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Addendum StartPage: 0

PUC DOCKET NO. 45956
SOAH DOCKET NO. 473-16-5379.WS

APPLICATION OF THE CITY OF SCHERTZ TO AMEND A SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY UNDER WATER CODE SECTION 13.255 AND TO DECERTIFY A PORTION OF GREEN VALLEY SPECIAL UTILITY DISTRICT'S CERTIFICATE RIGHTS IN BEXAR COUNTY	§	**BEFORE THE**
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	§	**PUBLIC UTILITY COMMISSION**
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	§	**OF TEXAS**
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CITY OF SCHERTZ'S REPLY TO
GREEN VALLEY SPECIAL UTILITY DISTRICT'S MOTION FOR REHEARING

TABLE OF CONTENTS

Page

137

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CITY OF SCHERTZ'S REPLY TO GREEN VALLEY SPECIAL UTILITY DISTRICT'S MOTION FOR REHEARING

TO: THE HONORABLE CHAIRMAN AND COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION

COMES NOW, the City of Schertz (the "City") and files this Reply to Green Valley Special Utility District's ("GVSUD") Motion for Rehearing (the "Motion"), in accordance with the Texas Administrative Procedure Act ("APA")[1] and Public Utility Commission ("Commission") Rule 16 Texas Administrative Code ("TAC") § 22.264. This Reply is timely filed.

I. INTRODUCTION

The Motion should be denied because the Points of Error alleged therein are a disingenuous characterization of this contested case hearing and the findings in the Commission's Final Order. GVSUD's Motion conceals pertinent and dispositive information while attempting—again—to mislead the Commission on operative law. In any event, nearly all of the Points of Error are merely reiterations of the arguments that the Administrative Law Judge ("ALJ") and Commission have already rejected in this matter. Points of Error Nos. 1-5 and 7 have been extensively considered by both the ALJ and the Commission over the last two years, and the Motion is devoid of any new or persuasive authority that supports a finding of legal error or justifying a rehearing on these decided matters. Likewise. the Motion raises a new alleged

[1] TEX. GOV'T CODE §§ 2001.001-.902 (West 2013).

defect (Point of Error No. 6), which not only lacks a legally supportable basis, but has also existed from the beginning of this contested case hearing process, which GVSUD has never raised. Finally, the Motion attempts to impose a nonexistent requirement upon the Commission (Point of Error No. 8), and absurdly asks the Commission to punish itself for not meeting that non-existent requirement.

In short, the Motion is GVSUD's last-ditch, desperate effort to prevent the Commission's well-reasoned and legally supported Final Order, determining that the Application was properly filed and processed, and that GVSUD is not entitled to compensation in this matter. The Motion seeks relief that is inappropriate both procedurally and legally, and should thus be denied in its entirety.

II. GENERAL REPLY

GVSUD has failed to comply with the minimum requirements of a motion for rehearing under both the APA and applicable Commission rules. The APA expressly requires the rehearing requestor to "identify with particularity findings of fact [("FOF")] or conclusions of law[("COL"] that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error."[2] Moreover, Commission rules require that "[i]f an ultimate finding of fact stated in statutory language is claimed to be in error, the motion for rehearing shall state all underlying or basic findings of fact claimed to be in error and *shall cite specific evidence which is relied upon* as support for the claim of error."[3]

The Motion is fundamentally lacking on these basic requirements, re-urging GVSUD's failed legal theories and mischaracterized facts, and refusing to (1) identify which particular FOFs and COLs it alleges are in error, and (2) cite specific evidence to support such allegations of erroneous findings of fact. As such, the motion is procedurally deficient as a matter of law and should be denied outright.[4]

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[2] *Id.* § 2001.146(g).

[3] 16 TAC § 22.264(b).

[4] *See* TEX. GOV'T CODE § 2001.146(g); 16 TAC § 22.264(b).

III. REPLY TO POINT OF ERROR NO. 1

In its Point of Error No. 1, GVSUD again alleges that GVSUD's sewer CCN is not subject to decertification under Texas Water Code ("TWC") § 13.255 because it is protected from encroachment under federal law, namely 7 U.S.C. § 1926(b).[5] Whether § 1926(b) preempts the decertification sought by the City has been raised and properly rejected multiple times by the Commission throughout this proceeding.[6] That discussion is incorporated herein by reference.[7]

In short, the Commission lacks jurisdiction to determine whether § 1926(b) preempts the application of TWC § 13.255. State administrative agencies, such as the Commission, have only those powers expressly conferred upon them by the Texas Legislature.[8] A state agency has exclusive jurisdiction when the legislature has granted the agency with the sole authority to make an initial determination in a dispute.[9] The Texas Legislature only granted the Commission clear authority over the granting, amending, and decertifying of water and sewer certificates of convenience and necessity ("CCN") through TWC Chapter 13, Subchapter G (in this case, TWC § 13.255); in enacting this protocol, the Legislature did not authorize or direct the Commission to deny an application if the CCN holder is merely a debtor under 7 U.S.C.A. § 1926.[10] Rather, the judicial branch is the correct entity to assess and determine whether a state law is preempted by a federal law.[11]

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[5] Green Valley Special Utility District's Motion for Rehearing, Docket Item No. 135, at 5-9 (Dec. 12, 2017) [hereinafter Motion].

[6] Commission's Preliminary Order, Docket Item No. 36, at 5 (September 12, 2016); SOAH Order No. 8 Denying Motions to Dismiss and Abate and Setting Schedule, Docket Item No. 100 (Aug. 10, 2017); Preliminary Order, *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, PUC Docket No. 45702*, Docket Item 53, at 4 (July 1, 2016) [hereinafter Cibolo Docket].

[7] City's Surreply to Plea to the Jurisdiction and Motion to Dismiss, Docket Item No. 17, at 3-7 (July 1, 2016); City's Response to GVSUD's Interim Appeal of SOAH Order No. 8, Docket Item No. 103, at 2-12 (Aug. 28, 2017).

[8] State administrative agencies, such as the TCEQ, have only those powers expressly conferred upon them by the Legislature. *Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995); *Brazoria City. v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 728, 734 (Tex. App.—Austin 2004, no pet.).

[9] *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004).

[10] *See* TWC § 13.255.

[11] Cibolo Docket Preliminary Order, Docket Item 53, at 4 (July 1, 2016).

In re-urging this legally and factually unsustainable position, GVSUD still conveniently refuses to acknowledge the following information that is critical to the analysis:

- The Fifth Circuit determination is not final and non-appealable.[12] As such, the determinations made therein are not yet binding. Further, such appealable Fifth Circuit decision only pertains to a Motion to Dismiss, not a final ruling on the merits in that case.

- The Commission taking jurisdiction over that which it has not been expressly granted is, itself, legal error.[13] Thus, the express language in TWC § 13.254 prohibiting the consideration of federal debt compared to the silence in TWC § 13.255 is of no consequence.

- Consistent with the Commission's determination on this matter, the Supremacy Clause expressly applies to judges.[14] As such, the Commission appropriately determined that preemption is best determined by the judiciary.

Moreover, grasping at straws to revive this exhausted argument, GVSUD mischaracterizes the ALJ's analysis in SOAH Order No. 8. GVSUD suggests that the ALJ agrees with GVSUD's position and only denied the motion because the issue was not referred to the State Office of Administrative Hearings ("SOAH").[15] In fact, however, the ALJ's citation to case is nothing more than that; GVSUD is reading in an opinion that is not expressed in the Order.[16]

Furthermore, GVSUD attempts to impose on the Commission the requirement that it include FOFs and COLs on matters over which it does not have jurisdiction.[17] Such legally irrelevant matters are not required under Commission rules to be included in the Final Order.[18]

Finally, GVSUD's last alleged legal error is incomprehensible. It appears that GVSUD is taking issue with the very premise of TWC § 13.255—that a municipality can singly certify a

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[12] The deadline to file a petition for a writ of certiorari in this matter has been extended to December 29, 2017.

[13] *See GTE–Southwest, Inc.*, 901 S.W.2d at 407; *Brazoria City*, 128 S.W.3d at 734.

[14] U.S. CONST. art. VI ("[T]he laws of the United States . . . shall be the supreme law of the land; and the *judges* in every state shall be bound thereby.") (emphasis added).

[15] Motion, at 6, note 13.

[16] *See* SOAH Order No. 8, Docket Item 100, at 1-3 (Aug. 10, 2017).

[17] Motion, at 7.

[18] *See* 16 TAC §§ 22.262, 22.263.

CCN that overlaps with areas that have been annexed or incorporated into the municipality's limits.[19] GVSUD cites no authority whatsoever to support its assertion that curtailment (to the extent any curtailment exists for non-existent sewer service) is only authorized if there is a showing that service has not been made available by the CCN holder.[20] This assertion, like the rest of the Motion, lacks legal merit, as evidenced by GVSUD's complete failure to cite any law in support thereof.

For all of these reasons, and the reasons extensively addressed throughout this proceeding, GVSUD's Point of Error No. 1 should be denied.

IV. REPLY TO POINT OF ERROR NO. 2

The entirety of GVSUD's Point of Error No. 2 is premised on a legally flawed interpretation of "property" and a blatant misrepresentation of what the City, the ALJ, and the Commission have concluded constitute "property" for purposes of TWC § 13.255.

A. The Final Order does not require physical facilities to be constructed and explicitly recognizes that property may be intangible.

GVSUD asserts that the Final Order requires that "actual physical facilities must [be] constructed in the decertificated area or elsewhere in the CCN area."[21] This assertion is belied by the following:

- While the FOFs to which GVSUD refers do reference physical facilities (and conclude that GVSUD possesses none), the FOFs are not limited to whether GVSUD has physical property. The other FOFs that GVSUD failed to cite refer to non-physical facilities, such as a Texas Pollutant Discharge Elimination System permit, wastewater service contracts, and wastewater infrastructure designs.[22]
- The Final Order concludes, as a matter of law, that property is generally defined broadly to include any property interest, not just physical property, through its recitation of general definitions of "property" and to a statutory provision relevant to this proceeding, TWC § 13.255(g).[23]

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[19] Motion, at 8-9.

[20] Motion, at 8.

[21] *Id.*

[22] Motion, at 9 (citing Final Order, Docket Item No. 133, at 7-8 (FOF Nos. 16-18, 26) (Nov. 11, 2017) [hereinafter Final Order]); Final Order, at 8 (FOF Nos. 20-23).

[23] Final Order, at 15 (COL Nos. 15-18).

Thus, while physical facilities in the decertificated area or the sewer CCN would be indicative of tangible property that could be rendered useless or valueless by GVSUD (of which there are none), the Final Order does not and cannot be interpreted to stand for the proposition that *only* physical facilities in the decertificated area or the sewer CCN can achieve that result. In fact, the Final Order expresses just the opposite.

GVSUD then points to the definition of "service", which includes—as GVSUD describes it—"planning acts that necessarily lead up to physical construction", as a basis for its assertion.[24] However, such definitions are irrelevant to a consideration of whether an alleged property interest is, in fact, property. In other words, GVSUD conflates a determination that certain actions, like planning, are a "service" with a determination that certain actions constitute "property". Regardless of whether money was spent on the acts leading up the physical construction, GVSUD has failed to demonstrate that those acts constitute property.

For these reasons, GVSUD has failed to substantiate that the Final Order artificially limits "property" to physical facilities. This misrepresentation thus does not qualify as a valid Point of Error.

B. The Final Order properly characterized non-property items, regardless of the fact that money was spent on such items.

In this Point of Error, GVSUD maintains the flawed argument that money it has spent on items, such as planning documents, is property.[25] As has been explained at length throughout this proceeding by the City (and supported by Commission Staff), and which is incorporated herein by reference,[26] money no longer possessed by GVSUD is not property. The ALJ and Commission both agreed with the City. In short, any other reading would be inconsistent with the plain meaning of the word "property", even when that term is broadly construed. By the

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[24] Motion, at 10.

[25] Motion, at 10-11.

[26] City of Schertz's Motion for Partial Summary Decision, Docket Item No. 75, at 8-9 (Mar. 14, 2017); SOAH Order No. 6, Docket Item No. 82, at 3 (Mar. 24, 2017); SOAH PFD, Docket Item No. 84, at 15-19 (May 9, 2017); City of Schertz's Reply to Green Valley SUD's Exceptions to PFD, Docket Item No. 93, at 22-23 (June 6, 2017).

precise words used to describe the status of this money–*money spent*–GVSUD implicitly admits that it is no longer under the possession or control of the money. Said another way, GVSUD has released its rights of ownership in that money, and that money has no inherent value. A person cannot transfer or acquire spent money. The very control that makes something property is entirely lacking. The thing on which money was spent cannot serve as a "proxy" for that money either, because money has been converted into something else. When money is spent on actual property, the ownership is not in the money spent to acquire that item, but rather it is transferred to the item itself.

Simply put, property is not the only thing that may be purchased with money. Either you own an interest in something, or you don't. Here, GVSUD does not, because what it purchased—planning and design—are not property or an investment in which GVSUD has a stake. They are services performed on behalf of GVSUD. In this way, there is no money "purgatory". GVSUD has incessantly relied on this language from a non-binding proposal for decision ("PFD") in another case under another statute to make its point on a legally erroneous and absurd argument.[27]

GVSUD's argument that money spent and no longer in its possession is property is ludicrous and was properly rejected in the Final Order. Thus, this erroneous theory is insufficient to constitute a point of error and should be rejected.

C. The Final Order correctly identified the TWC § 13.255(g) factors as tools for valuation, not as an indicia of being considered property thereunder.

GVSUD bases Point of Error No. 2 partially on the fact that the Final Order does not acknowledge the factors listed in TWC § 13.255(g) as conferring a property interest for the items listed therein.[28] For the reasons previously explained in this matter, which are incorporated herein by reference, the § 13.255(g) factors are not a menu of property interests from which

[27] Motion, at 11.

[28] Motion, at 12-13.

GVSUD can pick and choose what it owns.[29] GVSUD's argument to this end is flawed for the following:

- The Final Order expressly acknowledges a broad definition of "property", despite GVSUD's blatantly false assertion to the contrary.[30]
- TWC § 13.255(g) expressly limits the application thereof to valuation, not property identification.[31] Thus, the Commission is not artificially constructing a wall between identification and valuation of property in the Final Order; the plain language of TWC § 13.255(g) provides that construct.
- The compensation factors do not authorize payment for non-property, as GVSUD alleges. Rather, the compensation factors are tools used to determine the *value* of property. However, that valuation can include consideration of non-property factors.[32] GVSUD fundamentally misunderstands how valuation works.

For these reasons, the Commission's interpretation of the role that the § 13.255(g) factors play in a determination of what constitutes property is legally sound. As such, this basis for Point of Error No. 2 must be denied.

D. The Final Order does not constitute an unconstitutional taking because a taking cannot occur if there is not property to take.

GVSUD alleges that the Final Order will result in an unconstitutional taking because it is not compensated for money spent on engineering services, namely planning and design.[33] However, an unconstitutional taking only occurs if a person's "*property*" is "taken, damaged, destroyed for or applied to a public use without adequate compensation being made."[34] Moreover, consistent with the takings provision, § 13.255(c) and (g) require just and adequate compensation, but that compensation is only due if GVSUD actually has property taken away

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[29] City of Schertz's Reply to Green Valley SUD's Exceptions to PFD, Docket Item No. 93, at 14-15 (June 6, 2017).

[30] Final Order, at 15 (COL Nos. 15-18).

[31] TWC § 13.255(g) ("For the purpose of implementing this section, the *value* of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection.") (emphasis added).

[32] *Id.* (". . . the value of personal property shall be determined according to the factors in this subsection.").

[33] Motion, at 14.

[34] U.S. CONST. AMEND. V (emphasis added).

from it. Here, it does not. In this case, as previously explained by the City and acknowledged by the Commission,[35] a taking cannot occur in this matter for at least the following reasons:

- Planning and design work are not property.[36]
- The planning and design work is not being taken for a public use. GVSUD still has access to that planning and design work for which it has paid, it just no longer has access to a portion of its sewer CCN.
- GVSUD has not even alleged that these interests are rendered useless or valueless as a result of decertification even if it is property, thus compensation is not authorized under TWC § 13.255.

Moreover, an unconstitutional taking will occur if the City is required to compensate GVSUD for something that it has not lost as a result of decertification. If TWC § 13.255 is read in the incorrect manner, as GVSUD proposes, the City would be unjustly required to pay GVSUD for a benefit or interest that the City has not received through this decertification.

By rejecting GVSUD's unsubstantiated and absurd claims to the contrary, the Commission is doing exactly what GVSUD asks: interpreting the statute in a manner that is consistent with plain mandate of the state and federal constitutions and which gives effect to the entire statute in such a way that results in a just and reasonable result. Therefore, this basis for Point of Error No. 2 must also be denied.

V. REPLY TO POINT OF ERROR NO. 3

GVSUD's Point of Error No. 3 seeking compensation for legal expenses and professional fees is likewise premised on (1) the flawed "money spent" theory (which fails for the reasons provided in response to Point of Error No. 2, discussed in Section IV, above), and (2) an

[35] City of Schertz's Reply to Green Valley SUD's Exceptions to PFD, Docket Item No. 93, at 24-25 (June 6, 2017).

[36] *Supra* Section IV.B.

argument about fairness.[37] With respect to the latter, GVSUD particularly alleges that it should be compensated for its participation in this contested case hearing.[38]

This assertion is fundamentally absurd and lacks legal and factual merit because, as previously briefed:[39]

- It is based on the falsity that GVSUD was mandated to participate in the contested case hearing. There is nothing in TWC § 13.255 that requires the CCN holder to be a part of any decertification process at the Commission. It was GVSUD's voluntary choice, which then triggered the incurrence of legal and professional fees.

- GVSUD had 180 days between the date that it filed its notice of intent to serve a portion of GVSUD's sewer CCN and the date that it filed its application to negotiate without incurring the legal and professional fees it now seeks to recover.

- GVSUD misrepresents how much of its sewer CCN is being decertified as a "significant portion", where in reality it is 405 acres out of a 76,000-acre sewer CCN area—less than 1% of the entire CCN area.

- Just because GVSUD's independent appraiser "identified such costs as compensable property items" simply does not make them so.[40]

- Compensation is only contemplated by TWC § 13.255 if there is property and that property is rendered useless or valueless. Legal fees and professional fees are not only non-property interests, as explained hereinabove at Section IV.B and IV.C, but they also are not rendered useless or valueless. Even if these fees are property, they are not rendered useless or valueless to GVSUD simply because the services they paid for did not end in a favorable result.

For these reasons, GVSUD's Point of Error No. 3 must be rejected.

VI. REPLY TO POINT OF ERROR NO. 4

In its Point of Error No. 4, GVSUD alleges that the Final Order is erroneous in not requiring compensation for lost net revenues.[41] Such allegation is a mischaracterization of what

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[37] Motion, at 15-16.

[38] *Id.*

[39] City of Schertz's Reply to Green Valley SUD's Exceptions to PFD, Docket Item No. 93, at 28-29 (June 6, 2017).

[40] Motion, at 16.

[41] Motion, at 17.

GVSUD is really requesting–that is, lost profits from future, unknown and unidentified customers. To reach the result that GVSUD seeks, the Commission must disregard operative fact and law, namely:

- GVSUD has no sewer customers inside or outside the area to be decertified, thus it is not collecting any revenues from sewer service.[42]

- Because GVSUD has no sewer revenues, decertification will not result in a loss of revenues.[43]

- GVSUD has no costs to serve the sewer CCN, thus decertification will not result in increased costs to its non-existent customers.[44]

- "Checkerboarding" of a CCN is not prohibited under TWC § 13.255.[45] Regardless, GVSUD has not demonstrated how and where such checkerboarding will occur because it has no customers.[46] Moreover, the Commission is authorized to decertify more that the City has requested.[47]

- GVSUD's argument about the plain reading of the compensation factors—which are not property interests to begin with for the reasons stated in Section IV.C, above—is fundamentally flawed because, based on a plain reading of TWC § 13.255(g), such compensation is expressly prohibited. The Texas Legislature clearly and unambiguously determined that future revenues or profits from future customers are not a contemplated property interest in TWC § 13.255(g).[48] Compensation for future revenues is specifically limited to only include future revenues from existing customers, *i.e.* the customer that the utility actually has, by limiting the scope of the

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[42] Direct Testimony of Robert Adams, P.E., Docket Item No. 53, at Ex. G (GVSUD Response to Schertz Requests for Admission ("RFA") Nos. 1-1, 1-2, 1-5, 1-6, 1-9, 1-10, 2-3, 2-5, 2-6, 2-7, 2-8, 2-9, 2-19, 2-24, 2-26, Requests for Information ("RFI") Nos. 1-3, 1-4, 1-5, 1-6, 1-8, 1-11, 1-12, 1-15, 1-16) (Nov. 17, 2016).

[43] *See* GVSUD Appraisal, Docket Item No. 58, at 200003.

[44] Direct Testimony of Robert Adams, P.E., Docket Item No. 53, at Ex. G (GVSUD Response to Schertz RFA Nos. 1-8, 1-16) (Nov. 17, 2016).

[45] *See generally* TWC § 13.255.

[46] City of Schertz's Reply to Green Valley SUD's Exceptions to PFD, Docket Item No. 93, at 34-35 (June 6, 2017).

[47] TWC § 13.255(c).

[48] TWC § 13.255(g); Direct Testimony of Stephen Blackhurst, Docket Item No. 59, at 13:3-6, 15:22-16:2 (Dec. 15, 2016) (indicating that the language of TWC § 13.255(g) stating "the impact on future revenues and expenses of the retail public utility" was replaced with "the impact on future revenues lost from existing customers.").

factor to revenues from *existing* customers.[49] GVSUD witness, Mr. Stephen Blackhurst, conceded this interpretation.[50]

- As the City has previously explained at length, compensation for alleged lost future net revenues from future customers is not authorized under the "other relevant factors" language in TWC § 13.255(g) pursuant to the principles of statutory construction.[51]

Again, GVSUD is requesting to be "made whole" for something that is not taken from it because it does not exist. The Final Order is supported, both legally and factually. Thus, Point of Error No. 4 must be denied.

VII. REPLY TO POINT OF ERROR NO. 5

In its Point of Error No. 5, GVSUD re-asserts its argument that the Final Order is erroneous because it fails to address GVSUD's claim for compensation for net increased costs.[52] Like Points of Error Nos. 2-4, this assertion blatantly disregards one of the fundamental findings in the Final Order—that the TWC § 13.255(g) compensation factors are not property interests.[53] Unlike other alleged interests, GVSUD conceded that increased costs were not property interests.[54] GVSUD only raises this issue because it is a compensation factor listed in TWC § 13.255(g).[55] In determining that mere listing in the compensation factors does not indicate that something is property, the Final Order fully addressed this claim.

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[49] *Id.*

[50] Direct Testimony of Stephen Blackhurst, Docket Item No. 59, at 13:3-6, 15:22-16:2 (Dec. 15, 2016).

[51] City of Schertz's Reply to Green Valley SUD's Exceptions to PFD, Docket Item No. 93, at 29-34 (June 6, 2017) (discussing how the Texas Code Construction Act and the principles of statutory construction preclude GVSUD's interpretation that allows consideration of future revenues from future customers through the broad "other relevant factors" language in TWC § 13.255(g) where the Texas Legislature has explicitly addressed the consideration of such revenues in another factor listed in TWC § 13.255(g)).

[52] Motion, at 18.

[53] Final Order, at 15 (COL No. 18).

[54] Green Valley Special Utility District's Exceptions to the Proposal for Decision, Docket Item No. 90, at 21 (May 25, 2017).

[55] *Id.*

Further, as to the merits of the argument, for Factor 5 to apply, GVSUD must (1) currently have wastewater customers, and (2) at least some of those customers must still be GVSUD customers after decertification by the City.[56] Only then can an evaluation of the costs associated with those customers be evaluated for impacts of decertification.[57] GVSUD, however, fails at the first step because GVSUD has no wastewater customers.[58] Therefore, it is impossible for any customers to remain after decertification. Further, GVSUD has not adopted sewer rates or a sewer impact fee.[59] Unless and until that happens, there are no increased costs for GVSUD customers, even if they had wastewater customers. This allegation under TWC § 13.255(g) certainly cannot be a viable property interest.

Rather than acknowledge these legal and factual impediments, the Motion instead attempts to make an argument about fairness on why GVSUD should nevertheless be compensated.[60] However, such a plea should be rejected for the following:

- Although GVSUD has an obligation to keep costs low, it currently has not adopted rates, so it is impossible to quantify how much the costs will increase from removing less than 1% of the CCN area within which GVSUD has no sewer customers.[61]
- GVSUD's claim that it was unable to meaningfully address this claim is belied by the multiple opportunities GVSUD had to present such evidence, including responses to discovery requests, its "expert" witnesses' prefiled testimony, its Response to City of

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[56] *See* TWC § 13.255(g).

[57] *Id.*

[58] Direct Testimony of Robert Adams, P.E., Docket Item No. 53, at Ex. G (GVSUD Response to Schertz RFA Nos. 1-1, 1-2, 1-5, 1-6, 1-9, 1-10, 2-3, 2-5, 2-6, 2-7, 2-8, 2-9, 2-19, 2-24, 2-26, RFI Nos. 1-3, 1-4, 1-5, 1-6, 1-8, 1-11, 1-12, 1-15, 1-16) (Nov. 17, 2016). *See also* GVSUD Appraisal, Docket Item No. 58, at 200003 (Dec. 15, 2016) (admitting that the GVSUD Appraisal bases its evaluation of increased costs to future, currently nonexistent customers based on projections in the now outdated 2006 Wastewater Master Plan, not on actual customers).

[59] Direct Testimony of Robert Adams, P.E., Docket Item No. 58, at Ex. G (GVSUD Response to Schertz RFI 1-8) (Nov. 17, 2016).

[60] Motion, at 18.

[61] Direct Testimony of Robert Adams, P.E., Docket Item No. 58, at Ex. G (GVSUD Response to Schertz RFI 1-8) (Nov. 17, 2016).

> Schertz's Motion for Partial Summary Decision, its Reply to Commission Staff's Statement of Position and Response to City of Schertz's Motion for Partial Summary Decision, its Exceptions to the Proposal for Decision, and its Reply to Exceptions to the Proposal for Decision. That GVSUD did not avail itself of these multitude opportunities to produce robust evidence and testimony and brief its impact simply does not warrant rehearing.

Because ill-supported pleas for contrived fairness do not constitute legal error that justifies rehearing or remand, GVSUD's Point of Error No. 5 should be denied. In fact, to agree with Point of Error No. 5 would reach an unfair result to the City, because the City would be required to compensate GVSUD for a benefit or interest that the City has not received through this decertification. Fairness and constitutionality necessitate the finding that no property of GVSUD is rendered useless or valueless to GVSUD by the decertification. The City has presented a wealth of detailed testimony and exhibits supporting this claim in light of TWC § 13.255, the applicable law, and GVSUD has failed to avail itself of the opportunities it has had to explain how any of its alleged property is rendered useless or valueless. In short, because GVSUD has nothing, it gets nothing. To require the City to give GVSUD money for something that it has not lost or, in some instances, ever even owned, would not only be contrary to the very purpose of TWC § 13.255, but also would be unfair to the City.

VIII. REPLY TO POINT OF ERROR NO. 6

GVSUD argues in Point of Error No. 6 that the procedures adopted by the Commission in this docket constitute an improper rulemaking under the APA because the standards applied here "are plainly intended to be generally applicable to all CCN holders."[62] GVSUD's assertion lacks merit. Under the APA, a "rule":

> (A) means a state agency statement of ***general applicability*** that:
> (i) implements, interprets, or prescribes law or policy; or
> (ii) describes the procedure or practice requirements of a state agency . . .[63]

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[62] Motion, at 19.

[63] TEX. GOV'T CODE § 2001.003(6) (emphasis added).

To constitute a "rule", "an agency statement interpreting law must bind the agency or otherwise represent its authoritative position in matters that impact personal rights."[64] Furthermore, as the Austin Court of Appeals has opined, "[a]lthough the distinction between a 'rule' and an agency statement that concerns only 'internal management or organization . . . and not affecting private rights' may sometimes be elusive, the core concept is that the agency statement must in itself have a binding effect on private parties."[65] Therefore, "distinction exists between nonbinding evaluative guidelines that take into consideration case-specific circumstances—which have been held not to be a rule—and policies that dictate specified results without regard to individual circumstances, which have been held to be a rule."[66]

GVSUD provides nothing to suggest that the bifurcated process implemented in this proceeding was the Commission's exercise of its authoritative position on matters that impact personal rights. Rather, the use of the bifurcated process is merely one method by which the Commission chose in this instance to manage a case brought under its rules at 16 TAC Chapter 24, Subchapter G, particularly § 24.120. GVSUD cannot and does not point to anything in the record that suggests that the bifurcated procedure was intended to apply generally in all instances or that it was intended to in any way affect GVSUD's personal rights in a way that is different than what was already authorized under § 24.120. The Commission's adoption of such management of this case cannot be considered a "rule" under the APA just because GVSUD proclaims that it is so.

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[64] *Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex. App. —Austin 2011, no pet.).

[65] *Slay v. Texas Comm'n on Envtl. Quality*, 351 S.W.3d 532, 546 (Tex. App. —Austin 2011, pet. denied).

[66] *Texas State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 529 (Tex. App.—Austin 2014, pet. denied) (citing *Slay*, 351 S.W.3d at 538-39).

Even if the Commission finds that it engaged in rulemaking, ad hoc rulemaking is justified in certain circumstances. Courts have held that rulemaking does not have to be accomplished through petition and public comment; adjudicative rulemaking (*i.e.*, rulemaking through a contested case hearing) is likewise allowed.[67] When using the formal rulemaking procedure under the APA would "frustrate the effective accomplishment of the agency's function"—such as construing a new rule or when an issue cannot be captured within the bounds of a general rule—adjudicative rulemaking may be appropriate.[68] This process is "not a mere finding of fact or interpretation of a statutory term but it is an agency formulating policy subject to its delegated rule making power that sets forth a standard that is binding on the parties before the agency."[69]

The City is aware of only one other case under TWC § 13.255 in which this bifurcated process is used, and that case is proceeding concurrently with the City's case.[70] In that case, in describing the bifurcated process, the Commission expressly acknowledged that "this is the first case of this type to be referred to SOAH,"[71] and that such a process is necessary in order to first determine what property is rendered useless and valueless before engaging, perhaps unnecessarily, in the fact-intensive process of determining compensation.[72] As such, the Commission's bifurcation through the contested case hearing process served to advance the Commission's functions in decertification matters by altering an otherwise frustrated process, which is a proper adjudicative rulemaking.

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[67] *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999).

[68] *Id.*

[69] *Witcher*, 447 S.W.3d at 536 (citations omitted).

[70] Cibolo Docket Preliminary Order, Docket Item 53 (July 1, 2016).

[71] Cibolo Docket, Supplemental Preliminary Order, Docket Item No. 58, at 4 (Jul. 20, 2016).

[72] *Id.* at 2-4.

Finally, GVSUD's sudden aversion to the bifurcated process is suspect. GVSUD is raising the so-called rulemaking for the first time in its Motion, despite being subject to that process for the last year and a half. Simply because that process was not favorable to it, GVSUD now, after the entirety of the proceedings have been completed, raises the issue of an improper rulemaking. Moreover, GVSUD asserts, without explanation, that it has been harmed as a result of this process.[73] However, a legally and factually-based Final Order that is the result of a months-long process in which GVSUD was a willing and active participant does not equate to harm.[74] Regardless, any such harm would have been equally borne by the City. This is a disingenuous attempt to undo an outcome that GVSUD does not like.

Because GVSUD has wholly failed to provide any substantiation for its baseless assertion that the bifurcation of the hearing process was improper, GVSUD's Point of Error No. 6 must be denied.

IX. REPLY TO POINT OF ERROR NO. 7

GVSUD's Point of Error No. 7 alleges that the City's notice of intent to provide service to its annexed areas within the GVSUD sewer CCN is defective, thus the notice was not provided within the required 180 days before the application for single certification was filed.[75] However, the premise for this alleged error is that the map included in the notice identified parcels that the City did not intend to decertify. This argument, which has been addressed

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[73] Motion, at 20.

[74] GVSUD's assertion that its participation is a "Hobson's choice" of forfeiting its rights or engaging an attorney to defend GVSUD in the contested case hearing is nonsensical. Motion, at 20-21. First, GVSUD had the opportunity to negotiate with the City for a period of 180 before this process at the Commission began. It failed to take meaningful advantage of that period. Second, GVSUD is not a mandatory party to this suit; it willfully intervened. Third, no law or policy relevant to this proceeding requires or even contemplates that the City will be responsible for the fees associated with the legal gamble that GVSUD undertook in engaging in this proceeding.

[75] Motion, at 22.

repeatedly throughout the contested case hearing process,[76] fails to acknowledge the following facts:

- The additional tracts were identified in a separate color from the tracts that are the subject of the application.
- The notice explained that those tracts were included for the purpose of negotiation.
- The metes and bounds descriptions of the tracts that are the subject of the application were also included in the notice.
- GVSUD never indicated that it did not know which tracts were the subject of the application, even as it proceeded to develop an appraisal of the quite definite 405 acres of its sewer CCN.

Regardless of the factual absurdity of this alleged Point of Error, GVSUD again fails to substantiate its assertion with a legal justification. As the City has explained and as the Commission has already agreed, the City met the notice requirements under both TWC § 13.255 and the version of 16 TAC § 24.120 in effect at the time the notice was sent.[77] The City was only required to, "in writing, notif[y] the retail public utility of its intent to provide service to the incorporated or annexed area. . . ."[78] The City did just that. In fact, the City did that with specificity by various means.

GVSUD's Point of Error thus lacks legal and factual merit. As such, Point of Error No. 7 must be denied.

X. REPLY TO POINT OF ERROR NO. 8

GVSUD asserts in Point of Error No. 8 that rehearing is justified because the Final Order does not contain the maps reflecting the amended sewer CCN area.[79] Here, GVSUD ignores the following:

- The Commission is not legally obligated to include a map in the final order;[80] and

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[76] City's Initial Brief, Docket Item No. 115, at 6-9 (Sept. 22, 2017); Proposal for Decision Phase 2, Docket Item No. 122, at 2, 8-11 (Oct. 18, 2017); Final Order, at 4 (FOF Nos. 1-2F).

[77] *Id.*

[78] TWC § 13.255(b); 16 TAC § 24.120(b) (2014).

[79] Motion, at 23.

[80] 16 TAC § 22.262, 22.263.

- A map exists independent of the Final Order.[81]

GVSUD fails to cite to any authority stating that such maps are required to be included in the Final Order.[82] This is because no such rule exists. In Commission rules at 16 TAC §§ 22.262 and 22.263 relating to Commission actions after a PFD and final orders, respectively, several requirements are imposed on the Commission in developing a final order after a PFD is issued. The inclusion of a map is not one of them.[83] GVSUD is requesting the Commission to commit legal error by imposing non-existent requirements on itself to the detriment of the City—truly an improper rulemaking.

Although the Commission's typical practice may be to include the map as an attachment to the final order, rehearing is not justified simply because it was left out in this case. This omission is not prohibited, thus rehearing is extreme and legally unjustifiable. Point of Error No. 8 must be denied.

XI. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Schertz respectfully requests that the Commission deny Green Valley Special Utility District's Motion for Rehearing, and that it be granted such other and further relief to which it may be entitled.

Respectfully submitted,

LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)

DAVID J. KLEIN
State Bar No. 24041257
dklein@lglawfirm.com

[81] Commission Staff's Final Documents, Docket Item No. 132, at 6 (Nov. 17, 2017).

[82] *See id.*

[83] 16 TAC § 22.262, 22.263.

ASHLEIGH K. ACEVEDO
State Bar No. 24097273
aacevedo@lglawfirm.com

ATTORNEYS FOR THE CITY OF SCHERTZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 27th day of December, 2017, to the parties of record.

Ashleigh K. Acevedo