

Control Number' 46148



Item Number' 11

Addendum StartPage 0

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PUC Docket No. 46148

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PETITION BY LAS COLINAS SAN

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BEFORE THE PUBLIC UTILITY

MARCOS PHASE I LLC FOR

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EXPEDITED RELEASE FROM

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CRYSTAL CLEAR SPECIAL UTILITY

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DISTRICT'S WATER CCN NO. 10297

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COMMISSION OF TEXAS

LAS COLINAS SAN MARCOS PHASE I LLC'S COMBINED (1) RESPONSE TO CRYSTAL CLEAR SPECIAL UTILITY DISTRICT'S MOTION TO INTERVENE, PLEA TO THE JURISDICTION AND MOTION TO DISMISS AND RESPONSE; (2) RESPONSE TO STAFF'S FINAL RECOMMENDATION; AND (3) REPLY TO CRYSTAL CLEAR'S RESPONSE TO STAFF'S FINAL RECOMMENDATION

COMES NOW Petitioner Las Colinas San Marcos Phase 1 LLC ("Las Colinas" or "Petitioner") and files this joint combined pleading as its: (1) Response to Crystal Clear Special Utility District's Motion to Intervene, Plea to the Jurisdiction, Motion to Dismiss and Response; (2) Response to Staff's Final Recommendation; and (3) Reply to Crystal Clear's Response to Staff's Final Recommendation.

INTRODUCTION

This proceeding concerns the petition ("Petition") filed by Las Colinas to decertify certain property it owns from the area covered by the water Certificate of Convenience and Necessity ("CCN") of Crystal Clear Special Utility District ("Crystal Clear"). The Staff of the Texas Public Utility Commission ("PUC") recommends granting the petition. Crystal Clear, however, argues that the petition should be denied because (1) decertification is preempted by 7 U.S.C. § 1926(b) and (2) the requirements for decertification are not met because Las Colinas's property is "receiving water service."

Both these arguments fail. The Legislature has specifically forbidden the PUC from denying a decertification petition based on § 1926(b), and, in any event, Crystal Clear cannot invoke it on these facts. Further, as the PUC staff correctly concluded, the property is not receiving water service. Therefore, the Petition should be granted.

BACKGROUND

On July 11, 2016, Las Colinas filed its Petition with the PUC under Texas Water Code § 13.254(a-5) and Texas Administrative Code § 24.113(r), seeking the expedited release of property it owns in Hays County, Texas (Las Colinas's "Property"), from water CCN No. 10297, which is currently held by Crystal Clear.

On August 2, 2016, the Administrative Law Judge ("ALJ") issued Order No. 2, which set a deadline of August 9, 2016, for Crystal Clear to file a response to Las Colinas's Petition. Order No. 2 also required the staff of the PUC to file its final recommendation by August 16, and set a deadline of August 23 for Las Colinas to reply to any response filed by Crystal Clear.

On August 9, Crystal Clear filed its Motion to Intervene, Plea to the Jurisdiction, Motion to Dismiss and Response (Crystal Clear's "Response"). The PUC Staff filed its recommendation on August 16, recommending that Las Colinas's Petition be granted and responded to the arguments raised by Crystal Clear in opposition to the Petition. On August 17, the ALJ issued Order No. 3, allowing Crystal Clear to intervene. On August 18, Crystal Clear filed a response to the PUC Staff's recommendation.

Las Colinas now files a combined response to both of Crystal Clear's filings and to the PUC Staff's final recommendation.

RESPONSE TO CRYSTAL CLEAR'S PLEA TO THE JURISDICTION, MOTION TO DISMISS, AND RESPONSE

Under Texas Water Code § 13.254(a-5), property may be decertified from a water CCN if three criteria are met: (1) the property is “at least 25 acres;” (2) it is “not receiving water service; and (3) it is located in a county of a certain size (as specifically described in the statute). In this matter, it is undisputed that the first and third criteria are satisfied. Further, the property is not, and was not at the time Las Colinas’s Petition was filed, receiving actual water service from Crystal Clear or anyone else.

Crystal Clear raises two arguments in opposition to Las Colinas’s Petition. First, Crystal Clear claims that it has a loan from the United States under 7 U.S.C. § 1926(a). Therefore, Crystal Clear asserts, 7 U.S.C. § 1926(b) prohibits decertification of Las Colinas’s property. Indeed, according to Crystal Clear, it deprives the PUC of jurisdiction over Las Colinas’s Petition.

Second, Crystal Clear argues that the property is ‘receiving water service’ within the meaning of § 13.254(a-5)—even though it is not actually receiving any water service.

Both arguments are wrong and must be rejected. As the PUC staff correctly noted, the PUC may not consider any federal loan Crystal Clear may have. Furthermore, even if it could, Crystal Clear is not entitled to invoke § 1926(b) on these facts. Likewise, Las Colinas’s Property is not ‘receiving water service’ within the meaning of § 13.254(a-5).

A. Section 1926(b) does not prevent the granting of Las Colinas’s Petition.

Crystal Clear styles its pleading as, in part, a ‘plea to the jurisdiction. But a plea to the jurisdiction is a creature of the Texas Rules of Civil Procedure; there is no such animal in administrative practice at the PUC.

Further, the PUC is a Texas state agency. It was created in 1975 when the Texas Legislature passed the Public Utility Regulatory Act. As a state agency, the PUC has only those powers delegated to it by the Legislature. See *Kawasaki Motors Corp. U.S.A. v. Tex. Motor Vehicle Comm'n*, 855 S.W.2d 792, 797 (Tex. App.—Austin 1993, no writ). And where the Legislature has expressly forbidden an agency to act, the agency has no ability to ignore that statutory prohibition.

Effective September 1, 2014, the Texas Legislature granted the PUC jurisdiction over decertification petitions filed under § 13.254(a-5). There is no federal judicial decision, no federal statute or rule, nor any other federal authority prohibiting the PUC from exercising jurisdiction over decertification petitions, even where a claim under 7 U.S.C. § 1926(b) is involved. Therefore, the PUC indisputably has jurisdiction over this proceeding, as the PUC correctly concluded.

What Crystal Clear is really arguing is that § 1926(b) preempts, as a matter of federal law, the granting of any decertification petition under state law, like the one filed by Las Colinas. Some courts have held that § 1926(b) may preempt state law that would allow competitors of federally-indebted water utilities from encroaching upon their exclusive service territory. No court, however, has squarely held that § 1926(b) prevents a state or a state agency—as part of its police power to regulate the provision of water service—from granting a decertification petition like the one filed by Las Colinas.

Even more fundamentally, as the PUC staff have correctly pointed out, the Texas Legislature has expressly forbidden the PUC from denying a decertification petition under § 13.254(a-5) based on the existence of any federal debt or loans, which would include loans under § 1926. Specifically, § 13.254(a-6) provides that the PUC ‘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. Instead, the PUC may award compensation for property rendered valueless as a result of a decertification petition's being granted, as provided for in § 13.254(d)-(g-1). As the PUC staff correctly noted, the PUC's own precedent is to this same effect. Furthermore, decertification does not prohibit Crystal Clear from serving the Property, it merely removes it from Crystal Clear's exclusive area. To the contrary, no other utility can serve the Property without first paying compensation to Crystal Clear under § 12.254(d).

Thus, as the PUC Staff correctly concluded, the PUC may not deny Las Colinas's decertification Petition based on Crystal Clear's loan under § 1926(a). Even if Crystal Clear's federal-preemption argument were correct, the PUC could not grant relief based on it. That relief would have to come elsewhere. In this matter, however, even if the PUC could consider Crystal Clear's argument, Crystal Clear has failed to demonstrate that it is entitled to relief under § 1926 for multiple reasons, two of which are described below.

First, even where a water utility has a federal loan under 7 U.S.C. § 1926(a), it may not invoke § 1926(b) unless it has 'made service available' to the property in question. The Austin Court of Appeals has held that this means what has come to be known as the 'pipes in the ground test,' and this includes having sufficient water and facilities to provide water service to the property in question within a reasonable time. *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 522-23 (Tex. App.—Austin 2010, no pet.).¹ Further, a water utility has not 'made service available' within the meaning of § 1926(b) if the

¹ Crystal Clear cites the Fifth Circuit's decision in *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam), for what it calls the "bright line CCN test," i.e. the idea that a water utility has 'made service available' for purposes of § 1926(b) if it has the legal obligation to provide service—regardless of whether it has the ability to provide actual service. But this is an alternative holding—the utility in *North Alamo* was, in fact, capable of providing service, and, in any event, *North Alamo* is not binding in state court. The *Creedmoor* court rejected this alternative holding, and it has not been adopted by any other court. See *Creedmoor*, 307 S.W.3d at 519-23.

cost to the landowner would be excessive. *See, e.g. Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1271-72 (10th Cir. 2002) (remanding to district court for determination whether \$32,000 fee was excessive).

Las Colinas intends to develop the Property for which it seeks decertification. Crystal Clear's own consultant conducted a survey to determine the cost to provide the necessary service to Las Colinas and a nearby landowner (that also planned to develop its property) and estimated that the cost to Las Colinas and the other landowner would be between \$1.65 million and \$2.75 million. A copy of this estimate is attached as an exhibit to Crystal Clear's Response. Furthermore, after the other landowner indicated that it would not proceed with development, Crystal Clear orally advised Las Colinas that the cost to provide service to Las Colinas alone would be—not half of the prior estimate—but approximately \$1.8 million. See attached Exhibit A (declaration of Reagan Dickerson). Similarly, in an email—a copy of the relevant portion of which is attached as Exhibit B—to Las Colinas's consultant, Thomas Rhodes, Crystal Clear's general manager, Mike Taylor, stated that 'the property needs major infrastructure investment before it can be developed. None of this is consistent with Crystal Clear's claim that it has 'pipes in the ground' such that it can supply the water required by Las Colinas within a reasonable time at a reasonable cost.

Accordingly, because Crystal Clear presently lacks sufficient water and facilities to provide the water service needed by Las Colinas and because the cost of providing such service would be excessive, Crystal Clear cannot demonstrate that it has 'pipes in the ground' sufficient to show that it has 'made service available' to Las Colinas's property within the meaning of § 1926(b). Therefore, even if the PUC could consider Crystal Clear's § 1926(b) argument, Las Colinas would still be entitled to have its Petition granted.

B. Las Colinas's property is not "receiving water service" within the meaning of § 1926(b).

There is only one published decision construing the meaning of "receiving water service" in § 13.254(a-5): *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.* 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied). In that case, the Austin Court of Appeals held that property is 'receiving water service' if (1) it is receiving actual water service or (2) if the CCN holder has taken acts specifically to provide service to the property for which decertification is sought. *Id.* at 142. In *Crystal Clear*, Crystal Clear showed that it had water lines adjacent to the property and was capable of providing service to the property, at least in its then-current, undeveloped state. The court, however, held that this was not sufficient because none of the things upon which Crystal Clear relied showed specific actions to provide service to that particular piece of property for which decertification was sought, as opposed to generally providing service throughout its service area.

The same is true in this proceeding. Much of Crystal's Clear's Response is given over to discussing Crystal Clear's claim that it provides service to a residence that is near, but not part of, the Property to be decertified. But Crystal Clear's claim that it 'has active water facilities running under the Property and serving Mr. Dickerson's residence' is false. The water line running under Las Colinas's Property to Mr. Dickerson's residence is a private water line owned by Mr. Dickerson, not by Crystal Clear. (See Exhibit A). And the 1.97 acre parcel containing that residence is not part of the Property for which Las Colinas seeks decertification. Therefore, the fact that Crystal Clear provides water (through a pipe it doesn't own) to the single house on a nearby parcel is irrelevant to whether Las Colinas's Property is 'receiving water service.


None of the things relied upon by Crystal Clear, either in its pleadings or the attachments thereto, show any acts specifically to provide service to the Property. Providing service to a

nearby property, having a water line near the Property, and/or the ability to provide service to it in its present, undeveloped state is not sufficient under *Crystal Clear*. Even less so are such things as having an office in San Marcos, planning for future supply to its entire service area, or providing an estimate showing it would cost well over \$1 million to provide the service necessary for Las Colinas's proposed development. To the contrary, if anything, the latter shows the Property is not presently "receiving water service" within the meaning of § 13.254(a-5).

Nothing relied upon by Crystal Clear in this case in any way distinguishes it from the types of things Crystal Clear relied upon in the *Crystal Clear* case, which were found wanting. Accordingly, as the PUC staff correctly concluded, the Property is not "receiving water service" within the meaning of § 13.254(a-5), and Las Colinas's decertification petition should be granted.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: 

Mark Walters State Bar No. 00788611

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Austin, Texas 78701

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T: (512) 236-2360

F: (512) 391-2153

ATTORNEY FOR PETITIONER LAS
COLINAS SAN MARCOS PHASE I LLC

CERTIFICATE OF SERVICE

I hereby CERTIFY that on 23rd day of August, 2016, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses:

Brittany May Johnson
Public Utility Commission of Texas
1701 N Congress PO Box 13326
Austin, Texas 78711-3326

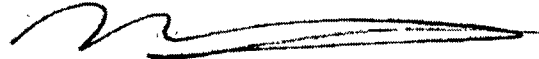
via fax to: (512) 936-7268

Attorney for Commission

Paul M. Terrill III
Geoffrey P. Kirshbaum
Scott R. Shoemaker
810 W. 10th Street
Austin, Texas 78701

via fax to: (512) 474-9888

Attorneys for Crystal Clear Special Utility District



Mark Walters

EXHIBIT A

PETITION BY LAS COLINAS SAN
MARCOS PHASE I LLC FOR
EXPEDITED RELEASE FROM
CRYSTAL CLEAR SPECIAL UTILITY
DISTRICT'S WATER CCN NO. 10297

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BEFORE THE PUBLIC UTILITY

COMMISSION OF TEXAS

AFFIDAVIT OF REAGAN DICKERSON

STATE OF TEXAS §

COUNTY OF HAYS §

BEFORE ME, the undersigned notary, personally appeared Reagan T. Dickerson, the affiant, a person who is known to me. After administering an oath, the affiant testified that:

1. "My name is Reagan T. Dickerson. I am over the age of eighteen years, of sound mind, and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. I am Managing Partner of Las Colinas San Marcos Phase I, LLC ("Las Colinas"), the petitioner in the above-captioned matter. In this position, I am familiar with the properties that it owns, and I have interacted on behalf of Las Colinas with Crystal Clear Special Utility District ("Crystal Clear") in an effort to obtain water service to Las Colinas' property.
3. Las Colinas San Marcos Phase I, LLC owns approximately 79.964 acres of land (the "Property"), located within the boundaries of water CCN No. 10297 issued to Crystal Clear. After discussions with Crystal Clear regarding the provision of water service to the Property, Crystal Clear presented the estimate attached as Exhibit 4 to Crystal Clear's Motion to Intervene, Plea to Jurisdiction, Motion to Dismiss and Response filed in the above-captioned matter. The estimate addresses both Las Colinas' Property and a neighboring property. However, when the neighboring property owner decided not to move forward with the water service, I was told by representatives of Crystal Clear that it would cost approximately \$1,800,000 in order for Crystal Clear to provide water service to Las Colinas' Property alone.
4. As I stated in my July 8, 2016, affidavit submitted in this proceeding, the Property is not receiving water service from Crystal Clear or any other water service provider. I understand Crystal Clear has indicated that a water line traverses the Property with the implication that Crystal Clear owns that water line. However, that is not true. The water

Affidavit of Reagan T. Dickerson
CCN. No. 10297

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line traversing the Property was constructed by me and members of my family who previously owned the Property and is a private water line which I own and maintain. The water line connects one tract of land which is not part of the Property to another tract of land which is not part of the Property. Crystal Clear has never paid any money for the construction or maintenance of the water line or taken any action to construct or maintain the water line.

5. On behalf of Las Colinas San Marcos Phase I, LLC, I request that the Public Utility Commission of Texas release this Property from water CCN No. 10297."

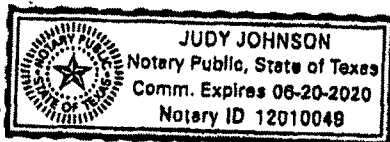
FURTHER AFFIANT SAYETH NAUGHT.


Las Colinas San Marcos Phase I LLC
a Texas Limited Liability Company


By:


Managing Member, Reagan T. Dickerson

Subscribed and sworn to before me by Reagan T. Dickerson, Managing Partner of Las Colinas San Marcos Phase I, LLC, on this 27 day of August, 2016, to certify which witness my hand and seal of office.




Notary Public in and for the State of Texas.


Print or Type Name of Notary Public

Commission expires June 20, 2020

Affidavit of Reagan T. Dickerson
CCN. No. 10297

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EXHIBIT B

From: Mike Taylor <miket@crystalclearsud.org>

Subject: RE: City of San Marcos Subdivision Plat Application

Date: May 2, 2016 at 4:41:24 PM CDT

To: Thomas Rhodes <thomas@etrdevcon.com>

Cc: Mike Fournier <mike@crystalclearsud.org>, Suzie Silva
<suzie@crystalclearsud.org>, "Clack, Jon" <JClack@sanmarcostx.gov>

Thomas,

We have had multiple discussions with Reagan. Wastewater by San Marcos has not been worked out to our knowledge. The property needs major infrastructure investment before it can be developed.

Mike Taylor

General Manager