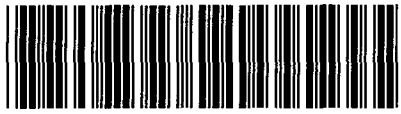

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PETITION BY LAS COLINAS SAN MARCOS PHASE I LLC FOR EXPEDITED RELEASE FROM CRYSTAL CLEAR SPECIAL UTILITY DISTRICT'S WATER CCN NO. 10297	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

LAS COLINAS SAN MARCOS PHASE I LLC'S RESPONSE TO CRYSTAL CLEAR SPECIAL UTILITY DISTRICT'S EXCEPTIONS TO THE PROPOSED ORDER

COMES NOW Petitioner Las Colinas San Marcos Phase 1 LLC ("Las Colinas" or "Petitioner") and files this Response to Crystal Clear Special Utility District's Exceptions to the Proposed Order.

INTRODUCTION

This proceeding concerns the petition ("Petition") filed by Las Colinas on July 11, 2016, 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, and, on September 1, the Administrative Law Judge ("ALJ") issued a proposed order granting Las Colinas's Petition. Crystal Clear filed exceptions to the proposed order on September 14, 2106. Crystal Clear's exceptions, however, raise no issue that should prevent the Commission from adopting the ALJ's proposed order.

Crystal Clear argues that the petition should be denied because (1) decertification is preempted by federal law and (2) 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 the existence of federal debt. Further, as the PUC staff correctly

concluded, the property is not "receiving water service." Therefore, the Petition should be granted.

ARGUMENT

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 form 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.

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 should be rejected.

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

Crystal Clear's federal preemption argument ignores the fact that the PUC is a state agency, not a court. In contrast to common law courts, state agencies rarely, if ever, have the power to decide state or federal constitutional claims. *See City of Dallas v. Stewart*, 361 S.W.3d 542, 579 (Tex. 2012) (agencies lack authority to decide takings claims); *Turner v. City of Carrollton Civil Serv. Comm'n*, 884 S.W.2d 889, 894 (Tex. App.—Amarillo 1994, no writ) (municipal agency lack authority to decide Equal Protection claim). Therefore, they do not have the power to declare state statutes they are charged with enforcing preempted by the Supremacy Clause of the United States Constitution. *Cf. Dallas Cent. Appraisal Dist. v. Hamilton*, No. 05-

99-0149-CV, 2000 WL 1048537, *8 (Tex. App.—Dallas July 31, 2000, pet. dism'd w.o.j.) ("We know of no authority, and appellants cite to none, which would allow an administrative agency to ignore its statutory duty because administrators believe the statute to be unconstitutional."). Furthermore, a state agency has only those powers delegated to it by the Legislature, and no others. *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.

Texas Water Code § 13.254(a-6) expressly 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).[1] 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).[2] Even if Crystal Clear's federal-preemption argument were correct—and it is not[3]—the PUC could not grant relief based on it. That relief would have to come elsewhere, in another forum. Crystal Clear cites no authority to the contrary. Indeed, despite having briefed this issue multiple times, Crystal Clear has yet to cite a single case in which it was held that a state agency could ignore a state statute on the ground it was preempted by federal law.

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[1] Furthermore, decertification does not limit Crystal Clear's ability to serve the Property, it merely removes it from Crystal Clear's exclusive area—but Crystal Clear can still serve it. And no other utility can serve the Property without first paying compensation to Crystal Clear under § 12.254(d).

[2] And regardless, the Supremacy Clause does not deprive the PUC of jurisdiction over this matter, as explained in Las Colinas's prior filings. *See* Las Colinas's joint combined (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 (hereinafter Las Colinas's Response) at 4.

[3] As explained in detail in Las Colinas's prior filings in this matter, Crystal Clear has failed to demonstrate that it has "made service available" to the Property such that it can invoke 1926(b). *See* Las Colinas's Response at 5-6.

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 arguably had lines running under 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 to show the property was "receiving water service" 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.

First, Crystal Clear argues that it provides to properties that are near, but not part of, the Property to be decertified. Even if true, this does not demonstrate that Las Colinas's Property itself is "receiving water service."

Crystal Clear also claims that it has a water line running under the Property and serving a residence on another piece of property that is near the Property to be decertified.

This claim is false. As demonstrated in Las Colinas's prior filings, the water line running under Las Colinas's Property is privately owned; it is not owned by Crystal Clear. (*See* Exhibit A to Las Colinas's Response). And the 1.97 acre parcel containing that residence that is served by that water line is not part of the Property for which Las Colinas seeks decertification. That

Crystal Clear provides water (through a pipe it doesn't own) to a single house on a nearby parcel does not demonstrate that Las Colinas's Property is "receiving water service."

Crystal Clear also claims that it has the present ability to serve the Property in its current, undeveloped state. But under the *Crystal Clear* case, even assuming Crystal Clear has the ability to provide water service, this does not mean that Las Colinas's Property is "receiving water service." Rather, under *Crystal Clear*, Crystal Clear must show that it has taken actions specifically to provide service to the Property. Nothing in anything submitted by Crystal Clear rises to this level. In fact, nothing relied upon by Crystal Clear in this proceeding in any way distinguishes it from the types of things Crystal Clear relied upon in the *Crystal Clear* case, which were found wanting.

Finally, Crystal Clear claims that it "incurred engineering, planning, and design expenses in preparing an estimate to add up to 1,292 connections to the Property." (Crystal Clear's Exceptions at 5). Crystal Clear performed a feasibility study for the Property, but it charged the then owner of the Property, Flying TZ LP, for the cost of that study. It was not an expense incurred by Crystal Clear. Further, the result of the study was that Crystal Clear would charge Las Colinas $1.8 million to install the infrastructure necessary to serve Las Colinas's intended development. And neither the PUC nor any court has held or even suggested that merely performing a feasibility study is sufficient to show that property is "receiving water service." At most, it arguably shows that Crystal Clear is capable of providing service to the Property (at considerable expense to Las Colinas). This is not sufficient under *Crystal Clear* to show that the Property is "receiving water service."

Accordingly, as the PUC staff correctly concluded, Las Colinas's 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.

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on 19th day of September, 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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