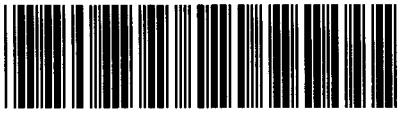

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APPLICATION OF CITY OF CIBOLO FOR SINGLE CERTIFICATION IN INCORPORATED AREA AND TO DECERTIFY PORTIONS OF GREEN VALLEY SPECIAL UTILITY DISTRICT SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY IN GUADALUPE COUNTY	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

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PUBLIC UTILITY COMMISSION
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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).

Federal preemption is an issue that cannot be ignored as Cibolo suggests. The answer to Issue #1 remains "yes." However, as discussed in GVSUD's Brief on Threshold Legal/Policy Issues ("GVSUD Brief"), there are multiple ways to reach the preemption conclusion.

Regarding Issue #2, GVSUD respectfully disagrees with both Commission Staff and Cibolo that no information should be required in response to §13.255(m). Either a water or wastewater compliance showing should be required in the context of a sewer CCN-only single certification application.

II. Reply to § 1926 Preemption Arguments

GVSUD agrees with Commission Staff and its cited authorities pointing to the conclusion that the Commission is "required to avoid violating federal law, even if this requires it to ignore otherwise applicable state statutes."[2] The cases Cibolo cites for the notion that the Commission must follow Texas Water Code state law even when federal law conflicts do not deal with federal preemption. The Texas Legislature cannot decide whether federal law must be followed. Section 1926 preemption is a federal "controlling legal principle" that must be followed by states and their agencies where applicable, as it is here.[3]

A. The State Cannot Authorize the Commission to Ignore Federal Law

Cibolo's contention that the Commission may not make a determination about § 1926 preemption without direction from the Texas Legislature is groundless because: (1) § 1926 will not be an issue in every TWC §13.255 case; and (2) would require the Commission to knowingly make a decision contrary to federal law even where § 1926 applies. The Commission has authority to undertake a determination of whether § 1926 applies or, in the interest of judicial

[2] Commission Staff's Response to Order Requesting Briefing on Threshold Legal/Policy Issues, at 3 (June 6, 2016).

[3] *Becker-Jiba Water Supply Corp. v. City of Kaufman*, 2003 U.S. Dist. LEXIS 10334, at *4-5, 15-21 (N.D. Tex. June 18, 2003); *see also Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 715-716 (10th Cir. 2004) (citations omitted).

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).

B. Reply to Cibolo's Pleading Deficiency Allegations

Cibolo generally contends the facts of this case are different from GVSUD's cited authorities, and sets forth topics it generally argues are not sufficiently pled, in a footnote where Cibolo states:

> 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 *Creedmoor, 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).[7]

Cibolo fails to elaborate on its points about factual contentions. While GVSUD agrees this case is not *identical* to the facts in the existing case law, the critical, uncontroverted facts in this case are sufficient to establish § 1926(b) preemption—federal indebtedness, municipal encroachment, the presence of a CCN for the service encroached upon, and the existing provider's factual ability to serve within a reasonable amount of time.[8]

Moreover, neither case Cibolo cites controls here. GVSUD will nevertheless address both of Cibolo's cited authorities below.

1. *Creedmoor-Maha*

In GVSUD's Brief on Threshold Legal/Policy Issues ("GSVUD Brief"), GVSUD addressed *Creedmoor-Maha Water Supply Corp. v. Texas Commission on Environmental Quality*, a Texas Third Court of Appeals case, which involved the § 1926(b) "made service

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[7] *Id.* at 6 n.10.

[8] *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915-16 (5th Cir. 1996); *El Oso Water Supply Corp. v. City of Karnes City*, 2011 U.S. Dist. LEXIS 156348, at *10-20 (W.D. Tex. Aug. 30, 2011), *aff'd*, 2012 U.S. Dist. LEXIS 147760 (W.D. Tex. Apr. 10, 2012) (finding that the entire El Oso Water Supply Corporation's CCN service area was federally protected under 1926(b) from encroachment actions by the City of Karnes, including a TWC §13.255 application, given the water supply corporation's outstanding federal loan); *Becker-Jiba Water Supply Corp. v. City of Kaufman*, 2003 U.S. Dist. LEXIS 10334, at *16-18 (N.D. Tex. June 18, 2003).

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).

likely adhere to its "bright line" rule over the *Creedmoor-Maha* approach in light of *El Oso Water Supply Corp. v. City of Karnes City*,[15] but this issue has not been tested before the Fifth Circuit since the *Creedmoor-Maha* decision in 2010.

2. *Public Water Supply District No. 3 (Eighth Circuit)*

Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo. ("*Laclede PWSD #3*"),[16] the second case offered in Cibolo's footnote, is the only authority provided for Cibolo's contention that the collateral pledged for a federal loan "makes a difference in the protection offered by § 1926(b)."[17] *Laclede PWSD #3* holds the federal loan must finance the protected service and includes concern about collateral in its policy discussion.[18] However, the Eighth Circuit incorrectly decided this issue, the Fifth Circuit would likely hold differently, and this authority is not controlling here.[19]

Most importantly, the Eighth Circuit's conclusion—that which service is financed makes a difference—is contrary to the plain language of the federal statute. Section 1926(b) says nothing about financing or collateral. Instead, it declares that *any* association (having a qualifying federal loan) shall not have its service curtailed or limited by municipal boundary expansion.[20] It is that simple.

The decision in *Laclede PWSD #3* was based on two points: (1) an incorrect statutory interpretation position that neither party advocated; and (2) an incorrect policy determination that

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[15] *El Oso Water Supply Corp. v. City of Karnes City*, 2011 U.S. Dist. LEXIS 156348, at *10-20 (W.D. Tex. Aug. 30, 2011), *aff'd*, 2012 U.S. Dist. LEXIS 147760 (W.D. Tex. Apr. 10, 2012).

[16] *Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon Mo.*, 605 F.3d 511 (8th Cir. 2010).

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

[18] *Public Water Supply Dist. No. 3*, 605 F.3d at 519-521.

[19] City of Cibolo's Brief fails to disclose that this is Eighth Circuit authority.

[20] 7 U.S.C.A. § 1926(b).

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).

way mean the service "curtailed or limited" must be federally financed or subject to a security interest.

The Eighth Circuit engaged in an equally flawed policy analysis. The Eighth Circuit concluded as a generalization that a broad scope of protection would benefit rural water districts, but "not promote rural water development because other services a rural district might happen to provide are irrelevant to maintaining the necessary economies of scale to allow rural water utility associations to remain viable and to keeping the per-user cost low for the service financed by the loan."[28] The Eighth Circuit also found "limiting the District's protection under the statute solely to the type of service being financed . . . will not appreciably impact the security of the federal loan."[29] The Eighth Circuit concluded that "divorcing the type of service underlying a rural district's qualifying federal loan from the type of service § 1926(b) protects would stretch the statute too far."[30] Essentially, the Eighth Circuit found that the impact on an association's ability to pay back its federal loan or remain viable was not significant enough to warrant federal protection when the same type of service is not involved. GVSUD disagrees with this conclusion as a factual matter, because by definition *all* of GVSUD's revenues ensure its ability to repay its federal loan, and because the statute's true purpose is to protect the *borrower's* rural development, not a city's ability to provide supposedly better service. Indeed, cases within the Fifth Circuit also lead to GVSUD's legal conclusion.

In *Moore Bayou Water Association, Inc. v. Town of Jonestown, Miss.*[31] involving a city's condemnation attempt, a federal district court within the Fifth Circuit found that the § 1926(b)

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[28] *Public Water Supply Dist. No.* 3, 605 F.3d at 520-521.

[29] *Id.*

[30] *Id.*

[31] *Moore Bayou Water Association, Inc. v. Town of Jonestown, Miss.*, 628 F. Supp. 1367 (N. D. Miss. 1986).

"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.

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."[38] The same rationale holds true for sewer CCN holders: to be capable of providing sewer service, Cibolo must show it currently meets sewer system minimum requirements. Therefore, if the Commission elects to read this public drinking water compliance demonstration requirement out of TWC § 13.255, it should at least replace it with a sewer system compliance demonstration equivalent.

Conclusion and Prayer

The District prays that the Commission dismiss or deny the City of Cibolo's TWC § 13.255 application, relieve the District of all further associated deadlines, and grant the District all other and further relief to which it is justly entitled at law or in equity.

[38] City of Cibolo's Brief on Threshold Legal/Policy Issues, at 7 (June 6, 2016).

Respectfully submitted,

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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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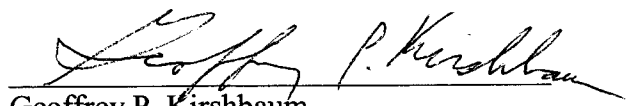

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