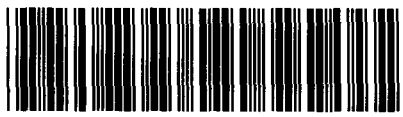

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PUC DOCKET NO. 45702
SOAH DOCKET NO. 473-16-5296.WS

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

CITY OF CIBOLO'S REPLY TO GREEN VALLEY SPECIAL UTILITY DISTRICT'S MOTION FOR REHEARING

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TO: THE HONORABLE CHAIRMAN AND COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION

COMES NOW, the City of Cibolo (the "City") and files this Reply to Green Valley Special Utility District's ("GVSUD") Motion for Rehearing (the "Motion"), in accordance with the Texas Administrative Procedure Act ("APA")[1] and Public Utility Commission ("Commission") Rule 16 Texas Administrative Code ("TAC") § 22.264. This Reply is timely filed.

I. INTRODUCTION

The Motion should be denied because the Points of Error alleged therein are a disingenuous characterization of this contested case hearing and the findings in the Commission's Final Order. GVSUD's Motion conceals pertinent and dispositive information while attempting—again—to mislead the Commission on operative law. In any event, nearly all of the Points of Error are merely reiterations of GVSUD's arguments that the Administrative Law Judge ("ALJ") and Commission have already rejected in this matter. Points of Error Nos. 1-5 and 7 have been extensively considered by both the ALJ and the Commission over the last two years, and the Motion is devoid of any new or persuasive authority that supports a finding of legal error or justifying a rehearing on these decided matters. As to GVSUD's Point of Error No.

[1] TEX. GOV'T CODE §§ 2001.001-.902 (West 2016).

6, the alleged defect not only lacks a legally supportable basis, but it has also been rejected by the Commission in reaching its final decision to approve the City's Application.

In short, the Motion is GVSUD's last-ditch effort to prevent the Commission's well-reasoned and legally supported Final Order, determining that the Application was properly filed and processed, and that GVSUD is not entitled to compensation in this matter. The Motion seeks relief that is inappropriate both procedurally and legally, and should thus be denied in its entirety.

II. GENERAL REPLY

GVSUD has failed to comply with the minimum requirements of a motion for rehearing under both the APA and applicable Commission rules. The APA expressly requires the rehearing requestor to "identify with particularity findings of fact [("FOF")] or conclusions of law [("COL"] that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error."[2] Moreover, Commission rules require that "[i]f an ultimate finding of fact stated in statutory language is claimed to be in error, the motion for rehearing shall state all underlying or basic findings of fact claimed to be in error and *shall cite specific evidence which is relied upon* as support for the claim of error."[3]

The Motion is fundamentally lacking on these basic requirements, re-urging GVSUD's failed legal theories and mischaracterized facts, and refusing to (1) identify which particular FOFs and COLs it alleges are in error, and (2) cite specific evidence to support such allegations of erroneous findings of fact. As such, the motion is procedurally deficient as a matter of law and should be denied outright.[4]

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[2] *Id.* § 2001.146(g).

[3] 16 TEX. ADMIN. CODE § 22.264(b) (TAC) (emphasis added).

[4] *See* TEX. GOV'T CODE § 2001.146(g); 16 TAC § 22.264(b).

III. REPLY TO POINT OF ERROR NO. 1

In its Point of Error No. 1, GVSUD again alleges that GVSUD's sewer CCN is not subject to decertification under Texas Water Code ("TWC") § 13.255 because it is protected from encroachment under federal law, namely 7 U.S.C. § 1926(b).[5] Whether § 1926(b) preempts the decertification sought by the City has been raised and properly rejected multiple times by the Commission throughout this proceeding.[6] That discussion is incorporated herein by reference.[7]

In short, the Commission lacks jurisdiction to determine whether § 1926(b) preempts the application of TWC § 13.255. State administrative agencies, such as the Commission, have only those powers expressly conferred upon them by the Texas Legislature.[8] A state agency has exclusive jurisdiction when the legislature has granted the agency with the sole authority to make an initial determination in a dispute.[9] The Texas Legislature only granted the Commission clear authority over the granting, amending, and decertifying of water and sewer certificates of convenience and necessity ("CCN") through TWC Chapter 13, Subchapter G (in this case, TWC § 13.255); in enacting this protocol, the Legislature did not authorize or direct the Commission to deny an application if the CCN holder is merely a debtor under 7 U.S.C.A. § 1926.[10] Rather, the judicial branch is the correct entity to assess and determine whether a state law is preempted by a federal law.[11]

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[5] Green Valley Special Utility District's (GVSUD) Motion for Rehearing, Docket Item No. 183, at 4-8 (Feb. 2, 2018) [hereinafter Motion].

[6] Commission's Preliminary Order, Docket Item No. 53, at 3-4 (July 1, 2016); SOAH Order No. 12 Memorializing Prehearing Conference; Denying Motion to Dismiss or Abate; Adopting Procedural Schedule; and stating Record Close Date, Docket Item No. 147, at 2 (August 14, 2017).

[7] City of Cibolo's (City) Response to GVSUD's Plea to Jurisdiction and Motion to Dismiss, Docket Item No. 21, at 3-8 (May 19, 2016); City's Brief on Threshold Legal/Policy Issues, Docket Item No. 32, at 2-6 (June 6, 2016); City's Response to GVSUD's Interim Appeal of SOAH Order No. 2, Docket Item No. 151, at 2-15 (August 28, 2017).

[8] State administrative agencies, such as the TCEQ, have only those powers expressly conferred upon them by the Legislature. *Public Util. Comm'n v. GTE–Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995); *Brazoria City. v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 728, 734 (Tex. App.—Austin 2004, no pet.).

[9] *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004).

[10] *See* Tex. Water Code Ann. § 13.255 (West 2008) (TWC).

[11] Preliminary Order, Docket Item No. 53, at 4 (July 1, 2016).

In re-urging this legally unsustainable position, GVSUD still conveniently refuses to acknowledge the following information that is critical to the analysis:

- The Commission did directly rule on the substance of GVSUD's initial plea to the jurisdiction, which was based exclusively on the § 1926(b) preemption issue.[12] Therein, the Commission determined that it lacked jurisdiction to consider that challenge, and such a determination was dispositive of that matter.[13] Moreover, GVSUD's argument is belied by the fact that even GVSUD has treated the Preliminary Order as a denial of the motion to dismiss. That decision formed the basis for GVSUD to appeal the denial of the motion to dismiss to district court, which is still ongoing.[14]

- GVSUD's cited Fifth Circuit determination is not final and non-appealable, and in fact, the Opinion has been appealed to the U.S. Supreme Court.[15] Further, the Supreme Court has requested a response from GVSUD, which is due March 12, 2018. As such, the determinations made by the Fifth Circuit are not yet binding and are unreliable in their own right. It is also important to note that such Fifth Circuit decision only pertains to a Motion to Dismiss, not a final ruling on the merits in that case.

- The Commission taking jurisdiction over that which it has not been expressly granted is, itself, legal error.[16] Thus, the express language in TWC § 13.254 prohibiting the consideration of federal debt compared to the silence in TWC § 13.255 is of no consequence.

- Consistent with the Commission's determination on this matter, the Supremacy Clause expressly applies to judges.[17] As such, the Commission appropriately determined that preemption is best determined by the judiciary.

Furthermore, GVSUD attempts to impose on the Commission the requirement that it include FOFs and COLs on matters over which it does not have jurisdiction.[18] Such legally irrelevant matters are not required under Commission rules to be included in the Final Order.[19]

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[12] GVSUD Plea to the Jurisdiction and Motion to Dismiss, Docket Item No. 11 (Apr. 29, 2016).

[13] Preliminary Order, at 2-4, 7.

[14] *Green Valley Special Util. Dist. v. City of Cibolo*, No. A-16-CA-627-SS, 2016 WL 5793797 (W.D. Tex. 2016).

[15] *Green Valley Special Util. Dist. v. City of Cibolo*, 866 F.3d 339 (5th Cir. 2017), *petition for cert. filed* (U.S. Dec. 27, 2017) (No. 17-938).

[16] *See GTE-Southwest, Inc.*, 901 S.W.2d at 407; *Brazoria City*, 128 S.W.3d at 734.

[17] U.S. CONST. art. VI ("[T]he laws of the United States . . . shall be the supreme law of the land; and the *judges* in every state shall be bound thereby.") (emphasis added).

[18] Motion, at 6.

Finally, GVSUD's last alleged legal error in this Point of Error No. 1 inappropriately suggests that the Commission should take a leap and deny the Application for reasons outside of the legislative directive in TWC § 13.255. GVSUD's argument takes issue with the very premise of TWC § 13.255—that a municipality can singly certify a CCN that overlaps with areas that have been annexed or incorporated into the municipality's limits.[20] GVSUD cites no authority whatsoever to support its assertion that curtailment (to the extent any curtailment exists for non-existent sewer service) is only authorized if there is a showing that service has not been made available by the CCN holder.[21] This assertion, like the rest of the Motion, lacks legal merit, as evidenced by GVSUD's complete failure to cite any law in support thereof.[22]

For all of these reasons, and the reasons extensively addressed throughout this proceeding, GVSUD's Point of Error No. 1 should be denied.

IV. REPLY TO POINT OF ERROR NO. 2

Point of Error No. 2 is merely a restatement of GVSUD's legally flawed interpretation of the term "property" for purposes of TWC § 13.255, which was opposed by the City, initially rejected by the ALJ, and ultimately denied by the Commission. Once again, this contention should be denied for the following reasons.

A. The Order does not erroneously impose a requirement that physical infrastructure be constructed in the area to be decertified.

GVSUD asserts that the Final Order requires that "actual physical facilities must [be] constructed in the decertificated area or elsewhere in the CCN area."[23] This assertion is belied by the following:

- While the FOFs to which GVSUD refers do reference physical facilities (and conclude that GVSUD possesses none), the FOFs are not limited to whether GVSUD has physical property. The other FOFs that GVSUD failed to cite refer to non-

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[19] *See* 16 TAC §§ 22.262, 22.263.

[20] Motion, at 6.

[21] *Id.* at 7.

[22] *Id.*

[23] *Id.* at 8.

physical facilities, such as a Texas Pollutant Discharge Elimination System permit, wastewater service contracts, and wastewater infrastructure designs.[24]

- The Final Order concludes, as a matter of law, that property is generally defined broadly to include any property interest, not just physical property, through its recitation of general definitions of "property" and to a statutory provision relevant to this proceeding, TWC § 13.255(g).[25]

Thus, while physical facilities in the decertificated area or the sewer CCN would be indicative of tangible property that could be rendered useless or valueless by GVSUD (of which there are none), the Final Order does not and cannot be interpreted to stand for the proposition that *only* physical facilities in the decertificated area or the sewer CCN can achieve that result. In fact, the Final Order expresses just the opposite.

GVSUD then points to the definition of "service", which includes—as GVSUD describes it—"planning acts that necessarily lead up to physical construction", as a basis for its assertion.[26] However, such definitions are irrelevant to a consideration of whether an alleged property interest is, in fact, property. In other words, GVSUD conflates a determination that certain actions, like planning, are a "service" with a determination that certain actions constitute "property". Regardless of whether money was spent on the acts leading up the physical construction, GVSUD has failed to demonstrate that those acts constitute property.

For these reasons, GVSUD has failed to substantiate that the Final Order artificially limits "property" to physical facilities. This misrepresentation thus does not qualify as a valid Point of Error.

B. The Order is not predicated on an erroneous position regarding money spent because that money, once spent, is no longer property.

In this subissue of Point of Error No. 2, GVSUD again recites its flawed argument that money it has spent on items, such as planning documents, is property under TWC § 13.255.[27] As has been explained at length throughout this proceeding by the City (and supported by

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[24] *Id.* (citing Final Order, Docket Item No. 182, at 13, 15-16, 19 (FOF Nos. 41, 42, 63, 71) (COL Nos. 26-27) (Jan. 10, 2018) [hereinafter Final Order]); Final Order, at 11, 12 (FOF Nos. 43, 48).

[25] Final Order, at 17 (COL Nos. 7-8).

[26] Motion, at 9.

[27] Motion, at 9-11.

Commission Staff), and which is incorporated herein by reference,[28] money no longer possessed by GVSUD is not property under TWC § 13.255. The ALJ and Commission both agreed with the City's position. Any other interpretation of the word "property" in TWC § 13.255 would be inconsistent with the plain meaning of "property", even when that term is broadly construed. By the precise words used to describe the status of this money–*money spent*–GVSUD implicitly admits that it is no longer under the possession or control of the money. Said another way, GVSUD has released its rights of ownership in that money, and that money has no inherent value. A person cannot transfer or acquire spent money. The very control that makes something property is entirely lacking. The thing on which money was spent cannot serve as a "proxy" for that money either, because money has been converted into something else. When money is spent on actual property, the ownership is not in the money spent to acquire that item, but rather it is transferred to the item itself.

Simply put, property is not the only thing that may be purchased with money. Either you own an interest in something, or you don't. Here, GVSUD does not, because what it purchased—planning and design—are not property or an investment in which GVSUD has a stake. They are services performed on behalf of GVSUD. In this way, there is no money "purgatory." GVSUD has incessantly relied on this language from the non-binding proposal for decision ("PFD") in another case under another statute to make its point on a legally erroneous and absurd argument.[29]

Moreover, despite the fact that GVSUD's incorrect complaints that the Commission's determination of what is "property" in this subissue is legally unsupported, GVSUD itself presents no law to the contrary—merely its conclusory statement that the Commission is wrong.[30] GVSUD even takes this mistaken theory a step further and suggests that it is entitled to

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[28] Commission Staff's Initial Brief, Docket Item No. 116, at 3-6; City's Initial Brief, Docket Item No. 118, at 8-17; Commission Staff's Initial Brief, Docket Item No. 121, at 3-6 (February 28, 2017); City's Reply Brief, Docket Item No. 123, at 9-17 (February 28, 2017); City's Reply to GVSUD's Exceptions to PFD, Docket Item No. 134, at 11-15 (May 22, 2017); Commission Staff's Reply to GVSUD's Exceptions, Docket Item No. 133, at 1-3 (May 22, 2017).

[29] Motion, at 10.

[30] *Id.* at 9-11.

an "allocable" portion of those dollars invested, despite there being no suggestion of such an allotment in TWC § 13.255 and the record being void of any demonstration that an "allocable" portion of those dollars have been rendered useless or valueless.[31]

GVSUD's argument that money spent and no longer in its possession is property is ludicrous and was properly rejected in the Final Order. Thus, this restated erroneous theory is insufficient to constitute a point of error, and it should be rejected, again.

C. The Commission's interpretation of the factors set forth in TWC § 13.255(g) is not erroneous because such interpretation is in conformance with the plain language of the statute.

GVSUD bases this subissue of its Point of Error No. 2 partially on the fact that the Final Order does not acknowledge the factors listed in TWC § 13.255(g) as conferring a property interest for the items listed therein.[32] For the reasons previously explained in this matter, which are incorporated herein by reference, the TWC § 13.255(g) factors are not a menu of property interests from which GVSUD can pick and choose what it owns.[33] GVSUD's argument to this end is flawed for the following:

- The Final Order expressly acknowledges a broad definition of "property", despite GVSUD's blatantly false assertion to the contrary.[34]
- TWC § 13.255(g) expressly limits the application thereof to valuation, not property identification.[35] Thus, the Commission is not artificially constructing a wall between identification and valuation of property in the Final Order; the plain language of TWC § 13.255(g) provides that construct.
- The compensation factors in TWC § 13.255(g) do not authorize payment for non-property interests, as GVSUD alleges. Rather, the compensation factors are tools used to determine the *value* of property and as guidance on how to calculate just and adequate compensation if property is rendered useless or valueless as a result of

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[31] TWC § 13.255(g); *see id.*

[32] Motion, at 11-14.

[33] City's Reply to GVSUD's Exceptions to PFD, Docket Item No. 134, at 12-13 (May 22, 2017).

[34] Final Order, at 17 (COL Nos. 7-9).

[35] TWC § 13.255(g) ("For the purpose of implementing this section, the *value* of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection.") (emphasis added).

decertification.[36] GVSUD fundamentally misunderstands how valuation works in TWC § 13.255(g).

For these reasons, the Commission's interpretation of the role that the TWC § 13.255(g) factors play in a determination of what constitutes property is legally sound. As such, this basis for Point of Error No. 2 must be denied.

D. The result of the Commission's finding that investments in planning and design activities for the decertified area are not property is not an unconstitutional taking.

GVSUD alleges that the Final Order will result in an unconstitutional taking because it is not compensated for money spent on engineering services, namely planning and design.[37] However, an unconstitutional taking only occurs if a person's "*property*" is "taken, damaged, destroyed for or applied to a public use without adequate compensation being made."[38] Moreover, consistent with the takings provision, TWC § 13.255(c) and (g) require just and adequate compensation, but that compensation is only due if GVSUD actually has property taken away from it. Here, it does not. In this case, as previously explained by the City and agreed by the Commission,[39] a taking cannot occur in this matter for at least the following reasons:

- Planning and design work are not property.[40]
- The planning and design work is not being taken for a public use. GVSUD still has access to that planning and design work for which it has paid, it just no longer has access to a portion of its sewer CCN.
- GVSUD has not even alleged that these interests are rendered useless or valueless as a result of decertification even if it is property, and thus compensation is not authorized under TWC § 13.255.

Moreover, an unconstitutional taking will occur if the City is required to compensate GVSUD when GVSUD has not lost any property as a result of decertification. If TWC § 13.255

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[36] *Id.*

[37] Motion, at 14-15.

[38] U.S. CONST. amend. V (emphasis added).

[39] City's Reply to GVSUD's Exceptions to PFD, Docket Item No. 134, at 18-19 (May 22, 2017).

[40] *Supra* Section II.B.

is read in the incorrect manner, as GVSUD proposes, then the City would be unjustly required to pay GVSUD for a benefit or interest that the City has not received through this decertification.[41]

Having rejected GVSUD's absurd claims regarding a non-existent taking, the Commission has done exactly what GVSUD asks: interpreting TWC § 13.255 in a manner that is consistent with plain mandate of the state and federal constitutions and which gives effect to the entire statute in such a way that results in a just and reasonable result. Therefore, this subissue of Point of Error No. 2 must also be denied.

V. REPLY TO POINT OF ERROR NO. 3

GVSUD's Point of Error No. 3, restating its previously rejected argument that it should receive compensation for legal expenses and professional fees when no property was rendered useless or valueless by the Application, should be denied again because (1) its flawed "money spent" theory again fails for the reasons provided in response to Point of Error No. 2, above, and (2) fairness does not merit compensation, even if the Commission decided to inappropriately make decisions beyond the TWC § 13.255 rubric. GVSUD's contention in this Point of Error is absurd and lacks legal and factual merit, because as previously briefed:[42]

- It is based on the falsity that GVSUD was mandated to participate in the contested case hearing. There is nothing in TWC § 13.255 that requires the CCN holder to be a part of any decertification process at the Commission. It was GVSUD's voluntary choice, which then triggered the incurrence of legal and professional fees.

- GVSUD had 180 days between the date that it filed its notice of intent to serve a portion of GVSUD's sewer CCN and the date that it filed its application to negotiate without incurring the legal and professional fees it now seeks to recover.

- GVSUD misrepresents how much of its sewer CCN is being decertified as a "significant portion" of a "high-growth area", where in reality it is 405 acres out of GVSUD's 76,000-acre sewer CCN area—less than 1% of the entire CCN area.

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[41] GVSUD suggests that the plain meaning would have an absurd result because the plain reading of § 13.255 results in GVSUD not receiving any form of compensation. Motion, at 14 (citing *Texas Dep't of Protective & Regulatory Svcs. v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004)). However, it is GVSUD's "plain reading" interpretation of § 13.255 that would have an absurd result because GVSUD would receive undue compensation when the City has received no identifiable property that is rendered useless or valueless to GVSUD.

[42] City's Reply to GVSUD's Exceptions to PFD, Docket Item No. 134, at 22-23 (May 22, 2017).

- the opinion of GVSUD's independent appraiser that these items are "property" under TWC § 13.255 was rejected.[43]

- Compensation is only contemplated by TWC § 13.255 if there is property and that property is rendered useless or valueless. Legal fees and professional fees are not only non-property interests, as explained hereinabove at Section IV.B and IV.C, but they also are not rendered useless or valueless. Even if these fees are property, they are not rendered useless or valueless to GVSUD simply because the services they paid for did not end in a favorable result.

For these reasons, GVSUD's Point of Error No. 3 must be rejected.

VI. REPLY TO POINT OF ERROR NO. 4

In its Point of Error No. 4, GVSUD re-urges its rejected theory that the Final Order is erroneous for not requiring compensation for lost net revenues.[44] Such theory is a creative mischaracterization of what GVSUD is really requesting–that is, lost profits from future, unknown and unidentified customers. To reach the result that GVSUD seeks, the Commission must disregard the following clear and operative facts and law:

- GVSUD has no sewer customers inside or outside the area to be decertified, thus it is not collecting any revenues from sewer service.[45] It also has no retail sewer rates.

- Because GVSUD has no sewer revenues, decertification will not result in a loss of revenues.[46]

- GVSUD has no costs to serve the sewer CCN, thus decertification will not result in increased costs to its non-existent customers.[47]

- "Checkerboarding" of a CCN is not prohibited under TWC § 13.255.[48] Regardless, GVSUD has not demonstrated how and where such checkerboarding will occur

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[43] Motion, at 15.

[44] Motion, at 17.

[45] Direct Testimony of Rudolph "Rudy" F. Klein. IV, P.E., ("Cibolo Ex. 1"), Docket Item No. 74, at Ex. G (Response to Cibolo Request RFI 1-4. RFAs 1-2, 1-4; 1-10. 2-4, 2-5. 2-6. 2-7. 2-8, and 2-9).

[46] *See* GVSUD Appraisal, Docket Item No. 50, at 4.

[47] Reply Brief of City of Cibolo, Docket Item No. 123, at 17-19.

[48] *See generally* TWC § 13.255.

because it has no customers.[49] Moreover, the Commission is authorized to decertify more that the City has requested.[50]

- GVSUD's argument about the plain reading of the compensation factors—which are not property interests to begin with for the reasons stated in Section IV.C, above—is fundamentally flawed because, based on a plain reading of TWC § 13.255(g), such compensation is expressly prohibited. The Texas Legislature clearly and unambiguously determined that future revenues or profits from future customers are not a contemplated property interest in TWC § 13.255(g).[51] Compensation for future revenues is specifically limited to only include future revenues from existing customers, *i.e.* the customer that the utility actually has, by limiting the scope of the factor to revenues from *existing* customers.[52] GVSUD witness, Mr. Stephen Blackhurst, conceded this interpretation.[53]

- As the City has previously explained at length, compensation for alleged lost future net revenues from future customers is not authorized under the "other relevant factors" language in TWC § 13.255(g) pursuant to the principles of statutory construction.[54]

- Irrespective of whether compensation is consistent with other regulatory schemes,[55] for the reasons explained herein, it is not consistent with the regulatory scheme under which this case is brought.[56] Moreover, compensation is only constitutionally required when there has been a taking.[57] For the reasons explained herein, no taking has occurred.

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[49] City's Reply to GVSUD's Exceptions to PFD, Docket Item No. 134, at 24 (May 22, 2017).

[50] TWC § 13.255(c).

[51] TWC § 13.255(g); Direct Testimony of Stephen Blackhurst, Docket Item No. 79, at 11:19-22, 14:14-16 (November 2, 2016) (indicating that the language of TWC § 13.255(g) stating "the impact on future revenues and expenses of the retail public utility" was replaced with "the impact on future revenues lost from existing customers.").

[52] *Id.*

[53] Direct Testimony of Stephen Blackhurst, Docket Item No. 79, at 11:19-22, 14:14-16 (November 2, 2016).

[54] City's Reply to GVSUD's Exceptions to PFD, Docket Item No. 134, at 10-17, 23-24 (May 22, 2017) (discussing how the Texas Code Construction Act and the principles of statutory construction preclude GVSUD's interpretation that allows consideration of future revenues from future customers through the broad "other relevant factors" language in TWC § 13.255(g) where the Texas Legislature has explicitly addressed the consideration of such revenues in another factor listed in TWC § 13.255(g)).

[55] Motion, at 17.

[56] TWC § 13.255.

[57] TEX. CONST. art. I, § 17.

Again, GVSUD is requesting to be "made whole" for something that is not taken from it because it does not exist. The Final Order is supported, both legally and factually. Thus, Point of Error No. 4 must be denied.

VII. REPLY TO POINT OF ERROR NO. 5

In its Point of Error No. 5, GVSUD re-asserts its flawed argument that the Final Order is erroneous because it fails to address GVSUD's claim for compensation for net increased costs.[58] Like Points of Error 1-4, this assertion blatantly disregards one of the fundamental findings in the Final Order—that the TWC § 13.255(g) compensation factors are not property interests.[59] Unlike GVSUD's other alleged interests, GVSUD has and continues to concede that these increased costs are not property interests.[60] GVSUD only raises this issue because it is a compensation factor listed in TWC § 13.255(g).[61] In determining that the mere listing in the compensation factors does not indicate that something is property, the Final Order fully addressed this claim.

Further, as to the merits of the argument, for Factor 5 to apply, GVSUD must (1) currently have wastewater customers, and (2) at least some of those customers must still be GVSUD customers after decertification by the City.[62] Only then can an evaluation of the costs associated with those customers be evaluated for impacts of decertification.[63] GVSUD, however, fails at the first step because GVSUD has no wastewater customers.[64] Therefore, it is impossible

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[58] Motion, at 18-19.

[59] Final Order, at 17 (COL No. 9-10).

[60] Green Valley Special Utility District's Exceptions to the Proposal for Decision, Docket Item No. 130, at 4 (May 12, 2017); and Motion at 18.

[61] *Id.*

[62] *See* TWC § 13.255(g).

[63] *Id.*

[64] Cibolo Ex. 1, Ex. G at 558 (Response to Cibolo RFI 1-4. RFAs 1-2, 1-4: 1-10. 2-4, 2-5. 2-6. 2-7. 2-8, and 2-9); *See also* GVSUD Appraisal, Docket Item No. 50, at 4 (June 28, 2016) (admitting that the GVSUD Appraisal bases its evaluation of increased costs to future, currently nonexistent customers based on projections in the now outdated 2006 Wastewater Master Plan, not on actual customers).

for any customers to remain after decertification. Further, GVSUD has not adopted sewer rates or a sewer impact fee.[65] Unless and until that happens, there are no increased costs for GVSUD customers, even if they had wastewater customers. This allegation under TWC § 13.255(g) certainly cannot be a viable property interest.

Rather than acknowledge these legal and factual impediments, the Motion instead attempts to make an argument about fairness on why GVSUD should nevertheless be compensated.[66] However, such a plea should be rejected for the following:

- Although GVSUD has an obligation to keep costs low, it currently has not adopted rates, so it is impossible to quantify how much the costs will increase from removing less than 2.2% of the CCN area within which GVSUD has no sewer customers.[67]
- There is no record evidence demonstrating the impact of decertifying 2.2% of the acreage out of the GVSUD sewer CCN on other, currently non-existent customers.
- GVSUD's claim that it was unable to meaningfully address this claim is belied by the multiple opportunities GVSUD had to present such evidence, including responses to discovery requests, its "expert" witnesses' prefiled testimony, its Response to City of Cibolo's Motion for Partial Summary Decision, its Reply to Commission Staff's Statement of Position and Response to City of Schertz's Motion for Partial Summary Decision, in response to questions asked on cross-examination during the hearing on the merits of Phase 1, its Exceptions to the Proposal for Decision, and its Reply to Exceptions to the Proposal for Decision. That GVSUD did not avail itself of these multitude opportunities to produce robust evidence and testimony and brief its impact simply does not warrant rehearing.

Because ill-supported pleas for contrived fairness do not constitute legal error that justifies rehearing or remand, GVSUD's Point of Error No. 5 should be denied. In fact, to agree with Point of Error No. 5 would reach an unfair result to the City, because the City would be required to compensate GVSUD for a benefit or interest that the City has not received through this

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[65] Cibolo Ex. 1, Ex. G, at 561 (GVSUD Response to Cibolo RFI 1-8) (Oct. 19, 2016).

[66] Motion, at 18.

[67] City's Objections to and Motion to Strike GVSUD Testimony, Docket Item No. 84, at Attachment B (GVSUD Response to Cibolo RFI 1-8, at 38).

decertification. Fairness and constitutionality necessitate the finding that no property of GVSUD is rendered useless or valueless to GVSUD by the decertification. The City has presented a wealth of detailed testimony and exhibits supporting this claim in light of TWC § 13.255, the applicable law, and GVSUD has failed to avail itself of the opportunities it has had to explain how any of its alleged property is rendered useless or valueless. In short, because GVSUD has nothing, it gets nothing. To require the City to give GVSUD money for something that it has not lost or, in some instances, ever even owned, would not only be contrary to the very purpose of TWC § 13.255, but also would be unfair to the City.

VIII. REPLY TO POINT OF ERROR NO. 6

GVSUD's Point of Error No. 6 reasserts its prior argument that the procedures adopted by the Commission in this Docket to process this Application constitute an improper rulemaking under the APA because the standards applied here "are plainly intended to be generally applicable to all CCN holders."[68] Such assertion lacks merit. Under the APA, a "rule":

> (A) means a state agency statement of ***general applicability*** that:
> (i) implements, interprets, or prescribes law or policy; or
> (ii) describes the procedure or practice requirements of a state agency . . .[69]

To constitute a "rule", "an agency statement interpreting law must bind the agency or otherwise represent its authoritative position in matters that impact personal rights."[70] Furthermore, as the Court of Appeals in Austin has opined, "[a]lthough the distinction between a 'rule' and an agency statement that concerns only 'internal management or organization . . . and not affecting private rights' may sometimes be elusive, the core concept is that the agency statement must in

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[68] Motion, at 19-22.

[69] TEX. GOV'T CODE § 2001.003(6) (emphasis added).

[70] *Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex. App. —Austin 2011, no pet.).

itself have a binding effect on private parties."[71] Therefore, "distinction exists between nonbinding evaluative guidelines that take into consideration case-specific circumstances—which have been held not to be a rule—and policies that dictate specified results without regard to individual circumstances, which have been held to be a rule."[72]

GVSUD provides nothing to suggest that the bifurcated process implemented in this proceeding was the Commission's exercise of its authoritative position on matters that impact personal rights. Rather, the use of the bifurcated process is merely one method by which the Commission chose in this instance to manage a case brought under its rules at 16 TAC Chapter 24, Subchapter G, particularly § 24.120. The Commission's rules were silent as to the procedure the Commission was to use in processing a § 13.255 case, so it established a process by which to implement its existing rules. GVSUD cannot and does not point to anything in the record that suggests that the bifurcated procedure was intended to apply generally in all instances or that it was intended to in any way affect GVSUD's personal rights in a way that is different than what was already authorized under § 24.120. The Commission's adoption of such management of this case cannot be considered a "rule" under the APA just because GVSUD proclaims that it is so.

Even if the Commission finds that it engaged in rulemaking, *ad hoc* rulemaking is justified in certain circumstances. Courts have held that rulemaking does not have to be accomplished through petition and public comment; adjudicative rulemaking (*i.e.*, rulemaking through a contested case hearing) is likewise allowed.[73] When using the formal rulemaking procedure under the APA would "frustrate the effective accomplishment of the agency's function"—such as construing a new rule or when an issue cannot be captured within the bounds

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[71] *Slay v. Texas Comm'n on Envtl. Quality*, 351 S.W.3d 532, 546 (Tex. App. —Austin 2011, pet. denied).

[72] *Texas State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 529 (Tex. App.—Austin 2014, pet. denied) (citing *Slay*, 351 S.W.3d at 538-39).

[73] *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999).

of a general rule—adjudicative rulemaking may be appropriate.[74] This process is "not a mere finding of fact or interpretation of a statutory term but it is an agency formulating policy subject to its delegated rule making power that sets forth a standard that is binding on the parties before the agency."[75]

In describing the bifurcated process, the Commission expressly acknowledged that "this is the first case of this type to be referred to SOAH,"[76] and that such a process is necessary in order to first determine what property is rendered useless and valueless before engaging, perhaps unnecessarily, in the fact-intensive process of determining compensation.[77] As such, the Commission's bifurcation through the contested case hearing process served to advance the Commission's functions in decertification matters by altering an otherwise frustrated process, which is a proper adjudicative rulemaking. Moreover, the City is aware of only one other case under TWC § 13.255 in which this bifurcated process is used, and that case proceeded concurrently with the City's case.[78] Since that case, the Commission has adopted a rulemaking to codify a variation of the procedure tested in these two cases.[79]

Finally, GVSUD's sudden aversion to the bifurcated process is suspect. GVSUD is raising the so-called rulemaking for the first time in its Motion, despite being subject to that process for the last year and a half. Simply because that process was not favorable to it, GVSUD

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[74] *Id.*

[75] *Witcher*, 447 S.W.3d at 536 (citations omitted).

[76] Supplemental Preliminary Order, Docket Item No. 58, at 4 (Jul. 20, 2016).

[77] *Id.* at 2-4.

[78] *Application of City of Schertz to Amend a Sewer Certificate of Convenience and Necessity under Water Code § 13.255 and to Decertify a Portion of Green Valley Special Utility District's Certificate Rights in Bexar County*, Commission Docket No. 45956; SOAH Docket No. 473-16-5739.WS; Preliminary Order, Docket Item No. 36 (September 12, 2016).

[79] Commission Project No. 46151, Order Adopting the Repeal of § 24.113 and § 24.120 and New § 24.113 and § 24.120 (May 4, 2017).

now, after the entirety of the proceedings have been completed, raises the issue of an improper rulemaking. Moreover, GVSUD asserts, without explanation, that it has been harmed as a result of this process.[80] However, a legally and factually-based Final Order that is the result of a months-long process in which GVSUD was a willing and active participant does not equate to harm.[81] Regardless, any such harm would have been equally borne by the City. This is a disingenuous attempt to undo an outcome that GVSUD does not like.

Because GVSUD has wholly failed to provide any substantiation for its baseless assertion that the bifurcation of the hearing process was improper, GVSUD's Point of Error No. 6 must be denied.

IX. REPLY TO POINT OF ERROR NO. 7

GVSUD's Point of Error No. 7 is another restatement of a previously rejected GVSUD argument, this time mistakenly alleging that the City's notice of intent to provide service to its annexed areas within the GVSUD sewer CCN under TWC § 13.255 is defective.[82] Here, GVSUD's claim that the notice was defective because the City's map included in the notice identified parcels that the City did not intend to decertify should again be set aside for the following reasons and facts, which have been asserted repeatedly throughout this contested case hearing:

- The additional tracts were identified in a separate color from the tracts that are the subject of the application.

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[80] Motion, at 20-21.

[81] GVSUD's assertion that its participation is a "Hobson's choice" of forfeiting its rights or engaging an attorney to defend GVSUD in the contested case hearing is nonsensical. Motion, at 21. First, GVSUD had the opportunity to negotiate with the City for a period of 180 before this process at the Commission began. It failed to take meaningful advantage of that period. Second, GVSUD is not a mandatory party to this suit; it willfully intervened. Third, no law or policy relevant to this proceeding requires or even contemplates that the City will be responsible for the fees associated with the legal gamble that GVSUD undertook in engaging in this proceeding.

[82] Motion, at 22-23.

- The notice explained that those additional tracts were included for the purpose of negotiation.
- GVSUD never indicated that it did not know which tracts were the subject of the application, even as it proceeded to develop an appraisal of the quite definite 1,694 acres of its sewer CCN in this hearing- the area that had been designated in the notice as the area to be decertified.
- Nothing in the Commission's rules or TWC § 13.255 preclude the inclusion of additional information in the notice.

Regardless of the factual absurdity of this alleged Point of Error, GVSUD again fails to substantiate its assertion with a legal justification. But as the City has explained and as the Commission has already agreed, the City met the notice requirements under both TWC § 13.255 and the version of 16 TAC § 24.120 in effect at the time the notice was sent.[83] The City was only required to, "in writing, notif[y] the retail public utility of its intent to provide service to the incorporated or annexed area. . . ."[84] The City did just that. In fact, the City did that with specificity by various means. GVSUD's Point of Error thus lacks legal and factual merit. As such, Point of Error No. 7 must be denied.

X. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Cibolo respectfully requests that the Commission deny Green Valley Special Utility District's Motion for Rehearing, and that it be granted such other and further relief to which it may be entitled.

[83] City's Initial Brief, Docket Item No. 163, at 6-11 (Sept. 22, 2017); Proposal for Decision Phase 2, Docket Item No. 122, at 6-8 (Nov. 21, 2017); Final Order, Docket Item No. 182, at 14 (FOF Nos. 58-60) (January 10, 2018).

[84] TWC § 13.255(b); 16 TAC § 24.120(b) (2014).

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 e-mail, fax, hand-delivery and/or regular, first class mail on this 16th day of February, 2018, to the parties of record.

Ashleigh K. Acevedo