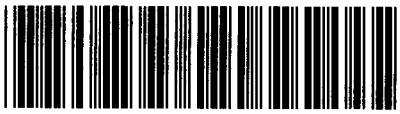

Control Number: 45702

Item Number: 53

Addendum StartPage: 0

PUC DOCKET NO. 45702

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

PRELIMINARY ORDER

On March 8, 2016, the city of Cibolo filed an application seeking single certification of a sewer service area within Cibolo's corporate limits and decertification of that portion of Green Valley Special Utility District's sewer certificate of convenience and necessity (CCN), under Texas Water Code (TWC) § 13.255 and 16 Texas Administrative Code (TAC) § 24.120.

On April 22, 2016, Green Valley filed a motion to intervene, and in Order No. 3, issued on April 28, 2016, the Commission administrative law judge (ALJ) granted that motion. On April 29, 2016, Green Valley filed a pleading styled as a plea to the jurisdiction and motion to dismiss, arguing in part that Cibolo's application must be dismissed for lack of jurisdiction because Green Valley holds a United States Department of Agriculture (USDA) rural-development loan, and therefore section 1926(b) of the Federal Consolidated Farm and Rural Development Act bars municipal encroachment of Green Valley's sewer CCN.[1]

On May 4, 2016, the Commission issued an order requiring Cibolo and inviting other interested parties to file a list of issues to be addressed in this proceeding. Cibolo, Green Valley, and Commission Staff each timely filed lists of issues. In response to proposed threshold issues, on May 27, 2016, parties were invited to submit initial and reply briefs on two threshold issues. Cibolo, Green Valley, and Commission Staff each filed initial briefs on June 6, 2016. Cibolo,

---

[1] Green Valley Special Utility District's Plea to the Jurisdiction and Motion to Dismiss at 2-3, *citing* 7 U.S.C.A. § 1926(b) (Apr. 29, 2016).

53

Green Valley, Commission Staff, and the Texas Municipal League filed separate reply briefs or comments on June 14.

I. Threshold Legal/Policy Determinations

Parties filed briefs addressing the following threshold legal and policy questions. After consideration of parties' arguments, the Commission reaches the following determinations.

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.

It is well established that a Texas administrative agency, such as the Commission, may only exercise those specific powers that the Legislature has delegated to it.[2] Such agency authority may be found in "clear and express"[3] statutory language, as well as "whatever power is reasonably necessary to fulfill a function or perform a duty that the [L]egislature has expressly placed in the agency."[4] However, "reasonably necessary" is not synonymous with expedient. An agency may not "exercise what is effectively a new power, or *a power contradictory to the statute*" even if it is administratively useful.[5]

---

[2] *Subaru of America Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).

[3] *Public Utility Commission of Texas v. Cities of Harlingen,,* 311 S.W.3d 610, 615 (Tex. App.-Austin 2010, no pet.).

[4] *TXU Generation Co. v. Public Utility Commission of Texas,* 165 S.W.3d 821, 829 (Tex. App.-Austin 2005, no pet.).

[5] *Texas Coast Utilities Coalition v. Rail Road Commission of Texas*, 423 S.W.3d 355, 360 (Tex. 2014) (quoting *Public Utility Commission of Texas v. City Public Service Board of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001); and citing *Public Utility Commission of Texas v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995)) (emphasis added).

At issue in this proceeding is the Legislature's explicit directive to the Commission that it "*shall* grant single certification to the municipality" that applies for single certification of an area that has been incorporated or annexed by the municipality.[6] The Commission must also determine whether the statutorily-mandated grant of single-certification to the municipality will render a certificated retail public utility's property useless and valueless, whether the municipality requests transfer of property, and, if so, set the monetary amount that is adequate and just to compensate the retail public utility for such property.[7] None of these additional duties, however, are grounds for the Commission to deny a municipality's application, and indeed the only basis for denial set forth in TWC § 13.255 involves a municipality's failure to demonstrate compliance with public-drinking-water requirements set by the Texas Commission on Environmental Quality (TCEQ).

Green Valley argues that, despite the language in TWC § 13.255 stating that the Commission shall grant single certification to the municipality, the judicial doctrine of federal preemption requires the Commission to nevertheless dismiss or deny a municipality's application if the certificated retail public utility is indebted to the federal government under § 1926(a) of the Federal Consolidated Farm and Rural Development Act.[8] Green Valley goes on to assert it satisfies each element of the tests the federal courts have applied in determining whether a certificated borrower's service area is federally protected from encroachment under § 1926(b) of the Federal Consolidated Farm and Rural Development Act.[9] Yet, Green Valley's and other parties' arguments regarding the federal judiciary's adjudications of § 1926(b) cases highlight the imprudence of the Commission veering from the straight-forward path laid by the Legislature to instead attempt to navigate the thicket that is judicial interpretation of federal-loan law.

---

[6] TWC § 13.255(c) (emphasis added).

[7] *Id.*

[8] Green Valley Special Utility District's (Green Valley's) Initial Brief on Threshold Legal/Policy Issues (Initial Brief) at 9 ("[F]ederal preemption of TWC § 13.255 by § 1926(b) applies and requires the Commission deny or dismiss Cibolo's application due to irreconcilable conflict.") (Jun. 6, 2016).

[9] Green Valley's Initial Brief at 2-9; Green Valley's Reply Brief on Threshold Legal/Policy Issues (Reply Brief) at 4-9 (Jun. 14, 2016).

No party advocating dismissal or abatement of this proceeding cited to a decision – judicial or administrative – requiring the Commission to conduct its own inquiry and application of federal-loan law in a Commission proceeding under TWC § 13.255. Moreover, the Commission has not been able to locate a provision within the Texas Water Code permitting the Commission to abdicate statutory duties regarding service-area certification based upon federal-preemption concerns. In fact, the only TWC certification provisions that make mention of the federal-rural-loan programs expressly *prohibit* the Commission from denying applications to revoke all or part of a CCN (under other provisions of the Texas Water Code) on the basis that a certificate holder is a borrower of a federal loan program.[10]

Green Valley is seeking a federal district court ruling on whether § 1926(b) of the Federal Consolidated Farm and Rural Development Act bars Cibolo from applying to this Commission for single certification to provide sewer service in a portion of Green Valley's service area. Unlike the Commission, that forum has the authority to determine whether federal law preempts a statute enacted by the Legislature. Unless Cibolo withdraws its application here – or a court orders otherwise – the Commission must comply with the statutory duties and timelines mandated by the Legislature.

Consistent with the discussion above, the Commission concludes that it does not have authority to determine whether § 1926(b) of the Federal Consolidated Farm and Rural Development act federally preempts TWC § 13.255. Therefore the Commission may not deny an application 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 act.

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?

---

[10] *E.g.* 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 § 13.255(m) requires the Commission to "deny an application for single certification by a municipality that fails to demonstrate compliance with [TCEQ's] minimum requirements for public drinking water systems."[11] That prescription is not limited by any other language in the section.

One might argue that it is onerous to require a municipality seeking amendment of its sewer CCN to show that its public-drinking-water systems comply with TCEQ's minimum requirements. However, the better argument is that the Legislature intended to protect the public interest by requiring a municipality to show it is in compliance with public-drinking-water requirements before the municipality is entitled to expand any of its service areas. Given that the unambiguous language applies to any application under TWC § 13.255, and applying the requirement in this case protects the public health, the Commission declines to ignore TWC § 13.255(m) in sewer CCN proceedings brought under TWC § 13.255.

II. Issues to be Addressed

After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in this docket:

1. Is the area for which the city of Cibolo seeks single certification currently within the certificated service area of a retail public utility?

2. If so, did Cibolo provide written notice to the retail public utility of Cibolo's intent to provide service to the area for which Cibolo seeks certification? TWC § 13.255(b) and 16 TAC § 24.120(b).

3. If so, did Cibolo wait more than 180 days after providing the written notice before Cibolo filed its application with the Commission? TWC § 13.255(c) and 16 TAC § 24.120(c).

4. Is Cibolo's application administratively complete pursuant to 16 TAC § 24.8? In making this determination, the following questions should be addressed:

---

[11] TWC § 13.255(m).

a. Has Cibolo demonstrated that no retail public utility facilities will be rendered useless or valueless to the retail public utility? TWC § 13.255(c) and 16 TAC § 24.120(c). If not, has Cibolo included in its application all appraisals required under TWC § 13.255(l) and 16 TAC § 24.120(m)?[12]

b. Is Cibolo requesting the transfer of specified property of a retail public utility? TWC § 13.255(c) and 16 TAC § 24.120(c). If so, has Cibolo included in its application all appraisals required under TWC § 13.255(l) and 16 TAC § 24.120(m)?

5. Has Cibolo demonstrated that its public-drinking-water systems comply with TCEQ's minimum requirements for public-drinking-water systems? TWC § 13.255(m) and 16 TAC § 24.120(n).

6. Has the retail public utility submitted to the Commission a written list with the names and addresses of any lienholders and the amount of the retail public utility's debt, if any? 16 TAC § 24.120(b)(1).

7. If any lienholders exist, has the retail public utility notified the lienholders of this decertification process consistent with 16 TAC § 24.120(b)(2)?

8. What is the adequate and just compensation to be paid to the retail public utility for any of its facilities that will be useless or valueless to it or that Cibolo requests be transferred? TWC §§ 13.255(c), (g), (g-1), and (l) and 16 TAC § 24.120(c), (g), (h), and (m).

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed.

---

[12] *See Application of City of Heath to Amend a Certificate of Convenience and Necessity to Decertifya Portion of Forney Lake Water Supply Corporation's Service Area in Rockwall County*, Docket No.44541, Order on Appeal of Order No. 4 (Aug. 24, 2015).

IV. Effect of Preliminary Order

The Commission's discussion and conclusions in this Order regarding threshold legal and policy issues should be considered dispositive of those matters. Questions, if any, regarding threshold legal and policy issues may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the ALJ. The ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of an ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 30th day of June 2016.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY MARTY MARQUEZ, COMMISSIONER