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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	§	PUBLIC UTILITY COMMISSION OF TEXAS

CITY OF CIBOLO'S BRIEF ON THRESHOLD LEGAL/POLICY ISSUES

COMES NOW the City of Cibolo (the "City"), by and through its undersigned attorneys of record, and files this Brief ("Brief") to the Public Utility Commission's ("Commission") Order Requesting Briefing on Threshold Legal/Policy Issues issued on May 27, 2016. This brief is timely filed. In support of its Brief, the City respectfully shows the following:

I. INTRODUCTION

On March 8, 2016, more than 180 days after the City provided the District with notice of its intent to provide retail wastewater service to certain portions of its corporate limits that are within the boundaries of Green Valley Special Utility District's ("District") sewer certificate of convenience and necessity ("CCN") No. 20973, the City filed its application (the "Application") for single sewer CCN certification to such areas at the Commission under Tex. Water Code ("TWC") § 13.255 and 16 Tex. Admin. Code ("TAC") § 24.120. This docket ensued. On April 29, 2016, the District filed its Plea to the Jurisdiction and Motion to Dismiss with Debt Information Listing ("Motion"). The City and Commission timely filed responses briefs opposing the Motion, and the District filed a reply on May 26, 2016. On May 27, 2016, the Commission requested briefing on two 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 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 drinking water systems even if the certification sought is solely to provide sewer service?

This Brief addresses these two issues, as discussed in more detail, herein.

II. 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

The Commission should not deny the City's application seeking single sewer certification under TWC § 13.255 in this matter because the CCN holder claims to be a borrower under Section 1926(a) of the Federal Consolidated Farm and Rural Development Act.[1] For both legal and policy reasons, the Commission, in processing a TWC § 13.255 application, should not and cannot make a determination that such law is pre-empted by a separate federal law (in this case, 7 U.S.C.A. § 1926). Rather, the judicial branch is the correct entity to assess and determine whether a state law is preempted by a federal law. Accordingly, the Commission should process the City's TWC § 13.255 application in accordance with the protocol established by the Texas

[1] 7 U.S.C.A. 1926 (2016).

Legislature in that law and allow a court to decide whether a federal statute preempts such state law, if asked.

A. The Regulation of CCNs is Purely a State Function Over Which the Commission Has Clear Jurisdiction

The Texas Legislature granted the Commission clear authority over the granting, amending, and decertifying of water and sewer CCNs through TWC Chapter 13, Subchapter G. 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.[2] To this end, the Texas Legislature enacted TWC § 13.255, a statute providing that if a municipality wants to provide retail water and/or sewer service within any portion of its corporate limits that is also within a water and/or sewer CCN holder's service area, then (1) the municipality may file an application under TWC § 13.255 to decertify that portion of the water and/or sewer CCN holder's[3] service area that is within that municipality's corporate limits, after proper notice, and (2) "[t]he utility commission *shall* grant single certification to the municipality."[4] To be clear, if the municipality's TWC § 13.255 application only contemplates being singly certificated to provide retail wastewater service, which is the subject of the City's request in this docket, then the Commission will not evaluate whether to decertify any portion of any water CCN holder's service area. Thus, under TWC § 13.255, the Commission clearly has jurisdiction over whether it may grant single certification to a municipality for land within its corporate limits.

The Texas Legislature provided a clear roadmap and protocol for the Commission to process and grant a municipality's request for single CCN certification under TWC § 13.255.

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

[3] TWC § 13.255does not apply to all CCN holders. However, the District, as a special utility district, is one of the types of entities that may be decertified under TWC § 13.255.

[4] TWC § 13.255(c).

Prior to issuing a final order granting single CCN certification to the municipality, the Legislature requires the Commission to investigate the following:

- Are the areas for which the City seeks single certification within the service area of a nonprofit water or sewer service corporation, a special utility district under Texas Water Code ("TWC") Ch. 65, or a fresh water supply district under TWC Ch. 53?
- Did the City notify GVSUD in writing of its intent to provide service to the areas for which the City seeks single certification? TWC § 13.255(b) and 16 TAC § 24.120(b).
- If so, did the City wait at least 180 days after providing GVSUD notice before the City filed its Application with the Commission?
- Has the City demonstrated that no retail public utility sewer facilities will be rendered useless or valueless to GVSUD? TWC § 13.255(c) and 16 TAC § 24.120(c). If not, has the City provided an appraisal as required under TWC § 13.255(l) and 16 TAC § 24.120(m)?
- What is the adequate and just compensation to be paid, if any, to GVSUD for any GVSUD property rendered useless or valueless to GVSUD as a result of single certification to the City? TWC §§ 13.255(c), (g), (g-1), and (l) and 16 TAC § 24.120(c), (g), (h), and (m).[5]

The Texas Legislature, in enacting this processing protocol in TWC § 13.255, 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. Such an extreme and drastic notion, as is the wish of the District, is far beyond

[5] These are the list of issues submitted by the City in this matter.

the bounds of TWC § 13.255; and, 16 Tex. Admin. Code § 24.120, the Commission's rule implementing this statute, certainly does not support the District's interpretation.[6]

B. The Commission Does Not Have Jurisdiction to Make a Determination as to Whether a Federal Law Pre-Empts State Law

State district courts have general jurisdiction over matters that are not reserved to other adjudicative bodies.[7] State courts can and do rule on claims where federal laws are raised. Pursuant to the Texas Constitution, a district court's jurisdiction "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body."[8] State agencies, however, "may exercise only those powers the law confers upon them in clear and express statutory language and those reasonably necessary to fulfill a function or perform a duty that the Legislature has expressly placed with the agency."[9] Here, as discussed in Section II.A., above, no state law directs the Commission to consider the federally indebted status of a CCN holder, and such analysis is not necessary to perform its duty under TWC § 13.255(c) to grant single certification to the City, in light of the protocol in that law. The District provides no authority from a Texas court that TWC § 13.255 is preempted by 7 U.S.C.A. § 1926, and such analysis is unnecessary for the Commission in this case. Further, the District does not provide any case law holding that an unpledged asset of a federal debtor is somehow protected under 7 U.S.C.A. § 1926(b) or that

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[6] Prior to the transfer of jurisdiction over water and sewer CCNs from the Texas Commission on Environmental Quality ("TCEQ") to the Commission, the TCEQ implemented TWC § 13.255 through rule 30 TAC § 291.120, and this rule also did not support the District's interpretation either.

[7] *City of Mont Belvieu v. Enter. Products Operating, LP*, 222 S.W.3d 515, 519-20 (Tex. App.—Houston [14th Dist] 2007).

[8] *See In re Entergy Corp., supra*, at 322 (citing the Texas Constitution art. V, § 8).

[9] *In re Entergy Corp., supra*, at 322.

preemption under §1926(b) prohibits a state regulatory agency from modifying the service area of a federally indebted utility.

The result, then, is that the Commission should not and cannot dismiss the City's TWC § 13.255 Application based on the District's alleged federal claim. Otherwise, the Commission would need to undertake a full analysis to consider the merits of the 1926(b) claim, which would be beyond the authority granted by the Texas Legislature. Making a determination on the question of whether TWC § 13.255 is preempted is not for the Commission, but rather for the Texas Legislature, in drafting the law, and the judicial branch, as to whether the law is in fact preempted.

C. Policy Issues

From a policy standpoint, it makes most sense for the Commission to consider the sufficiency and merits of the application without regard to the § 1926(b) claim. To allow an intervener to have a TWC § 13.255 application dismissed merely by making a claim, however meritless, would mean that the intervener could gain the protections of § 1926(b) without actually having to prove that protection is warranted. That is exactly what the District is attempting to accomplish in this docket, as it is unlikely that the District has pled facts sufficient to meet a 1926(b) claim (namely the issues of whether it has "qualifying federal debt" and whether it has "provided or made service available").[10] This is not an analysis for the Commission to consider, and the Texas Legislature has not directed the Commission to undertake such analysis.

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[10] Many of the cases cited by the District in its Motion and Reply contain facts that are vastly different than the facts at issue in this docket. Also, existing case law contradicts some of the arguments put forth by the District, especially *Creemoor, supra*, on the issue of "providing service" and *Public Water Supply Dist. No. 3 of Laclede County, Mo. V. City of Lebanon, Mo.*, 605 F.3d 511, on the issue of whether the collateral pledged makes a difference in the protection offered by 1926(b).

III. 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

A municipality filing an application under TWC § 13.255 to become singly certificated for only a sewer CCN should not be required to establish that it is compliance with the TCEQ's minimum requirements for drinking water systems. This question arises because of the language contained in TWC § 13.255(m), which provides that "[t]he utility commission shall deny an application for single certification by a municipality that fails to demonstrate compliance with the commission's minimum requirements for public drinking water systems." Such an interpretation would have negative, unintended consequences. Specifically, this interpretation would preclude a municipality from exercising its rights to be singly certificated for sewer service under TWC § 13.255 if it did not possess a public water system. There are municipalities in Texas where the city provides retail sewer service, but another entity, by agreement or otherwise, provides retail water service within the corporate limits of those municipalities. It would make no sense to deny an application for a sewer CCN on the basis that the municipality did not operate a public drinking water system.

The reason for subsection TWC § 13.255(m) is presumably that if a municipality seeking single certification of a water CCN area under TWC § 13.255 was not meeting the public drinking water system minimum requirements, it would not be capable of providing the continuous and adequate retail water service required of water CCN holders.

IV. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Cibolo respectfully requests that the Commission deny the District's Plea to the Jurisdiction and Motion to Dismiss and that it be granted such further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, hand-delivery and/or regular, first class mail on this 6th day of June, 2016 to the parties of record.

David J. Klein