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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

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PUBLIC UTILITY COMMISSION
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COMMISSION OF TEXAS

**LAS COLINAS SAN MARCOS PHASE I LLC'S RESPONSE TO CRYSTAL CLEAR
SPECIAL UTILITY DISTRICT'S MOTION FOR REHEARING**

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 ("Crystal Clear") Motion for Rehearing.

INTRODUCTION

Crystal Clear's Motion for Rehearing ("Motion") should be denied. It raises no new issues that have not already been addressed in its prior filings and that could justify a rehearing in this matter.

BACKGROUND

This proceeding concerns the petition ("Petition") filed by Las Colinas on July 11, 2016, pursuant to Texas Water Code § 13.254(a-5), to decertify certain property it owns from the area covered by the water Certificate of Convenience and Necessity ("CCN") no. 10297 of Crystal Clear. On August 16, 2016, the Staff of the Texas Public Utility Commission ("PUC") recommended granting the petition, and, on September 1, the Administrative Law Judge ("ALJ") issued a proposed order that also recommended granting Las Colinas's Petition.

Crystal Clear filed exceptions to the proposed order on September 14, 2016. On September 21, Commissioner Marquez filed a memo recommending certain changes to the

ALJ's Proposed Order, and, at an open meeting on September 22, the Commission voted to adopt the Proposed Order with the changes recommended by Commissioner Marquez.

A final order granting Las Colinas's Petition was signed on September 28, 2016. Crystal Clear filed the instant Motion on October 21, 2016. The PUC staff responded to Crystal Clear's Motion on October 27, 2016.

ARGUMENT

As noted by the PUC staff in its October 27 response, under Tex. Gov't Code § 2001.146(g), a party filing a motion for rehearing must identify with particularity the findings of fact, conclusions of law, evidentiary or legal rulings claimed to be erroneous and state the legal and factual basis for the error. Crystal Clear's Motion does not raise any new claims or arguments that were not presented in its previous filings. And it has never addressed, either in its Motion or elsewhere, Las Colinas's arguments demonstrating that Crystal Clear is wrong.

Crystal Clear's Motion raises two arguments—the same two arguments that have already been addressed by the granting of 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) and therefore is ineligible for decertification.

Both arguments are wrong.

A. Federal law 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 lacked 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. dismiss'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. Crystal Clear’s Motion fails to address, much less distinguish, any of these authorities.

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.” Thus, 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—and it is not¹—the PUC could not grant relief based on it. That relief would have to come elsewhere, in another forum.

Crystal Clear’s Motion fails to address any of this. To the contrary, although this issue has been briefed repeatedly, Crystal Clear has yet to cite a single judicial decision or any other

¹ 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.

authority concluding that a state agency is free to ignore a state statute on the ground it is preempted by federal law.

B. Las Colinas's property was not "receiving water service" within the meaning of Texas Water Code § 13.254(a-5).

As also discussed at length in the prior briefing, 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. At most, Crystal Clear has shown that it has the present ability to serve the Property in its current, undeveloped state. But under the *Crystal Clear* case, this does not mean that Las Colinas's Property is "receiving water service." Rather, 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 all found wanting.

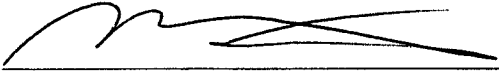
Additionally, Crystal Clear continues to claim that it has a water line running under the Property and serving a residence on another piece of property that is near the Property to be decertified. In fact, however, as demonstrated in Las Colinas's prior filings, the water line running under Las Colinas's 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."

Likewise, Crystal Clear continues to erroneously claim 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 Motion at 5). This is inaccurate. As pointed out in prior filings, while it is true that Crystal Clear performed a feasibility study for the Property, 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, the PUC correctly granted Las Colinas's Petition and Crystal Clear's Motion for Rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on 7th day of November, 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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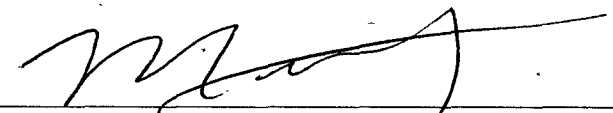
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