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PETITION OF LAS COLINAS SAN §  
MARCOS PHASE I, LLC TO AMEND §  
CRYSTAL CLEAR SPECIAL UTILITY §  
DISTRICT'S WATER CERTIFICATE §  
OF CONVENIENCE AND NECESSITY §  
IN HAYS COUNTY BY EXPEDITED §  
RELEASE §

BEFORE THE PUBLIC UTILITY

COMMISSION OF TEXAS

### CRYSTAL CLEAR'S RESPONSE TO STAFF'S FINAL RECOMMENDATION

Crystal Clear Special Utility District ("Crystal Clear" or "Intervenor") files this Response to Commission Staff's Final Recommendation subject to its Plea to the Jurisdiction and Motion to Dismiss and in support would show as follows.

#### I. INTRODUCTION

On July 11, 2016, Las Colinas San Marcos Phase I, LLC ("Las Colinas" or "Applicant") filed with the Public Utility Commission of Texas ("Commission") a petition for expedited release of approximately 79.964 acres from Crystal Clear Special Utility District's water certificate of convenience and necessity ("CCN") No. 10297 in Hays County (the "Property"). Commission Staff filed its Final Recommendation on the Application on August 16, 2016. Therefore this response is timely filed.

Staff's recommendation calls for the Administrative Law Judge ("ALJ") and the Commission to ignore federal law, misapply state law, and even ignore the facts of the case. After relying solely on state law to sidestep federal preemption of state law, Staff concludes that the Property is not receiving service because Crystal Clear is not currently sending water *to the particular tract* consisting of the Property, and because Crystal Clear did not say it was providing water service to the tract adjacent to the Property, owned by Reagan Dickerson, Las Colinas' owner. Staff's recommendation fails to broadly apply the definition of "service" required by *Tex. Gen. Land Office*

*v. Crystal Clear Water Supply Corp.*<sup>1</sup> Staff also failed to recognize that Crystal Clear in fact does send water to Mr. Dickerson's adjacent tract. Therefore, the ALJ should not follow its recommendation.

## **II. ARGUMENT AND AUTHORITIES**

### **A. The Commission cannot ignore federal preemption.**

Federal preemption is a *controlling legal principle* that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress. That includes TWC § 13.254(a-6). Staff improperly relies on state law (TWC § 13.254(a-6) to ignore federal law (7 U.S.C.A. § 1926(b)). Crystal Clear recognizes that TWC § 13.254(a-6) states that the Commission cannot deny a petition based on the fact that the certificate holder is a borrower under a federal loan program. But that state law does not change the fact that federal law controls. Under federal law, the Commission cannot grant Las Colinas' application.

### **B. The Property is receiving service.**

Staff also concludes that the Property is not receiving 'service' from Crystal Clear under *Crystal Clear*. Staff cannot reach that result without misapplying the law and the facts. Staff indicates that under *Crystal Clear*, the utility must have 'facilities or lines committed to providing water to the particular tract or has performed acts or supplied anything to the particular tract.' Final Recommendation at 3-4 (emphasis in original). Staff indicates there are two 'problems' with Crystal Clear's position that the Property receives service from Crystal Clear. These 'problems' are addressed below.

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<sup>1</sup> *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.* 449 S.W.3d 130, 137 (Tex. App.— Austin 2014, pet. denied) ("*Crystal Clear*").

1. **Staff misapplies *Crystal Clear*.**

The first ‘problem,’ according to Staff, is that ‘Crystal Clear SUD has not clearly stated that Mr. Dickerson’s residence is part of [a] tract of land for which release is being sought. As a result, Staff concludes that the Property is not receiving service. Staff essentially concludes that under *Crystal Clear*, unless the Property is receiving an actual flow of water dedicated especially for the Property, it is not receiving service ‘to that particular tract.

Crystal Clear was the appellant in *Crystal Clear*. *Crystal Clear* does not call for the narrow definition of ‘service’ Staff has applied. In analyzing ‘service’ under TWC § 13.002(21), the Court in *Crystal Clear* stated:

Thus, ***the term “service” is of intentionally broad scope*** and encompasses an array of activities that a retail public utility might engage in as part of its mission of ‘providing potable water service or sewer service, or both, for compensation.’<sup>2</sup>

In *Crystal Clear*, the Texas Commission on Environmental Quality and the Texas General Land Office contended that a tract of land is not receiving water service ‘if the landowner is not receiving actual water on the property. *Id.* at 140. In response, the Court stated, ‘[w]e find nothing in the text of the statute, however, that compels this interpretation. *Id.* The Court further stated:

Certainly an active water tap on the Decertified Property would constitute a facility or line “used” to supply water to the tract on which it was located. But it might also be sufficient if there were facilities or lines ‘committed’ to such service, such as a dedicated water line that had been installed to serve that property even if such line were not currently operative.

*Id.* In other words, the Court in *Crystal Clear* rejected the narrow definition of service that Staff has applied in this case. Crystal Clear incorporates its analysis in its Motion to Intervene herein by reference. But as a reminder, the Property is receiving ‘service’ because, among other facilities,

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<sup>2</sup> *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.* 449 S.W.3d 130, 137 (Tex. App. Austin 2014, pet. denied) (emphasis added).

Crystal Clear currently has a 6' service line running adjacent to the Property on the East side that is dedicated to providing service to the Property. That dedication is already demonstrated by the fact that Crystal Clear maintains a residential supply line *running right under the Property* from that 6' line, providing current water supply to the residence of Reagan Dickerson, owner of Las Colinas, which in turn owns the Property. Under TWC 13.002(21) and under *Crystal Clear*, the Property is clearly receiving 'service.

**2. Staff misstates the facts.**

The second 'problem, according to Staff, is that 'Crystal Clear SUD fails to assert that Mr. Dickerson's residence is currently receiving water service from the active facilities, as required by Commission precedent. Final Recommendation at 4. Staff is wrong and Crystal Clear must clarify the record. In its Motion to Intervene, Crystal Clear states, verbatim:

Mr. Dickerson, the owner and general partner of Las Colinas, is a Crystal Clear customer. *See Exhibit B.* Crystal Clear has active water facilities running under the Property and serving Mr. Dickerson's residence on a 1.97-acre parcel that is surrounded by the Property on three borders, and by Interstate 35 to the West ("Dickerson Tract"). *Id.*

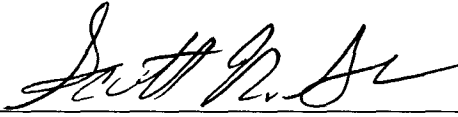
Crystal Clear's Motion to Intervene at 15. Staff's factual error illustrates that its conclusions as to whether the Property is receiving 'service' were based on incorrect facts, and thus should be disregarded.

**IV CONCLUSION & PRAYER**

Crystal Clear respectfully requests the Honorable Administrative Law Judge issue an order that: (1) grants Crystal Clear's Plea to the Jurisdiction and Motion to Dismiss; and (2) subject thereto, otherwise denies Las Colinas' Petition.

**Respectfully submitted,**

**TERRILL & WALDROP, P.C.**

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**ATTORNEYS FOR CRYSTAL CLEAR SPECIAL UTILITY  
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## **CERTIFICATE OF SERVICE**

I hereby CERTIFY that on August 18, 2016, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses:

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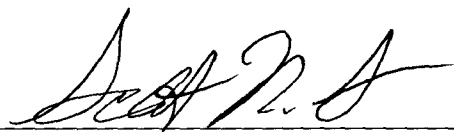
*via fax to: (512) 391-2112*

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