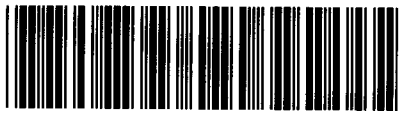

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APPLICATION OF CITY OF CIBOLO FOR SINGLE CERTIFICATION IN INCORPORATED AREA AND TO DECERTIFY PORTIONS OF GREEN VALLEY SPECIAL UTILITY DISTRICT SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY IN GUADALUPE COUNTY	§ § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

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PUBLIC UTILITY COMMISSION FILING CLERK

GREEN VALLEY SPECIAL UTILITY DISTRICT'S REPLY BRIEF ON THRESHOLD LEGAL/POLICY ISSUES

COMES NOW, Green Valley Special Utility District ("GVSUD" or the "District") and files this Reply Brief on Threshold Legal/Policy Issues in the above-referenced docket subject to GVSUD's Plea to the Jurisdiction and Motion to Dismiss previously filed. In support, GVSUD would show as follows.

I. Introduction

On May 27, 2016, the Commission ordered briefing on two threshold legal/policy issues:

(1) May the Commission deny a municipality's application seeking single certification under Texas Water Code (TWC) § 13.255 solely on the basis that a retail public utility that holds a CCN for all or part of the requested 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?[1]

Regarding Issue #1, Commission Staff's legal analysis regarding federal preemption is sound. Conversely, the City of Cibolo ("Cibolo") position is flawed and, in some respects, favors abating this case until GVSUD receives the federal ruling it now seeks in federal court.

[1] Order Requesting Briefing on Threshold Legal/Policy Issues (May 27, 2016).

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economy, abate this proceeding while GVSUD seeks a federal court ruling on same. There is no approach that eliminates the need for a decision on the federal § 1926(b) issue when raised in response to a TWC §13.255 application.

From a policy standpoint, GVSUD disagrees that "it makes most sense for the Commission to consider the sufficiency and merits of the [TWC §13.255] application without regard to the § 1926(b) claim."[4] That would violate GVSUD's rights under § 1926(b) for its certificated sewer service area to remain free from limitation or curtailment after GVSUD "provided or made available" service.[5] But Cibolo also states that it is "unlikely that the District has pled facts sufficient to meet a 1926(b) claim" without stating what specific facts Cibolo believes must be pled or are missing.[6] Cibolo's unsupported view does not mean GVSUD has definitively failed to plead § 1926(b) facts or that GVSUD should not receive a fair hearing on the topic before the Commission makes its decision on the § 1926(b) issue. Cibolo would have the Commission completely ignore § 1926(b) preemption and proceed directly to the compensation phase TWC § 13.255 contemplates even if single certification is not possible because of § 1926(b). That does not make the "most sense" from a policy standpoint as Cibolo contends.

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[4] City of Cibolo's Brief on Threshold Legal/Policy Issues, at 6 (June 6, 2016).

[5] *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915-16 (5th Cir. 1996).

[6] City of Cibolo's Brief on Threshold Legal/Policy Issues, at 6 (June 6, 2016).

available" issue in the context of a TWC § 13.254(a-1) expedited release matter.[9] While not a federal decision and not a TWC § 13.255 matter, that decision ultimately turned on the fact that the court found Creedmoor did not allege facts demonstrating ability to serve the disputed area upon request or in a reasonable time, and in fact, the court found Creedmoor's pleadings and jurisdictional evidence negated that fact.[10] Here, the facts are different in that GVSUD's pleadings and jurisdictional evidence show it has factually provided or made sewer service available within its entire sewer CCN service area and District boundaries even though it has not received any requests for sewer service within the annexed tracts under dispute.[11] GVSUD could respond to such requests within a reasonable amount of time, but has received no requests.[12]

While the *Creedmoor-Maha* approach would be unnecessary here if the Commission follows the "bright line" test described in the GVSUD Brief, GVSUD would, in fact, satisfy the factual analysis required for an "ability to serve" test or "service" under the TWC §13.002(21) definition as also discussed in the GVSUD Brief.[13] Any doubts should be resolved in favor of GVSUD because of the Fifth Circuit's pronouncements that "[t]he service area of a federally indebted water association is sacrosanct," and "[e]very federal court to have interpreted § 1926(b) has concluded that the statute should be *liberally interpreted* to protect FmHA-indebted rural water associations from municipal encroachment."[14] The Fifth Circuit would

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[9] *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 518-24 (Tex. App.—Austin 2010, no pet.).

[10] *Id.* at 522-24.

[11] GVSUD's Brief on Threshold Legal/Policy Issues, at Exhibit B (Affidavit of Pat Allen) (June 6, 2016).

[12] *Id.*

[13] GVSUD's Brief on Threshold Legal/Policy Issues, at 2-9 (June 6, 2016).

[14] *North Alamo*, 90 F.3d at 915-16 (emphasis added) (citing *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (5th Cir. 1987), and other federal court decisions from the Fourth, Sixth, Seventh, and Tenth Circuits); *see also El Oso Water Supply Corp. v. City of Karnes City*, 2011 U.S. Dist. LEXIS 156348, at *18 (W.D. Tex. Aug. 30, 2011), *aff'd*, 2012 U.S. Dist. LEXIS 147760 (W.D. Tex. Apr. 10, 2012).

conflicts with Fifth Circuit precedent.[21] The Eighth Circuit's statutory interpretation argument was undertaken because both parties accused the other of reading terms into the statute that are not there.[22] Cibolo is advocating the same thing here. It seems, to split the difference, the Eighth Circuit attempted to discern a reason for why "service" is used in the singular in §1926(b), but § 1926(a) uses the plural "services."[23] But the Eighth Circuit's conclusion based on the analysis presented that "the service provided or made available" is "best interpreted to include only the type of service financed by the qualifying federal loan" lacks any actual textual support, particularly in light of the better, straightforward explanation not considered by the court.[24]

The plural "services" is used in § 1926(a) because there are a multitude of types of services discussed in that part of the statute for which facilities may be financed with federal loans or grants.[25] But § 1926(b) sets forth a prohibition on a "curtailed or limited" service of a singular variety by a municipality seeking to provide that same type of singular "service."[26] This is evidenced by the later use of the singular "service" within § 1926(b) where "granting of any private franchise for similar service" is prohibited.[27] It makes complete sense that it would take service of one variety by an encroaching municipality to interfere with service of the same variety provided or made available by an indebted association. However, that does not in any

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[21] *Public Water Supply Dist. No. 3*, 605 F.3d at 519-521; *see also* Appellants' Brief, 2009 U.S. 8th Cir. Briefs LEXIS 455, Appellees' Brief, 2009 U.S. 8th Cir. Briefs LEXIS 456, and Appellants' Reply Brief, 2009 U.S. 8th Cir. Briefs LEXIS 457.

[22] *Id.* at 519-521.

[23] *Id.*

[24] *Id.* at 519-521; *see also* Appellants' Brief, 2009 U.S. 8th Cir. Briefs LEXIS 455, Appellees' Brief, 2009 U.S. 8th Cir. Briefs LEXIS 456, and Appellants' Reply Brief, 2009 U.S. 8th Cir. Briefs LEXIS 457.

[25] 7 U.S.C.A. § 1926(a).

[26] 7 U.S.C.A. § 1926(b).

[27] 7 U.S.C.A. § 1926(b).

"prohibition is not conditioned on a finding that a given encroachment will significantly impair the ability to repay the FmHA loan."[32] Further, the statute "does not require or permit this court to condition the prohibition contained in section 1926(b) upon a finding that a *particular* encroachment would necessarily result in a significant impairment."[33] Thus, the Eighth Circuit's policy conclusion would not be determinative here following *Moore*.

City of Madison v. Bear Creek Water Association[34] followed *Moore* in determining that 1926(b) provides an "absolute prohibition" on encroachments.[35] *North Alamo* followed *Bear Creek* on this same point, calling service area of a federally indebted water association "sacrosanct" and discussing that the consensus of federal courts, including *Moore*, was that § 1926(b) should be "liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment.[36] The Western District of Texas recently followed this same line emphasizing the "virtually unassailable right of an indebted association to protection from municipal encroachment."[37] Thus, the narrow Eighth Circuit § 1926(b) reading in *Laclede PWSD #3* is unlikely to carry the day in the Fifth Circuit where it does not control.

III. Reply Regarding Compliance Demonstration Requirement

Neither Commission Staff nor Cibolo believe a TWC § 13.255(m) showing is required in the context of a sewer-only application despite the absence of a statutory exception. Cibolo states the reason for this section is "presumably that if a municipality seeking single certification of a

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[32] *Moore*, 628 F. Supp. at 1369-1370.

[33] *Moore*, 628 F. Supp. at 1369-1370 (emphasis added).

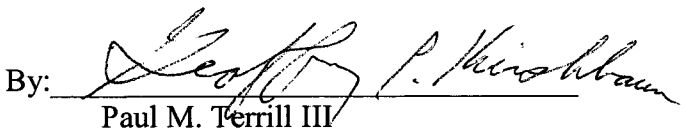
[34] *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987).

[35] *Bear Creek*, 816 F.2d at 1059.

[36] *North Alamo*, 90 F.3d at 915-16 (citing *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (5th Cir. 1987), and other federal court decisions from the Fourth, Sixth, Seventh, and Tenth Circuits).

[37] *El Oso Water Supply Corp.*, 2011 U.S. Dist. LEXIS 156348, at *10-20.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on June 14, 2016, 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:

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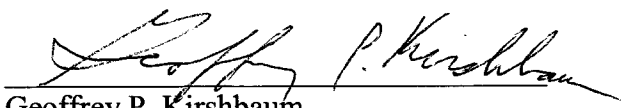

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