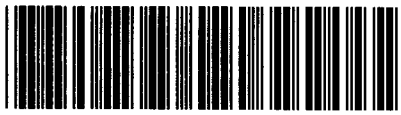

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P.U.C. DOCKET NO. 45702

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 REPLY BRIEF TO THE COMMISSION'S ORDER REQUESTING BREIFING 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 Reply Brief 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?

On June 6, Green Valley Special Utility District (Green Valley), The City of Cibolo, Texas (Cibolo), and Staff filed briefs in response to the commission's order. CADM set June 14, 2016, as the deadline for interested parties to file reply briefs. Therefore, this brief is timely filed.

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II. Argument

A. 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.

Cibolo asserts that "The Commission should not deny the city's application seeking single sewer certification...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)."[1] Cibolo further maintains the decision should be up to a court. While Cibolo correctly observes that nothing in Tex. Water Code Ann. § 13.255 (West 2007) (TWC) explicitly requires the Commission to consider the existence of federal debt, the Texas Water Code implicitly permits such debts to be considered.

As discussed in Staff's initial brief, 7 U.S.C.A. § 1926(b) of the Federal Consolidated Farm and Rural Development Act (FCFRDA) (§ 1926b) prohibits the Commission from amending or decertifying the service area of utilities who hold Farmer's Home Administration (FmHA) loans.[2] The Supremacy Clause of the United States Constitution declares that Federal law is "the supreme Law of the Land" and superior to any state law.[3] Applying TWC § 13.255 and ignoring its conflict with § 1926(b) of the FCFRDA would be an assertion that state law trumps federal law, an assertion which is clearly unconstitutional. According to Tex. Gov't Code Ann. § 311.021 (West 2016), "In enacting a statute, it is presumed that: (1) compliance with the constitution of this state

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[1] City of Cibolo's Brief on Threshold Issues at 2 (Jun. 6, 2016) (Cibolo's Brief).

[2] 7 U.S.C.A. § 1926 (West 2016): ("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.")

[3] 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.")

and the United States is intended." Thus, the Legislature did not intend to force the Commission to ignore the Constitutions' Supremacy Clause when applying TWC § 13.255.

Furthermore, the precedent established in *Ex parte Young*, and *Verizon Maryland, Inc. v. Pub. Serv. Com'n of Maryland*, makes ignoring FCFRDA § 1926(b) infeasible because those cases require state agencies to refrain from violating federal law.[4] When enacting a statute, it is presumed that "a result feasible of execution is intended."[5] Therefore, it is presumed that the Legislature intended that the Commission be able to consider FCFRDA § 1926(b) when processing TWC § 13.255 applications. And as the Legislature intended the Commission to be able to consider FCFRDA § 1926(b), the Commission is not required to determine whether a federal statute preempts state law. Instead, it is authorized to apply FCFRDA § 1926(b) in conjunction with TWC § 13.255.

This intent is further demonstrated by considering TWC § 13.254(a-1) and (a-6). Both subsections direct the commission to ignore the existence of federal debt when processing requests for expedited releases from water and sewer CCNs.[6] As Section 13.255 contains no such limitation, it must be presumed that no such limitation was intended by the Legislature. Otherwise, the Legislature would have included a prohibition in § 13.255 similar to the ones contained in § 13.254(a-1) and (a-6).

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

TWC § 13.255(m) requires a municipality seeking certification to obtain a finding from the Texas Commission on Environmental Quality's (TCEQ) that it is in compliance with the TCEQ's minimum requirements for water systems. All parties agree that the Commission should not require municipalities that are only seeking certification for a sewer system to obtain TCEQ's

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[4] *See Ex parte Young*, 201 U.S. 123, 161 (1908), and *Verizon Maryland, Inc. v. Pub. Serv. Com'n of Maryland*, 535 U.S. 635 (2002) (effectively requiring state agencies to refrain from violating federal law).

[5] Tex. Gov't Code Ann. § 311.021(4) (West 2016)

[6] TWC § 13.254(a-1) ("The fact that a certificate holder is a borrower under a federal loan program is not a bar to a request under this subsection for the release of the petitioner's land and the receipt of services from an alternative provider."); TWC § 13.254(a-6) ("The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program.").

finding that demonstrates compliance with TCEQ's water system requirements.[7] However, Green Valley believes that the Commission should require a municipality seeking only to provide sewer service to "meet this statutory prong by demonstrating compliance with the TCEQ's minimum requirements for *sewer* systems."[8] Staff disagrees.

Section § 13.255 applies to municipalities seeking certification to provide water service, sewer service, and both water and sewer service. If a municipality was seeking to provide both water and sewer service, it is undisputed that § 13.255(m) would require the municipality to obtain a TCEQ compliance finding for only for its water system. It imposes no requirement that the municipality obtain a similar finding for its sewer system. Thus, municipalities seeking both water and sewer certification are not required to obtain a TCEQ compliance finding for their sewer systems. As Green Valley has not provided any reason why municipalities seeking only sewer certifications should be treated differently, such municipalities should not be required to obtain TCEQ compliance findings for their sewer systems as a matter of consistency.

III. Conclusion

For these reasons as well as those stated in Staff's initial brief, Staff respectfully urges the Commission to find that it has the authority to consider the existence of federal debt and FCFRDA § 1926(b) when processing applications under TWC § 13.255, and to deny applications that would otherwise result in a violation of FCFRDA § 1926(b). Additionally, Staff respectfully urges the Commission to find that TWC § 13.255(m) does not apply to a municipality seeking only sewer certification.

[7] Green Valley Special Utility District's Brief on Threshold Legal/Policy Issues at 13 (Jun. 6, 2016) (Green Valley's Brief); Cibolo's Brief at 7.

[8] Green Valley's Brief at 13.

PUBLIC UTILITY COMMISSION
LEGAL DIVISION

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on June14, 2016, in accordance with P.U.C. Procedural Rule 22.74.

Landon J. Lill