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SOAH DOCKET NO. 473-16-5296.WS
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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**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

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SOAH ORDER NO. 5
RULING ON OBJECTIONS TO DIRECT TESTIMONY AND
DISCUSSING PROCEDURES RELATING TO HEARING EXHIBITS

On March 8, 2016, the City of Cibolo (City or Cibolo) filed an application for single certification of an area within its corporate limits and decertification of part of the sewer certificate of convenience and necessity held by Green Valley Special Utility District (Green Valley or GVSUD). The Public Utility Commission of Texas (Commission) issued two orders listing issues to be addressed in this case: the Preliminary Order, which lists Issues 1-8, and the Supplemental Preliminary Order, which lists Issues 9-11.¹ As the parties stipulated, this case is bifurcated, with the first stage (Stage I) addressing only Issues 9-11.² Issues 9-11 are:

9. What property, if any, will be rendered useless or valueless to Green Valley by the decertification sought by Cibolo in this proceeding? TWC [Texas Water Code] § 13.254(c).
10. What property of Green Valley, if any, has Cibolo requested be transferred to it? TWC § 13.254(c).
11. Are the existing appraisals limited to valuing the property that has been determined to have been rendered useless or valueless by decertification and the property that Cibolo has requested be transferred?³

¹ Preliminary Order (Jun. 30, 2016); Supplemental Preliminary Order (Jul. 20, 2016).

² SOAH Order No. 2 (Aug. 22, 2016) at 1.

³ Supplemental Preliminary Order at 4-5. As Green Valley points out, the above references in that order to TWC § 13.254 appear to be typographical errors and should refer to § 13.255.

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I. OBJECTIONS AND MOTIONS TO STRIKE DIRECT TESTIMONY

On October 26, 2016, Green Valley filed objections to and a motion to strike portions of the City's direct testimony and exhibits (Green Valley's objections). On November 2, 2016, the City filed its response. On November 9, 2016, the City filed objections to and a motion to strike portions of Green Valley's direct testimony and exhibits (the City's objections). On November 16, 2016, Green Valley filed its response.

This order addresses only whether material objected to is admissible under the Texas Rules of Evidence (TRE). All objections are **OVERRULED** unless stated otherwise in this order.

Regarding relevance objections, the issue is whether the material meets TRE relevance standards with respect to Issues 9-11. In considering relevance objections related to what constitutes "property" for purposes of Issues 9-11, the Administrative Law Judges (ALJs) focused on language in TWC § 13.255 and 16 Texas Administrative Code (TAC) § 24.120 that sheds light on that definition. As the parties suggest, other law may also be relevant to it. The ALJs took into account that some of the definition's details remain unclear and will likely be clarified through Commission orders in cases like this.

The City's leading question objections are unpersuasive because typically both questions and answers in prefiled testimony are drafted and reviewed by the same persons. That will not be the case with redirect examination at the hearing.

A. Green Valley's Objections to Testimony by Rudolph F. Klein

Green Valley's objections to the direct testimony of Rudolph F. Klein, IV, P.E. are **OVERRULED** except to the extent stated below:

Testimony Objected to	Objection	Ruling
P. 10, ll. 19-20; p. 15, ll. 7-8 (“TWC, Chapter 26; . . . and 30 TAC Chapter 351, Subchapter F.”); p. 16, l. 21 through p. 22, l. 10; p. 25, ll. 5-9 (As previously . . . Land. Regardless,”); p. 26, ll. 15-24 (First, . . . regionalization,”); p. 27, l. 21 through p. 28, l. 5 (“Again, . . . in the first place”); p. 28, ll. 12-18 (“First, . . . decertification.”); p. 29, l. 23 through p. 30, l. 9 (beginning with “First,”); Exh. E	Opinion outside the witness’s expertise (TRE 702)	OVERRULED , with this clarification: (1) Mr. Klein is qualified to offer the expert opinions in his direct testimony relating to Issues 9-11; (2) in doing so, he can describe his experience with and understanding of regulatory policies and law, which are a basis of his expert opinions, but those descriptions are not expert legal opinions.
P. 11, ll. 8-22; p. 12, ll. 17-18 (“APPRAISALS” . . . EXHIBITS-C AND D ARE”); p. 14, ll. 5-7 (“ . . . EXHIBITS-C AND D ARE . . .”), ll. 10-11 (“ . . . EXHIBITS-C AND D ARE . . .”), l. 14 (“ . . . EXHIBITS-C AND D”), ll. 15-17 (ending with “decertification; and”); p. 15, l. 5 (“the City’s appraisal”); p. 23, l. 6 (“City’s Appraisal,”), ll. 19-20 (City’s Appraisal,”); p. 31, l. 11 through p. 33, l. 11; Exh. C	Opinion outside the expertise of the witness and Mr. Stowe, who authored the letter in Exh. C; lack of foundation, hearsay (TRE 702, 703)	The hearsay objection is SUSTAINED IN PART : (1) Mr. Stowe’s letter is admissible not for the truth of any matter asserted therein but only to show a basis for Mr. Klein’s expert opinions about it; (2) his paraphrase of it on p. 14, ll. 15-16 (“, which notes that no property of GVSUD will be rendered useless or valueless”) and p. 33, l. 11 (“, and the City’s Appraisal accurately reflects that same opinion”) is stricken.

Regarding those rulings, the ALJs note the following. As discussed previously, Issue 11 is: “Are the **existing appraisals** limited to valuing the property that has been determined to have been rendered useless or valueless by decertification and the property that Cibolo has requested be transferred?”⁴ Stage I does not include Issue 4, which states:

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

⁴ Supplemental Preliminary Order at 5 (emphasis added).

application **all appraisals required** under TWC § 13.255(l) and 16 TAC § 24.120(m)?

- 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

The Supplemental Preliminary Order states:

[T]he Commission has previously determined that an application under TWC § 13.255 **cannot be administratively complete unless it includes any necessary appraisals**. Consistent with that precedent, the Commission included in its preliminary order in this case an issue and sub-issues regarding administrative completeness. However, **in light of the Commission's decision that the Commission should first determine what property, if any, must be addressed in any necessary appraisals, the Commission explicitly notes that administrative completeness should not be addressed by the SOAH [State Office of Administrative Hearings] ALJ during this phase of the proceeding.**⁶

It further states:

The Commission is aware that **appraisals** have already been submitted in this matter, but it is not clear that those **appraisals** are limited to valuing property, if any, that Cibolo has requested be transferred or would be rendered useless or valueless due to the proposed decertification. . . . After the Commission identifies in this first phase what property has been requested to be transferred or would be rendered useless or valueless, the appraisal process may be concluded, including if necessary additional appraisals by Cibolo's and Green Valley's selected appraisers.⁷

Based on the Preliminary Order and the Supplemental Preliminary Order, the ALJs conclude that: (1) whether Mr. Stowe's letter is an appraisal required under TWC § 13.255(l) and 16 TAC § 24.120(m) is outside the scope of Stage I and was not referred to SOAH for decision; and (2) for purposes of Issue 11, the ALJs are to assume that Mr. Stowe's letter is an appraisal and address whether it is limited as described in Issue 11.

⁵ Preliminary Order at 5 (emphasis added).

⁶ Supplemental Preliminary Order at 3 (footnotes omitted, emphasis added).

⁷ Supplemental Preliminary Order at 4 (emphasis added).

B. The City's Objections To Testimony By Joshua M. Korman

The City's objections to the direct testimony of Joshua M. Korman are **OVERRULED** except to the extent stated below:

Testimony Objected to	Objection	Ruling
P. 5, l. 19 through p. 6, l. 2 (beginning with "I"); p. 8, ll. 2-6; p. 11, ll. 14-21; p. 12, l. 9 through p. 13, l. 19; p. 14, l. 1 through p. 16, l. 2; p. 16, ll. 8-12 (ending with "compensation")	Opinion outside the witness's expertise (TRE 701, 702)	The objections are OVERRULED , with this clarification: (1) Mr. Korman is qualified to offer the expert opinions in his direct testimony relating to Issues 9-11; (2) in doing so, he can describe his experience with and understanding of regulatory policies and law, which are a basis of his expert opinions, but those descriptions are not expert legal opinions.
P. 6, l. 17 through p. 7, l. 4; p. 8, ll. 4-5 ("In the GVSUD . . . property."); p. 8, l. 9 through p. 9, l. 2 including Exh. GVSUD-2; p. 9, l. 16 through p. 11, l. 9; p. 11, ll. 20-21; p. 12, l. 9 through p. 15, l. 2; p. 15, ll. 11-14 (beginning with "That is why"); p. 15, l. 17 through p. 16, l. 2; p. 16, ll. 11-18 (beginning with "As discussed")	Lack of relevance (TRE 401, 402)	The relevance objection to p. 16, lines 12-18 (beginning with "Second,") is SUSTAINED ; that testimony is stricken.

For reasons discussed earlier in this order, the ALJs sustain the City's relevance objections to Mr. Korman's testimony questioning that Mr. Stowe's letter is an appraisal. The other material meets TRE relevance standards regarding the weight of evidence relating to Issues 9-11.

C. The City's Objections to Testimony by Stephen H. Blackhurst

The City's objections to the direct testimony of Stephen H. Blackhurst, P.E. are **OVERRULED** except to the extent stated below:


Testimony Objected to	Objection	Ruling
P. 7, ll. 17-19; p. 8, ll. 3-13; p. 11, ll. 1-15; p. 12, l. 4 through p. 13, l. 5; p. 13, l. 10 through p. 14, l. 7; p. 15, l. 1 through p. 16, l. 16; p. 17, ll. 1-13	Lack of personal knowledge; no foundation for expert testimony (TRE 701, 702)	<p>The objections are SUSTAINED in part: the following testimony is stricken:</p> <ul style="list-style-type: none">• P. 8, ll. 3-6, and 11-13 (beginning with “My understanding is that it was included just to clarify . . .”• P. 11, ll. 1-15• P. 12, ll. 6-7 (ending with “end.”)• P. 14, ll. 1-5 (ending with “area.”) <p>With those exceptions, the objections are OVERRULED, with this clarification: (1) Mr. Blackhurst is qualified to offer the expert opinions in the non-stricken portions of his direct testimony relating to Issues 9-11; (2) in doing so, he can describe his experience with and understanding of regulatory policies and law, which are a basis of his expert opinions, but those descriptions are not expert legal opinions.</p>


The stricken testimony is framed in terms of Mr. Blackhurst testifying to what others, who adopted the legal requirements he discusses, actually intended or how others viewed those requirements.

II. PROCEDURES RELATING TO HEARING EXHIBITS

At the hearing, each party **SHALL** provide: (1) two record copies and two appeal copies of all exhibits it offers into evidence; and (2) for exhibits other than prefiled testimony, also provide a copy for each other party and the ALJs. Material stricken in this order **SHALL** be redacted from prefiled testimony offered into evidence.

SIGNED November 22, 2016.


ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS


TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS