P.U.C. DOCKET NO. 45702

APPLICATION OF 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	§ § § § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S RESPONSE TO ORDER REQUESTING BRIEFING ON THRESHOLD LEGAL/POLICY ISSUES

COMES NOW the Commission Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this response to Commission Advising and Docket Management's (CADM) Order Requesting Briefing on Threshold Legal/Policy Issues. In support thereof, Staff would show the following:

I. Background

On May 2, 2016, CADM filed an order requesting threshold briefing on the following issues:

1. May the Commission deny a municipality's application seeking single certification 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 section 1926(a) of the Federal Consolidated Farm and Rural Development Act? In answering this issue, please address whether the Commission has authority to determine whether a federal statute preempts state law.

2. Must a municipality seeking single certification under TWC § 13.255 demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems even if the certification sought is solely to provide sewer service?

CADM set June 6, 2016, as the deadline for interested parties to file briefs. Therefore, this brief is timely filed.

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II. Argument

A. The Commission may deny a municipality's application based on 7 USC § 1926(b) of the Federal Consolidated Farm and Rural Development Act (FCFRDA).

1. Section 1926(b) of the FCFRDA prohibits the transfer of certificates of convenience and necessity under certain conditions.

Section 1926(b) of the Federal Consolidated Farm and Rural Development Act (FCFRDA) prohibits the Commission from amending or decertifying the service area of utilities who hold Farmer's Home Administration (FmHA) loans:

> The service provided or made available through any such association [as described in § 1926(a)] shall be not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise or similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event[1]

To secure 1926(b) protection, a utility must prove "(1) it has continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the utility 'made service available.'"[2] In *N. Alamo*, the Fifth Circuit made clear this two-prong test, further holding that a "permanent injunction was appropriate relief for the city's violation of statute, protecting federally-indebted water associations from municipal expansion."[3] If a utility proves 1926(b) protection, the Commission cannot amend the utility's service area without violating federal law.

Furthermore, the Commission is legally obligated to avoid violating federal law, even if that means ignoring applicable state laws.[4] In *Ex parte Young*, the United States Supreme Court declared that federal courts can enjoin state officers in their official capacity from violating federal law.[5] In that case, the Minnesota Railroad and Warehouse Commission adopted rate regulations

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[1] 7 U.S.C.A. § 1926 (West).

[2] *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996). [*N. Alamo*]

[3] *Id.* at 917.

[4] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing [sic] in the Constitution or Laws of any State to the Contrary notwithstanding.")

[5] *Ex parte Young*, 201 U.S. 123, 161 (1908).

that were unconstitutional.[6] The Court held that the commissioners and the state attorney general could not legally enforce that commission's rates even if Minnesota law required them to enforce them.[7]

While *Ex parte Young*, dealt with state laws that were unconstitutional, the underlying doctrine has been expanded to cases where state officers were accused of violating federal statutes. For example, in *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, the United States Supreme Court permitted injunction proceedings against the Maryland Public Service Commissioners for alleged violations of the Telecommunications Act of 1996.[8]

Like the Minnesota and Maryland commissions, this Commission is also required to avoid violating federal law, even if this requires it to ignore otherwise applicable state statutes. Should the Commission refuse to do so, injured parties may seek an injunction in federal court.

2. The Texas Water Code authorizes the Commission to apply federal law when necessary.

Chapter 13 of the Texas Water Code gives the Commission the authority to "regulate and supervise the business of each water and sewer utility within its jurisdiction"[9] including the authority to amend certificates of convenience and necessity (CCNs).[10] The Commission is given the authority to "do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of this power and jurisdiction."[11] Implicit in that which "is necessary" is the duty to recognize and apply overarching statutory authority. Thus, the Commission is required to acknowledge and apply federal law to its regulation of the business of the water utilities within its jurisdiction. As *Ex Parte Young* effectively requires the Commission to follow federal law, the Commission cannot amend a protected utility's service area. Thus, the

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[6] *Id.* at 131.

[7] *Id.* at 161 (1908).

[8] *Verizon Maryland, Inc. v. Pub. Serv. Com'n of Maryland*, 535 U.S. 635 (2002).

[9] Tex. Water Code § 13.241 (West 2007).

[10] TWC § 13.241.

[11] TWC § 13.041(a).

Commission may deny a municipality's TWC § 13.255 application based on 1926(b) of the FCFRDA.

B. A municipality seeking certification under TWC § 13.255 need not demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems when the certification sought is solely to provide sewer service.

TWC § 13.255(m) states: "The utility commission shall deny an application for single certification by a municipality that fails to demonstrate compliance with the commission's [TCEQ] minimum requirement for public drinking water systems."[12] As the statute does not qualify the type of application (water, sewer, or both), the statute appears to apply to all 13.255 applications. However, this would lead to an arbitrary result. TCEQ drinking water system requirements only apply to water systems.[13] Sewer systems are regulated under a separate set of requirements.[14]

In the Code Construction Act, the Texas Legislature instructed: "In enacting a statute, it is presumed that: . . . (3) a just and reasonable result is intended; (4) a result feasible of execution is intended . . . ."[15] The TCEQ drinking water system requirements contain, *inter alia*, disinfection and filtration requirements. If these requirements applied, a sewer line would prohibited from having any more than trace amounts of fecal coliform.[16] In other words, the sewer line would be prohibited from carrying sewage. This is clearly not the intent of the legislature and interpretation of TWC § 13.255(m) should be limited to applications involving water systems.

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[12] TWC § 13.255(m).

[13] 30 Tex. Admin. Code § 290.102(a) (TAC) (limiting applicability to "water systems").

[14] *See* 30 TAC §§ 285, 288.

[15] Tex. Gov't Code Ann. § 311.021 (West 2016).

[16] 30 TAC § 290.109.

PUBLIC UTILITY COMMISSION
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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on June 6, 2016, in accordance with P.U.C. Procedural Rule 22.74.

Landon J. Lill