



Control Number: 46148



Item Number: 14

Addendum StartPage: 0

RECEIVED

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

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BEFORE THE PUBLIC UTILITY COMMISSION

2016 SEP 14 PM 2:10
PUBLIC UTILITY COMMISSION
FILING CLERK

COMMISSION OF TEXAS

**CRYSTAL CLEAR SPECIAL UTILITY DISTRICT'S
EXCEPTIONS TO THE PROPOSED ORDER**

TO THE HONORABLE COMMISSIONERS:

NOW COMES, Crystal Clear Special Utility District ("Crystal Clear") and timely files these Exceptions to the Proposed Order.¹

I. INTRODUCTION

Crystal Clear files these exceptions to the Proposed Order, in particular the conclusions that: (1) the Commission may not deny Las Colinas San Marcos Phase II, LLC's ("Las Colinas") petition for expedited release ("Petition") based on the fact that Crystal Clear is a borrower under a federal loan program; and (2) Las Colinas has adequately proven that its 79.964-acre tract within Crystal Clear's water certificate of convenience and necessity ("CCN") No. 10297 in Hays County (the "Property") is not receiving water service under TWC § 13.254(a-5). Crystal Clear's evidence demonstrates that it meets the standards for 7 U.S.C.A. § 1926(b) protection, and therefore federal preemption of TWC § 13.255 by § 1926(b) applies, requiring the Commission to deny or dismiss the Petitioner's application. Crystal Clear also established that the Property is receiving water

¹ On September 1, 2016, the Honorable Administrative Law Judge issued the Proposed Order in the above-referenced docket in anticipation of the consideration of this docket at the Public Utility Commission's ("PUC") open meeting on September 22, 2016. Corrections or exceptions were requested to be filed on or before September 14, 2016. Therefore these exceptions are timely filed.

service under TWC § 13.254(a-5). Crystal Clear established that it has already undertaken various acts of service for the Property, including but not limited to providing facilities committed to the property and even used to run water beneath the Property to Las Colinas' owner, meeting the requirements for showing that the Property is receiving water service.

II. BACKGROUND

On July 11, 2016, Las Colinas filed its Petition for expedited release of the Property. Commission Staff filed its Final Recommendation on the Application on August 16, 2016. On August 17, 2016, Crystal Clear filed its Response to Commission Staff's Final Recommendation subject to its Plea to the Jurisdiction and Motion to Dismiss. On August 23, 2016 Las Colinas filed a Response to Crystal Clear's Motion to Intervene, Plea to the Jurisdiction Motion to Dismiss, and Response. On August 26, 2016, Crystal Clear replied to Las Colinas' Response. On September 1, 2016 the Honorable Administrative Law Judge issued the Proposed Order. Crystal Clear hereby timely files its Exceptions to the Proposed Order.

III. ARGUMENT

A. 7 U.S.C.A. § 1926(b) Preempts TWC §13.254 Under the U.S. Supremacy Clause.

Federal preemption is a *controlling legal principle* that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress. Such protection preempts any state law to the contrary, including TEX. WATER CODE §13.254 and P.U.C. Subst. R. 24.113. 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. Crystal Clear established that it meets the "service" test, under either the "bright line" or "ability to serve"

standards for 7 U.S.C.A. § 1926(b) protection, and therefore federal preemption of TWC § 13.255 by § 1926(b) applies, requiring the Commission to deny or dismiss Las Colinas' application due to the irreconcilable conflict.

The Proposed Order erroneously reaches the opposite conclusion in Conclusion of Law No. 8, and also erroneously concludes that the Commission has jurisdiction over the matter in Conclusion of Law No. 1. Conclusion of Law Nos. 1 and 8 should be revised as follows:

1. "The Commission does not have jurisdiction over this matter pursuant to TWC §§ 13.041 because 7 U.S.C.A. § 1926(b) preempts TWC §13.254 under the U.S. Supremacy Clause."
8. "Under 7 U.S.C.A. § 1926(b), the Commission must deny the petition based on the fact that Crystal Clear SUD is a borrower under a federal loan program."

Accordingly, Ordering Provisions 2-5 should also be deleted and Ordering Provision 1 should be revised as follows:

1. "Las Colinas' petition for expedited release is denied."

B. The Property is Receiving Water Service.

TWC § 13.254(a-5) only permits release of a tract of land if it is "not receiving water or sewer service." The Water Code broadly defines "service" as

any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under this chapter to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

TWC § 13.002(21). Notably, the statute does not require actual water or sewer service. In *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex.App.-Austin 2014, pet. filed), the Third Court of Appeals explained that "the term 'service' is of intentionally broad scope and encompasses an array of activities" in which a retail public utility might engage. This means that *any act* performed, *thing furnished or supplied*, or *any facilities or lines committed or used*

for the property in question supports a finding that the property is receiving water service under Section 13.254(a-5) (emphasis added). *Id.* at 136. Thus, actual water or sewer service is not required by the statute before a property is considered to be receiving water or sewer service, and a property could be receiving water or sewer service if the retail public utility performed an act, if the act was performed in furtherance of providing water or sewer service to the property. *See id.* at 140.

Here, the Property is receiving water service under TWC § 13.254(a-5). Crystal Clear established that it has undertaken various acts of service for the Property. Crystal Clear has active water facilities running water 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"). *See* Crystal Clear's Motion to Intervene, Plea to the Jurisdiction, Motion to Dismiss, and Response at 12-16. Crystal Clear has a 6" supply line running along the far-east part of the Property. *Id.* That 6" line can provide basic domestic service to the entire Property.² From that supply line, Crystal Clear has already installed a meter and a residential supply line that runs beneath the Property to Mr. Dickerson's residence on the Dickerson Tract. *Id.*

In addition to the active water service currently provided to Mr. Dickerson on the Dickerson Tract, Crystal Clear has performed other "act[s]" and committed facilities qualifying as "service" to the remainder of the Property in which Mr. Dickerson owns by and through his company, Las Colinas. For example, Crystal Clear makes service available to Mr. Dickerson's company, Las Colinas, from its Hunter Plant, located approximately two miles from the Property. *Id.* The 6" service line currently supplying water to the Dickerson Tract via a service line from the meter

² *Id.* While the 6" line can provide basic domestic service to the entire Property, in order to provide fire flow, system modifications would need to be made.

running under the Property runs approximately 3.5 miles back to the Hunter Plant. *Id.* From the Hunter Plant, Crystal Clear has ample water supply to serve the remainder of the Property owned by Mr. Dickerson, and has incurred costs in connection with keeping adequate water supplies available for the Property. *Id.*

Crystal Clear has also dedicated time and expense in responding to past service requests from Mr. Dickerson to serve the Property. *Id.* For example, Crystal Clear incurred engineering, planning, and design expenses in preparing an estimate to add up to 1,292 connections to the Property. *Id.* To date, Crystal Clear stands ready to perform additional acts of service and commit additional facilities to the Property as needed.

With this evidence in the record, and without an evidentiary hearing to weigh the credibility of the witnesses under cross examination, the PUC cannot—and should not—conclude that Petitioner met its burden of proving that the Property is not receiving water service. Therefore, Crystal Clear excepts to Finding of Fact Nos. 21-24 and Conclusion of Law Nos. 4-8. Accordingly, Finding of Fact Nos. 21-24 be revised as follows:

21. Crystal Clear SUD has committed facilities or lines providing water service to the 79.964-acre tract.
22. Crystal Clear SUD has performed acts or supplied anything to the 79.964-acre tract.
23. The 79.964-acre tract is receiving water service from Crystal Clear SUD as that term has been defined by the courts.
24. [Deleted]

Similarly, Conclusion of Law Nos. 4-8 be revised as follows:

4. “The presence of a residential supply line that runs beneath the petitioned property and serves a separate property is not proof that the 79.964-acre tract is “receiving water service” under TWC § 13.254(a-5).”

5. The presence of the 6" water supply line which runs adjacent to the petitioned property is proof that the 79.964-acre tract is receiving water service.
6. The 79.964 acre property is receiving water service from Crystal Clear SUD under TWC § 13.254(a-5).
7. Las Colinas is not entitled to approval of the petition because it is receiving water service, and therefore has not satisfied the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(r) and (s).
8. Under TWC § 13.254(a-6), the Commission must deny the petition based on the fact that Crystal Clear SUD is a borrower under a federal loan program.

IV. PRAYER

Crystal Clear respectfully requests that the Proposed Order be amended as follows:

New Findings of Fact:

21. Crystal Clear SUD has committed facilities or lines providing water service to the 79.964-acre tract.
22. Crystal Clear SUD has performed acts or supplied anything to the 79.964-acre tract.
23. The 79.964-acre tract is receiving water service from Crystal Clear SUD as that term has been defined by the courts.
24. [Deleted]

New Conclusions of Law:

1. "The Commission does not have jurisdiction over this matter pursuant to TWC §§ 13.041 because 7 U.S.C.A. § 1926(b) preempts TWC §13.254 under the U.S. Supremacy Clause."
4. "The presence of a residential supply line that runs beneath the petitioned property and serves a separate property is not proof that the 79.964-acre tract is "receiving water service" under TWC § 13.254(a-5)."
5. The presence of the 6" water supply line which runs adjacent to the petitioned property is proof that the 79.964-acre tract is receiving water service.
6. The 79.964 acre property is receiving water service from Crystal Clear SUD under TWC § 13.254(a-5).

7. Las Colinas is not entitled to approval of the petition because it is receiving water service, and therefore has not satisfied the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(r) and (s).
8. Under 7 U.S.C.A. § 1926(b), the Commission must deny the petition based on the fact that Crystal Clear SUD is a borrower under a federal loan program.

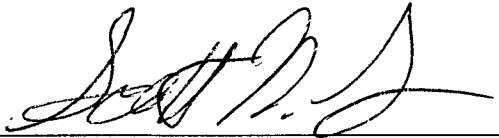
New Ordering Paragraphs:

1. Las Colinas' petition for expedited release is denied.
2. [Deleted]
3. [Deleted]
4. [Deleted]
5. [Deleted]

Crystal Clear requests that the PUC grant to it all such other relief to which it is entitled.

Respectfully submitted,

THE TERRILL FIRM, P.C.

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**ATTORNEYS FOR CRYSTAL CLEAR SPECIAL UTILITY
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CERTIFICATE OF SERVICE

I hereby CERTIFY that on September 14, 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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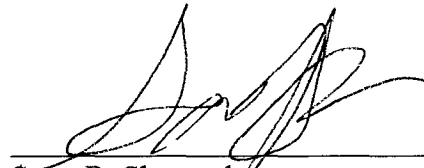
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