to the Jurisdiction and Motion to Dismiss with Debt Information Listing (Apr. 29, 2016)); Green Valley's Consolidated Reply to Response to its Plea to the Jurisdiction and Motion to Dismiss (May. 26, 2016); Green Valley's Brief on Threshold Legal/Policy Issues (Jun. 6, 2016); Green Valley's Reply Brief on Threshold Issues (Jun. 14, 2016); Green Valley's Supplemental Plea to the Jurisdiction, Motion to Dismiss, and in the Alternative, Motion to Abate (Aug. 9, 2017); Green Valley's Interim Appeal of SOAH Order No. 12 (Aug. 21, 2017).

[13] Preliminary Order at (June 30, 2016) at 4.

[14] Commission Advising Memorandum (Aug. 31, 2017) ("No commissioner has voted to add the Appeal of Order No. 12 to an open meeting agenda.").

[15] Preliminary Order at 4 ("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.") (emphasis added).

[16] *Green Valley Special Util. Dist. v. City of Cibolo*, 866 F.3d 339 at 341, 344 (5th Cir. 2017) ("Section 1926(b) prohibits the curtailment or limitation of 'the service provided or made available through any such association.' § 1926(b). Where a CCN imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service under § 1926(b). . . But § 1926(b)'s plain language does not limit the statute's protection to services that have received federal financing.").

[17] Commission Staff's Response to Green Valley's Interim Appeal of SOAH Order No. 12 at 2 (Aug. 28, 2017) (emphasis added). While the issue clearly gave the ALJ pause, she denied Green Valley's plea solely on the ground that the Commission had not referred the issue to SOAH. SOAH Order No. 12 at 3, n. 1 (ALJ explaining that her initial determination was to certify Green Valley's preemption issue to the Commission rather than deny its plea to the jurisdiction).

Rehearing En Banc on its decision that Green Valley's sewer CCN service area is federally protected and the decision still stands today.[18]

As with the Commissioners' decision not to address the Interim Appeal, the Order is likewise conspicuously silent on the federal protection issue. The Order merely identifies some of Green Valley's filings on the issue in the procedural history, but omits any reference to the 5th Circuit's decision, Green Valley's Supplemental Plea to the Jurisdiction, Green Valley's Interim Appeal of SOAH Order No. 12 and the Commission's no-ballot determination on Green Valley's Interim Appeal.[19] The Order is devoid of findings of fact or conclusions of law regarding the issue.

This failure to consider the effect of Green Valley's federal indebtedness on Cibolo's application constitutes legal error for at least two reasons. First, the Supremacy Clause of the United States Constitution mandates that "the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby."[20] Therefore, the Commissioners cannot comply with TWC § 13.254(a-1) or (a-6) directions to disregard federal law or extend those requirements here to a TWC § 13.255 case. Doing so would directly violate federal law prohibiting curtailment or limitation of a federally-indebted association's service area "by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body,

---

[18] *Green Valley Special Util. Dist. v. City of Cibolo*, Cause No. 16-51282 in the United States Court of Appeals for the Fifth Circuit, Order on Petition for Rehearing En Banc (Sep. 1, 2017) ("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.").

[19] Green Valley's Supplemental Plea to the Jurisdiction, Motion to Dismiss, and, in the Alternative Motion to Abate (Aug. 9, 2017); SOAH Order No. 12 (Aug. 14, 2017) denying Green Valley's Supplemental Plea; Green Valley's Interim Appeal of SOAH Order No. 12 (Aug. 21, 2017); Commission Advising Memorandum (Aug. 31, 2017).

[20] U.S. CONST. art. VI.

or by the granting of any private franchise for similar service within such area during the term of such loan. . ."[21] The Fifth Circuit has agreed.

Second, the Supremacy Clause-defying statute, TWC § 13.254, does not apply in this case. The Commission's determination that it cannot consider whether Green Valley's sewer CCN is protected from curtailment or limitation under 7 U.S.C. section 1926(b) is based on the Commission's erroneous adoption of language from TWC § 13.254, which purports to preempt the federal constitution. But this case is under TWC § 13.255, which does not mention – much less defy – the federal constitution or statutes. Nothing in § 13.255 prohibits the Commission from considering whether a CCN holder is protected by virtue of its federal indebtedness. Thus, even if the operative language of § 13.254 language was valid, which it is not, it was legal error to read into § 13.255 language that does not exist rather than to presume that the language was omitted for a reason.[22]

Third, it is legal error to curtail Green Valley's service area through a procedure such as TWC § 13.255 that does not require proof by the applicant that Green Valley is failing to make service available. The Commission's Order is devoid of such a finding because no opportunity to do so was presented under the Commission's *ad hoc* process.

The Commission should grant Green Valley's Motion for Rehearing on the federal protection issue and enter an order on rehearing denying Cibolo's application on federal preemption grounds, concluding that the plain words of TWC § 13.255 do not prohibit Commission consideration of

---

[21] 7 U.S.C. § 1926(b).

[22] The fact that TWC § 13.255 has been primarily limited to non-profit water/sewer supply corporations and special utility districts, common types of federally indebted "associations" since at least 1995, combined with the failure to add this type of provision to TWC § 13.255 when it was added to TWC § 13.254 in 2011 may have been an indication that this omission was actually deliberate. *See* Tex. H.B. 1935, 74th Leg. R.S. (1995); Tex. S.B. 573, 82nd Leg., R.S. (2005); *see also* 7 U.S.C. § 1926(a) (authorizing loans to "associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies...").

whether a CCN holder with existing federal debt is protected from municipal curtailment of its service area. Alternatively, the Commission should vacate its Order and issue an order abating this proceeding pending resolution of the federal preemption issue in the ongoing federal litigation involving Green Valley and Cibolo.[23]

Point of Error No. 2

The Commission Erred in Determining that GreenValley's Dollars Spent on Planning and Design of Facilities Allocable to the Area to be Decertificated Do Not Constitute Property Rendered Useless or Valueless under TWC § 13.255

A. The Order Erroneously Imposes a Requirement that Physical Infrastructure be Constructed in the Area to be Decertificated.

The Order imposes a legally insupportable prerequisite to compensation under TWC § 13.255 that actual physical facilities must have been constructed in the decertificated area or elsewhere in the CCN area. This error is evidenced by the Commission's reliance on its finding that Green Valley does not have infrastructure in the CCN area as a basis for its conclusions that Green Valley does not have any "facilities" that will be rendered useless or valueless.[24] The Commission has read into TWC § 13.255(g) a requirement that is simply not present and has thus rendered meaningless the § 13.255(g) provisions that are mandated to be considered in the assessment of personal property lost in partial CCN decertification scenarios. The statute requires compensation for "property" rendered useless or valueless.[25] Even if the statutory scheme authorized compensation only for "facilities," which it does not, the use of such term would require a finding that Green Valley be compensated.

---

[23] *Green Valley Special Util. Dist. v. City of Cibolo*, Civil Action No. 1:16-cv-00627-SS in the United States District Court for the Western District of Texas, Austin Division (pending). Prudence would dictate abatement because similar issues are pending in federal court in which the Commissioners are named defendants. *E.g.*, *Green Valley Special Util. Dist. v. Walker, et al.*, Civil Action No. 1:17-cv-00819-SS in the United States District Court for the Western District of Texas, Austin Division (pending); *Crystal Clear Special Util. Dist. v. Walker, et al.*, Civil Action No. 1:17-cv-00254-LY in the United States District Court for the Western District of Texas, Austin Division.

[24] Order at FoF 41, 42; 63, 71; CoL 26, 27.

[25] TWC § 13.255(c).

The Texas Water Code specifically defines "facilities" to include "all tangible *and intangible real and personal property without limitation...*"[26] Yet the Commission's plain statement that Green Valley has no "wastewater infrastructure" within the subject decertification area or elsewhere in its CCN reveals the actual basis for the Commission's erroneous limitation on compensation.[27]

The Commission does not and cannot point to any provision in the TWC § 13.255 statutory scheme that requires physical construction as a prerequisite to compensation as the Commission repeatedly implies.[28] In fact, the TWC and Commission rules broadly include all types of planning acts that necessarily lead up to physical construction in defining "service."[29] Those acts require spending real money now lost on an allocable basis. The Commission must therefore reverse its determination.

B. The Order is Predicated on the Erroneous Proposition that Money, Once Invested, is No Longer Property.

The Commission's *de facto* determination that the presence of physical facilities in the decertificated area or CCN area is required for compensation to be awarded is further evidenced by the Commission's erroneous conclusion that money, once spent, cannot be considered property or even a proxy for same.[30] The ALJs in the recent *City of Celina* ("*Celina*") docket correctly rejected

---

[26] TWC § 13.002(9) (emphasis added).

[27] Order at FoF 41.

[28] *E.g.*, Order at FoF 43 ("Green Valley does not have a Texas pollutant-discharge-elimination system permit *to construct* or operate a wastewater-treatment plant.").

[29] *See* TWC § 13.002(21) (defining "service" as "any act performed, anything furnished or supplied, and any facilities or line committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public."); 16 TAC § 24.3(62) (same).

[30] Order at CoL 12 (concluding that "[e]xpenditures are not property."); CoL 13 ("expenditures on permitting, planning, and design activities to provide wastewater service are not property.").

this theory.[31] The *Celina* ALJs recognized the absurdity of such a position, finding that it would require the money expended by a retail public utility to enter "*a sort of property purgatory*, transformed into non-property until some form of actual property (a physical facility) attaches-to and rescues it, at which point the expended money once again becomes property."[32] Those ALJs found this to be a "strained and narrow reading" of the TWC statutory compensation provisions.[33]

The Commission provides no legal basis for its view that money invested in planning and design for physical infrastructure which has not yet been constructed somehow loses its status as property for the purpose of TWC § 13.255. Instead, the Commission simply concludes that such investments are "not property" and cites solely to its *Celina* decision, which in turn cited to no legal authority to support this idea that investment dollars simply disappear and are not capitalized.[34] Money invested in design and planning does not disappear. Rather, dollar investments are exchanged for other valuable property interests, namely, system design and planning. Of course, these investments are prerequisites to obtaining permits and regulatory approvals necessary to implement a wastewater system. The Commission's findings related to lack of actual facilities, permits, or current customers are thus irrelevant to the determination of property rendered useless

---

[31] PUC Docket No. 45848, *City of Celina's Notice of Intent to Provide Water and Sewer Service to Area Decertified from Aqua Texas, Inc. in Denton County*, PFD (Jan. 27, 2017) at 18-19.

[32] *Id.* at 19.

[33] Order at CoL 12, 13 (citing the *Celina* Order at CoL 7A and 7B). *Celina* involved TWC § 13.254(g), which contains compensation provisions nearly identical to those in TWC § 13.255(g), including "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." *Compare* TWC § 13.254(g) *with* TWC § 13.255(g).

[34] Order at CoL 21-23, 26-27.

or valueless and constitute legal error,[35] as are the Commission's findings and conclusions that Green Valley is not entitled to compensation for same.[36]

When design and planning is rendered useless or valueless in whole or in part upon decertification, a reasonable proxy for that property's value is the "allocable" dollars invested.[37] The Commission's decision that money invested in planning and design is not recoverable without constructed physical infrastructure contravenes the plain language of TWC§ 13.255 and eviscerates the statutory intent to compensate CCN holders who lose the right to serve removed areas.

C. The Order is Premised on the Commission's Erroneous Determination that the Non-Exclusive Factors Set Forth in TWC § 13.255(g) Do Not Inform the Identification of Property.

The Commission's determination that costs are not property and that money, once spent, is no longer property ultimately rests largely on the groundless proposition that the list of non-exclusive factors *must* be read in isolation and as having absolutely no bearing on what is considered property.[38] This finding also serves as the improper basis for the Commission's finding that Green

---

[35] Order at CoL 40-47, 50-53D. Two of these findings are not only unsupported by any record evidence, but are patently false. Green Valley did not "concede that the decertification will not result in the dollars it expended on the 2006 wastewater master plan, a pollutant-discharge-elimination-system permit ... or the approximately 65-acre tract of land having no use or value to Green Valley." To the contrary, the record evidence was that those investments would be rendered useless or valueless on an allocable basis, which is the statutory standard under TWC § 13.255(g) ("... 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...*") (emphasis added). *See* Ex. GVSUD-C (Montgomery Direct) at 6, 9-19; Ex. GVSUD-B (Allen Direct) at 6-7, 12-16; Ex. GVSUD-A (Korman Direct) at 8, 12-13, 15-16; Tr. at 154 (Allen Testimony).

Likewise, there is no evidentiary basis for the Commission's inclusion of FoF 53A ("Green Valley is not a party to any wholesale-wastewater-treatment agreements that are currently in effect."). This issue was not addressed in testimony or the hearing on the merits. Had it been, the evidence would have shown that Green Valley does in fact have such an agreement in place.

[36] Order at FoF 71; CoL 27.

[37] *See* TWC § 13.255(g).

[38] Order at CoL 10 ("The factors listed in TWC § 13.255(g) are *limited* to determining the value of personal peroperty, if any, rendered useless or valueless by the decertification and are not themselves property interests.") (citing *Celina* at CoL 8A) (emphasis added);

Valley's appraisal,[39] which analyzed property rendered useless or valueless by relying in part on the mandatory factors to be considered in determining compensation, was "not limited to appraising transferred property or property that will be rendered useless or valueless by decertification."[40] The unambiguous statutory language in TWC § 13.255(g) dictates that the Commission "shall, at a minimum, include" these factors in order to ensure "that the compensation to a retail public utility is just and adequate" for personal property.[41]

Yet the compensation factors are not ascribed their plain meaning or even considered under the Commission's narrow reading of what constitutes "property" in the Order. The Order recognizes that the Texas Water Code does not define "property" and purports to adopt a broad meaning.[42] In fact, the Commission has previously recognized that a broad, inclusive definition of "property" applies in this situation that includes intangible personal property, like money, which would be in line with the Texas Supreme Court holding in *State v. Public Utility Commission.*[43] But the Commission's findings and conclusions purporting to apply a broad definition impose an insupportably narrow view of "property."[44] The resulting conclusion that Green Valley is not entitled

---

[39] Ex. GVSUD-1 at GVSUD 100000-100007.

[40] Order at CoL 19.

[41] TWC § 13.255(g). Green Valley notes that different standards not applicable here apply to real property compensation.

[42] Order at CoL 8.

[43] *Compare State v. Public Util. Comm'n*, 883 S.W.2d 190, 200 (Tex. 1994) ("In construing a statue, if the legislature does not definee 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 to which is the subject of ownership, corporeal or incorporeal, *tangible or intangible*, visible or invisible, real or personal.")(internal citations omitted)(emphasis added), *with* PUC Docket No. 45848, *Celina,* Order on Rehearing (Jun. 29, 2017) at 6 ("The Commission agrees with the ALJs that property, as generally understood, has a broad meaning and includes property real and personal, tangible and intangible.").

[44] Order at CoL 12 (concluding that expenditures are not property); CoL 13 (concluding that expenditures on permitting, planning, and design activities to provide wastewater service are not property); CoL 16 (imposing definitions of useless and valueless contrary to the plain wording of TWC § 13.255(g).

to compensation is legal error.[45] The Commission must therefore grant rehearing, enter an order on rehearing consistent with the *State v. Public Utility Commission*,[46] and determine that the factors *identify* a utility's property interests, including "the amount of ... expenditures."[47]

The Order attempts to erect an artificial wall between the identification and valuation of property that is not evidenced by a plain reading of the statute. The Commission's determination that the factors are somehow prohibited from aiding in property identification is not only unsupported by the plain language describing the factors, but is simply illogical. The Commission's interpretation would *require* compensation for items that are not property at all under the Commission's "spent money" theory. For example, Factor 3, one of the factors that the Commission "shall . . . include," requires the Commission to consider "the amount of any expenditures for planning, design or construction of service facilities that are allocable to the area in question."[48] Yet, under the Commission's "spent money" theory, these very expenditures, including those for permitting that are a state-imposed prerequisite to construction and operation of physical facilities, are not property.[49] Thus, the Commission's statutory interpretation would mean compensation is required for items the Commission has determined to be non-property.

The Commission's decision violates plain statutory language and renders the Texas Water Code compensation provisions meaningless. Further, the Commission's "strained and narrow" property interpretation serves to unjustly eliminate compensation to decertified CCN holders

---

[45] Order at FoF 55, 56, 63; 71; CoL 12, 13, 17-19, 20, 27, 27.

[46] *State v. Public Util Comm'n*, 883 S.W.2d at 200.

[47] TWC § 13.255(g).

[48] TWC § 13.255(g)

[49] Order at CoL 12, 13.

altogether in advance of physical construction despite the planning expense evidence supported by Green Valley's expert witnesses, including its licensed appraiser.[50]

D. The Result of the Commission's Finding that Investments in Planning and Design Activities for the Decertificated Area are Not Property is an Unconstitutional Taking.

The Order imposes an unduly restrictive compensation scheme which amounts to no compensation at all. By failing to give plain meaning to the governing purpose of TWC § 13.255(c) and (g), which is to ensure that retail public utilities such as Green Valley are provided just and adequate compensation for lost property upon decertification, the Order results in an unlawful regulatory taking, damaging, or destruction of property for public use in violation of the Texas and U.S. Constitutions.[51] Essentially, the possibility for compensation for certain expenditures as part of a TWC § 13.255 decertification is being eliminated by new Commission standards not present in the statutory text—an absurd result.[52]

The Commission is required to interpret a statute as intended to be consistent with the state and federal constitutions pursuant to the Code Construction Act.[53] The Commission is further obligated to interpret a statute in a manner in which "the entire statute is intended to be effective"

---

[50] *See* Docket No. 45848, Proposal for Decision (Jan. 27, 2017) at 19; Ex. GVSUD-1(GVSUD Appraisal) at GVSUD 100004; Ex. GVSUD-A (Korman Direct) at 8, 12-13, 15-16. In stark contrast, Cibolo presented no expert appraiser in this case. Instead, Cibolo only presented an engineer's letter report that includes improper legal analysis of what is or is not "property" rendered "useless or valueless" under TWC § 13.255 as a matter of law to support Cibolo's argument that it owes $0.00 to Green Valley for decertification. The Commission's determination that Cibolo's appraisal was limited to property that will be rendered useless or valueless is not only unsupported legally, but factually as well due to Cibolo's failure to engage any appraiser as required by the statutory scheme. Order at FoF 55; CoL 18.

[51] U.S. CONST. AMEND. V (". . . nor shall private property be taken for public use, without just compensation."); TEX. CONST. Art. I, §17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .").

[52] *See Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) (finding that statutes must be considered as a whole rather than their isolated provisions); *Texas Dept. of Protective and Regulatory Serv. v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004) (finding that if a statute is unambiguous, the interpretation supported by its plain language must be adopted unless such interpretation would lead to absurd results).

[53] TEX. GOV'T CODE § 311.021(1) (requiring a presumption that "compliance with the constitutions of this state and the United States is intended.").

and "a just and reasonable result is intended."[54] Finally, the Commission must not order the confiscation of property without providing for adequate compensation. The Order accomplishes none of these tasks and must be reversed on rehearing. The Order improperly renders Green Valley's dollar investments (*i.e.*, its property) useless or valueless without adequate or just compensation as required.

Point of Error No. 3

The Commission Erred in Determining that Green Valley is Not Entitled to Compensation for Necessary and Reasonable Legal Expenses and Professional Fees.

The Commission's determination that Green Valley is not entitled to compensation for necessary and reasonable legal expenses[55] is premised on the legally unsupported and unsupportable proposition that: (1) although money is property, it ceases to be the possessor's property once spent; (2) property is somehow divisible from its value; and (3) the mandated statutory compensation factors shall not give meaning to the term "property." As explained in Point of Error No. 2, which Green Valley incorporates herein, these propositions lack any legal authority and must be overturned on rehearing.

Green Valley did not initiate this proceeding, but was compelled to defend itself against Cibolo's attempted decertification and to be made whole in light of Cibolo's position that it should be able to take over a significant portion of what the parties agreed to be high-growth area[56] at zero cost. The Texas Water Code specifically contemplates such compensation[57] and Green Valley's expert appraiser identified such costs as compensable property items incurred by Green Valley to

---

[54] *Id.* at § 311.021(2) and (3).

[55] Order at FoF 71; CoL 12, 14, 27.

[56] Ex. GVSUD-A (Korman Direct) at 13; Tr. at 27 (Klein Testimony); Tr. at 109 (Korman Testimony).

[57] TWC § 13.255(g).

defend its other categories of property interests.[58] Yet, the Commission once again wrongly employs its artificial construct, wherein property and its value are somehow mutually exclusive, to deny any compensation for these expenditures.[59] The Order simply cannot be synthesized with the overriding statutory purpose of TWC § 13.255 requiring just and adequate compensation.

By failing to give plain meaning to the governing purpose of TWC § 13.255(c) and (g), which is to ensure that retail public utilities such as Green Valley are provided just and adequate compensation for lost property resulting from decertification,[60] the Order results in an unlawful regulatory taking, damaging, or destruction of property for public use in violation of the Texas and U.S. Constitutions.[61] The Commission's determinations that money spent is no longer property and that property identification and valuation must be mutually exclusive, and considered in isolation, cannot withstand constitutional scrutiny. This approach eviscerates the TWC § 13.255 compensation process and should be reversed on rehearing.

---

[58] Ex. GVSUD-1 at GVSUD 100007.

[59] Order at CoL 14, 18.

[60] *City of Blue Mound v. Southwest Water Co.*, 449 S.W.3d 678, 681-690 (Tex. App.– Fort Worth 2014, no pet.) (discussing *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799, 799-806 (Tex. 1936) and its application in *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618 (Tex. 1996) and *Texas Building Owners and Managers Assoc., Inc. v. Public Util. Comm'n*, 110 S.W.3d 524 (Tex. App.– Austin 2003, pet. denied)).

[61] U.S. CONST. AMEND. V (". . . nor shall private property be taken for public use, without just compensation."); TEX. CONST. Art. I, §17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . .").

Point of Error No. 4

The Commission Erred by Determining that Lost Net Revenues Resulting from Decertification Are Not Property.

The Commission erroneously concluded that Green Valley's lost net revenues that would result from decertification were not property and were not compensable.[62] The evidentiary record demonstrated that Green Valley will lose the economic opportunity to recoup its expenditures from inside the decertificated area if the Commission's grant of Cibolo's application is not denied on rehearing.[63] At the same time, Green Valley's costs to serve the remaining area will increase as the direct result of Cibolo's piecemeal, checkerboard approach to decertification.[64] The right to these lost net revenues is a relevant intangible personal property interest and therefore compensable under TWC § 13.255(g), which mandates that the Commission consider "other relevant factors" in determining compensation. The Commission's determination that lost revenue from future customers is not property and therefore not compensable depends on effectively reading the terms "at a minimum" and "other relevant factors" out of the statute. A plain reading of these provisions directs that the Commission's approach must ensure that the CCN holder is made whole upon decertification. Such an approach is mandated by constitutional requirements[65] and is consistent with compensation for partial takings in other contexts, such as eminent domain proceedings. The Commission should order on rehearing that these lost revenues are compensable property interests.

---

[62] Order at CoL 15, 19, 27.

[63] Ex. GVSUD-A (Korman Direct) at 13-15; Ex GVSUD-1 at GVSUD 100003-100004.

[64] *Id.*; Ex. GVSUD-C (Montgomery Direct) at 20-21.

[65] TEX. CONST. Art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . ."); *Horne v. Dep't of Agric.*, 135 S. Ct. at 2426, 2428-2429; *Steele v. Houston*, 603 S.W.2d 786, 792-93 (Tex. 1980).

Point of Error No. 5

The Commission Erred by Failing to Address Green Valley's Claim for Compensation For Net Increased Costs.

Green Valley's claim for compensation resulting from Cibolo's decertification included the net present value of higher service fees that will result to its remaining customers, but the Order contained no finding or conclusion addressing this issue. In briefing on the issue, Green Valley did not assert that these net increased costs were "property," but simply that they are compensable costs under the plain language of TWC § 13.255(g) without regard to whether the Commission considers them to be "property."[66] As a political subdivision, Green Valley has an obligation for the benefit of its constituents to keep its fees reasonable.[67] Green Valley employed a reasonable method to measure the cost impact to the remaining parcels resulting from Cibolo's piecemeal decertification approach. This piecemeal approach directly causes these increased costs regardless of whether they constitute property interests. The Commission should grant rehearing and address this issue one way or the other.

Yet, as the result of the Commission's untenable *ad hoc* dual hearing process,[68] Green Valley was denied any meaningful opportunity to present evidence on this compensation item. The Commission's Phase 1 interim decision was to deny compensation altogether and, similarly, deny Green Valley a Phase 2 property valuation hearing. The Commission's conclusion that no

---

[66] *See* Green Valley Initial Brief (Feb. 10, 2017) at 15-17; Ex. GVSUD-B (Montgomery Direct) at 20-21 (explaining the impact to Green Valley's remaining customers as measured in increased impact fees resulting from decertification); TWC § 13.255(g) (identifying as a factor to ensure the justness and adequacy of rates "any demonstrated impairment of service or *increase of cost to consumers* of the retail public utility remaining *after* the single certification") (emphasis added).

[67] Ex. GVSUD-B (Allen Direct) at 10; TWC §13.001(3).

[68] Green Valley further addresses the Commission's bifurcated hearing process in Point of Error No. 6, which it herein incorporates by reference.

compensation is due to Green Valley as the result of decertification when it failed to even consider Green Valley's claim for compensation resulting from the increased costs to its customers thus constitutes legal error.[69] On rehearing, the Commission should either: (1) adopt the compensation amount identified by Green Valley's appraisal, or (2) remand the proceeding for further proceedings on the amount of compensation due upon decertification for increased costs.

Point of Error No. 6

The Commission Erred by Engaging in Improper Rulemaking Through an Adjudicative Decision.

The new evidentiary standards and procedures that the Commission adopted in this docket were implemented well after this docket had commenced and after the Commission had ordered appraisals.[70] Implementation of these standards constitutes improper *ad hoc* rulemaking under the APA because these standards are plainly intended to be generally applicable to all CCN holders, yet were adopted and implemented in this contested case proceeding without the required notice, publication, and public participation.[71] The Texas Supreme Court has held that "[w]hen an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid."[72] Similarly, the Court has decided that "in a rulemaking proceeding, blanket notice must be given to

---

[69] Order at FoF 71; CoL 17, 27.

[70] *See* Order at 4, n. 18 (Commission acknowledging that its rulemaking proceeding in PUC Project No. 46151 addressing the procedures for processing of applications brought under TWC § 13.255 did not result in the adoption of new hearing procedures until May 4, 2017, which is more than a year after this docket was initiated). Notably, those new hearing procedures differ from those announced by the Commission in its July 1, 2016 Preliminary Order, which in turn was revised by the Commission's July 20, 2016 Supplemental Preliminary Order.

[71] APA at §§ 2001.023-.030.

[72] *El Paso Hosp. Dist. v. Tex. HHS Comm'n*, 247 S.W.3d 709, 715 (Tex. 2008).

the public at large. Contested case procedures and rulemaking procedures simply cannot be mixed in one hybrid proceeding."[73]

Here, the Commission established a unique bifurcated hearing process midway through a contested case proceeding without the required advanced notice and public participation, and in so doing has created new requirements of general applicability to decide pending and future decertification proceedings. The Commission has also announced new standards for how to apply the terms "property" and "useless or valueless" in the TWC § 13.255 context even though these terms have been part of TWC § 13.255 for many years and have never been interpreted or applied in this manner without proper notice to Green Valley. Applying the Supreme Court's requirements to this proceeding, the Commission's *de facto* rulemaking in the context of this contested case proceeding is invalid.

The Commission's error is particularly glaring given the TWC § 13.255(g-1) requirement that "[t]he Utility Commission shall adopt rules governing the evaluation of these [§ 13.255(g)] factors" because the newly adopted standards were not included in the Commission's rules effective when Cibolo submitted its application.[74] The Commission's decision to assess whether property had been rendered useless or valueless before and separately from deciding the value of that property

---

[73] *R.R. Comm'n v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 78 (Tex. 2003).

[74] TWC § 13.255(g); 16 TAC § 24.120. While the Commission eventually initiated a new rulemaking process in Project No. 46151, the Commission has only recently made a rulemaking decision through that process. PUC Project No. 46151, Order Adopting the Repeal of § 24.113 and § 24.120 and New § 24.113 and § 24.120 Adopted at the May 4, 2017 Open Meeting (May 4, 2017). Such rules may only operate prospectively. *E.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221, 109 S.Ct. 468 (1988) (Scalia, J., concurring) ("Adjudication deals with what the law was; rulemaking deals with what the law will be."); *Amarillo Indep. School Dist. v. Meno*, 854 S.W.2d 950, 958 (Tex. App – Austin 1993), writ denied). The Commission's final rule language adopted in Project No. 46151 does not even include the Commission's "property . . . rendered useless or valueless" " standard pronounced in the Order and seems to implement a different process than that followed here. Rather, new 16 TAC § 24.120(b)(5) simply provides a non-definition "definition" for "useless or valueless property" as "property that would be rendered useless or valueless to the current CCN holder by single certification."

came *after* the parties had engaged appraisers to assess that value.[75] Similarly, the Commission's new standards for what constitutes "property . . . rendered useless or valueless" did not come until the Commission's Phase 1 Interim Order.[76] Green Valley has been harmed as a result and, at least in this particular case, should receive compensation for its property interests (*i.e.,* monetary expenses) for good cause.

When the Commission first adopted the new procedure midway through this case and refused to consider Green Valley's federal protection issue or abate, Green Valley's alternative was simply to forfeit its property interests or continue. The Commission imposed a Hobson's choice of: (1) Green Valley forfeiting its right to compensation for its property interests rendered useless or valueless by decertification; or (2) being subjected to significant legal costs in an unreasonably complex and lengthy process, all simply to try to make itself whole. Green Valley could not have reasonably foreseen the path on which it had embarked when it made the decision to protect its property interests, and ultimately, those of its customers.[77]

The new Commission process interjected into the middle of this proceeding increased legal and professional fees exponentially by imposing a new contested case hearing procedure on the parties. The statutory scheme, in contrast, requires that the total compensation to be paid under TWC 13.255(g) be "determined not later than the 90th calendar day after the date on which the utility commission determines that the municipality's application is administratively complete." The Commission's new process turned this requirement on its head by delaying the administrative

---

[75] The Preliminary Order was issued on July 1, 2016 and was then further revised in July 20, 2016 by the Supplemental Preliminary Order, both of which occurred after the Commission required Green Valley to retain an appraiser and submit its appraisal.

[76] Interim Order (Jun. 29, 2017).

[77] At the time this proceeding was commenced, there was no provision in then-existing PUC SUBST. R. 24.120 giving Green Valley notice of this protracted hearing mechanism or the Commission's new statutory interpretations.

completeness finding until after the conclusion of the entire contested case process while simultaneously requiring filed appraisals at the beginning of the process. Given these circumstances, the Commission should grant rehearing and compensate Green Valley for the significant costs of defending against Cibolo's application, regardless of whether such costs are deemed "property."

Because the Commission's actions in excess of its authority without prior notice to Green Valley greatly enhanced Green Valley's legal and professional fees, the Order's finding that such costs are non-compensable approximately 21 months after the proceeding was initiated is both unjust and unreasonable. The Commission should therefore reverse its finding that these costs are not property consistent with its finding that such fees were reasonably and necessarily incurred, or at the very least, award compensation for these expenses based on equitable principles.

Point of Error No. 7

The Commission Erred by Finding that Cibolo's Notice of Intent Was Sufficient to Provide Notice to Green Valley of the Tracts Sought to be Decertificated.

The Commission erred in finding that Cibolo's 180-day notice of intent letter complied with the TWC § 13.255(b) and then-effective 16 TAC § 24.120 requirement that the applicant notify the retail public utility of its intent to provide service "to the incorporated or annexed area."[78] The notice of intent was defective because the accompanying map identified as areas to be decertified certain parcels that were in addition to the actual parcels that Cibolo intended to decertify through its notice of intent and application.[79] Because the notice of intent was defective, Cibolo failed to wait the required 180-day period prior to submitting its application. The Commission erred by finding and concluding otherwise.[80] Because the notice of intent was defective, the subsequent application could

[78] Order at 5, FoF 60, CoL 24.

[79] Joint Ex. 1 at 12-15.

[80] *Id.* at FoF 61, CoL 25.

not have been found administratively complete. The Commission erred by finding the application administratively complete.[81] The Commission should grant rehearing and issue an order on rehearing dismissing Cibolo's application in the absence of Cibolo providing a new notice of intent that complies with the currently effective 16 TAC § 24.120 followed by the requisite 180-day period prior to filing.

III. CONCLUSION AND PRAYER

Green Valley Special Utility District respectfully requests that the Commission grant Green Valley's Motion for Rehearing. Further, Green Valley requests that the Commission issue an Order on Rehearing vacating its January 10, 2018 Order and denying Cibolo's application on the ground that Green Valley's sewer CCN service area is protected from municipal encroachment arising from Green Valley's outstanding federal indebtedness pursuant to 7 U.S.C. § 1926(b).

Alternatively, Green Valley requests that the Commission rescind the Order and abate this proceeding pending a final order in the ongoing related federal lawsuit brought by Green Valley against the City of Cibolo.[82]

Alternatively, Green Valley respectfully requests that the Commission vacate the Order and issue an Order on Rehearing determining that Cibolo's requested decertification will render Green Valley property useless or valueless and remanding the case to SOAH for further proceedings regarding the proper valuation of Green Valley's affected property interests so that Green Valley receives adequate and just compensation for its lost CCN areas.

---

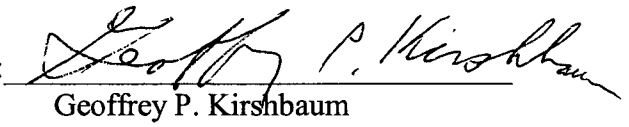
[81] *Id.* at FoF 62, CoL 28.

[82] *Green Valley Special Util. Dist. v. City of Cibolo*, Civil Action No. 1:16-cv-00627-SS in the United States District Court for the Western District of Texas, Austin Division (pending).

Alternatively, Green Valley requests that the Commission vacate its Order and enter an order on rehearing determining that Cibolo failed to provide proper notice of intent and either deny the Application or order Cibolo to resubmit its 180-day notice of intent letter with a clear description of the portion of Green Valley's sewer CCN area that Cibolo seeks to decertify, followed by a re-submitted application after that period. Green Valley further requests that the Commission grant Green Valley such other relief to which it is justly entitled.

Respectfully submitted,

TERRILL & WALDROP

By: 

Geoffrey P. Kirshbaum
State Bar No. 24029665
Shan S. Rutherford
State Bar No. 24002880
810 W. 10th Street
Austin, Texas 78701
(512) 474-9100 (phone)
(512) 474-9888 (fax)
gkirshbaum@terrillwaldrop.com
srutherford@terrillwaldrop.com

ATTORNEYS FOR GREEN VALLEY SPECIAL UTILITY DISTRICT

CERTIFICATE OF SERVICE

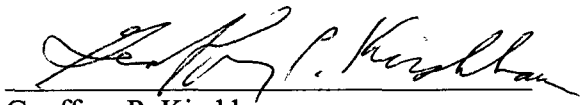
I hereby CERTIFY that on February 2, 2018, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

David Klein — *via fax to: (512) 472-0532*
Lloyd Gosselink
816 Congress Ave., Suite 1900
Austin, Texas 78701

ATTORNEY FOR APPLICANT

Landon J. Lill — *via fax to: (512) 936-7268*
Public Utility Commission of Texas
1701 N. Congress PO Box 13326
Austin, Texas 78711-3326

ATTORNEY FOR COMMISSION STAFF



Geoffrey P. Kirshbaum