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PUBLIC UTILITY COMMISSION  
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APPLICATION OF CITY OF PRINCETON	§	
TO AMEND ITS WATER AND SEWER	§	BEFORE THE
CERTIFICATES OF CONVENIENCE AND	§	
NECESSITY AND TO DECERTIFY A	§	PUBLIC UTILITY COMMISSION
PORTION OF ALTOGA WATER SUPPLY	§	
CORPORATION'S WATER SERVICE	§	OF TEXAS
AREA IN COLLIN COUNTY	§	

**COMMENTS ON CCN APPLICATION OF CITY OF PRINCETON BY  
NORTH COLLIN SPECIAL UTILITY DISTRICT AND  
ALTOGA WATER SUPPLY CORPORATION**

**TO THE PUBLIC UTILITY COMMISSION:**

North Collin Special Utility District ("North Collin SUD") and Altoga Water Supply Corporation ("Altoga") file these Comments on CCN Application of City of Princeton ("Application Comments") and respectfully show the following:

**INTRODUCTION**

This Docket relates to the Application of the City of Princeton ("Princeton") to amend its water and sewer certificates of convenience and necessity (the "Princeton CCN Application" or "Application"). Princeton seeks certification of an area that is currently certificated to Altoga. Altoga and North Collin SUD previously filed an application with the Public Utility Commission of Texas ("PUC") for approval of the sale, transfer or merger of facilities and certificate rights from Altoga to North Collin SUD for Altoga's certificated water service territory in Collin County (the "STM Application"). The STM Application is the subject of PUC Docket No. 46452. Princeton intervened in said docket, and a preliminary hearing conference was conducted by all parties before Administrative Law Judge Vandrovec on February 18, 2017.

Order No. 1 in the current docket provides for Princeton and PUC staff to file comments/recommendations regarding how the Princeton CCN Application should be processed and to propose a procedural schedule by March 8, 2017. Neither Altoga nor North Collin SUD is seeking to intervene as parties to this proceeding at this time. However, both Altoga and North Collin SUD reserve their respective rights to intervene in this proceeding for all purposes upon receipt of formal notice of the Princeton CCN Application if and when the application is deemed administratively complete.

By motion dated February 26, 2017, PUC staff seeks to abate the Princeton CCN Application. PUC Staff notes that Princeton's CCN Application is not ripe for review until a final decision is rendered by the PUC with respect to the STM Application.

There are important additional facts that impact PUC processing of the Princeton CCN Application including potential federal litigation that will determine Princeton's right to prosecute the application, the PUC's authority to grant the relief requested by Princeton, as well as the effect of the PUC granting the Princeton CCN Application, i.e., even if the PUC should grant Princeton's CCN Application, the effect of such ruling would be preempted by federal law<sup>1</sup>.

Further, Altoga and North Collin SUD assert that the Princeton CCN Application is defective because it fails to specify whether Princeton seeks dual certification or

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<sup>1</sup> Altoga and North Collin have filed a Complaint in Federal Court asserting entitlement to 7 U.S.C. § 1926(b) protection in relation to the "Altoga Service Area" (the area covered by Altoga's CCN) and seeking, in part, a declaration that Princeton's CCN Application cannot be pursued and/or if granted, will not affect Altoga's/North Collin's right to provide water service within the Altoga Service Area to the exclusion of Princeton. The Federal Courts addressing a party's rights under 7 U.S.C. § 1926(b), have held that any state law or state action which would curtail or limit the legal right or ability of a federally indebted association to provide water service, is preempted by federal law. The Courts have taken different approaches holding: (1) detachment/deannexation is itself not preempted, but has no effect on an association's § 1926(b) rights, i.e., does not take away the indebted association's legal right to provide water service; *Pittsburg County RWD #7 v. City of McAlester*, 358 F.3d 694 (10<sup>th</sup> Cir.2004), and (2) any attempt of detachment/deannexation (taking away an indebted association's legal right to provide service) is itself preempted; *Robertson Properties, Inc. v. PWSA #8*, 153 SW3d 320 (Mo.App.W.D.2005).

decertification of the Altoga service territory. Until Princeton amends its Application and clarifies the relief it seeks, the Application should not be declared administratively complete.

The purpose of these Application Comments is to bring these matters to the attention of PUC and to urge the Honorable Administrative Law Judge to grant PUC Staff's Motion to Abate.

### **ADMINISTRATIVE COMPLETENESS OF APPLICATION**

1. In Section 2(D) of the Princeton CCN Application, Princeton states "single certification or dual certification is being sought." The Application cannot be declared administratively complete until it clearly specifies whether Princeton seeks single certification (i.e., decertification) or dual certification. The PUC application form requires an applicant to specify whether it is seeking dual or single certification of the area that is the subject of the application. The Princeton CCN Application fails to do so.

2. Until Princeton amends the Application to clarify whether it seeks single or dual certification, the Princeton CCN Application should not be declared administratively complete. The statutory criteria for decertification (Texas Water Code §13.254) are different than those applicable to a new application (Texas Water Code §13.251). The Application cannot be processed until it is clear what statutory criteria govern consideration of the Application- those for decertification or dual certification.

3. From a notice perspective, it is also critical that the Application specify whether dual or decertification is being sought. A customer who reviews the Princeton CCN Application cannot determine whether Princeton seeks decertification or dual certification. The former would result in a change in the customer's service provider, while

the latter would not. Similarly, the impact on adjacent retail public utilities differs substantially according to whether Princeton seeks dual certification or decertification. By way of example, North Collin SUD and Altoga have agreed that Altoga will transfer its assets and service territory rights to North Collin SUD pursuant to the STM Application. Whether Princeton seeks dual certification or decertification would have very different impacts on such agreement.

4. The evaluation of the statutory criteria applicable to the Princeton CCN Application (whether it seeks dual certification or decertification) will also differ significantly according to whether Altoga holds the CCN or North Collin SUD holds the CCN. Since Altoga and North Collin SUD have previously contractually agreed for transfer of Altoga's CCN service rights and facilities to North Collin SUD, and because the STM Application is pending under Docket No. 46452, proper consideration of the Princeton CCN Application can only be made after a final decision is rendered in such proceeding.

#### **ALTOGA /NORTH COLLIN FEDERAL INDEBTEDNESS**

5. Altoga/North Collin are indebted to the United States Department of Agriculture ("USDA"). Because of this indebtedness, Altoga/North Collin qualify for protection from municipal encroachment of their service territory under 7 U.S.C. § 1926(b) ("1926(b)"). This federal statute forbids a neighboring municipality from limiting or curtailing the water service provided or made available within a federally indebted association's service territory, and prohibits any effort to compete with the USDA indebted association. To secure the protections of § 1926(b), Altoga and/or North Collin need only establish that (1) it has a continuing indebtedness to the USDA, and (2) Princeton has or is attempting to limit or curtail the service provided or made available by the USDA indebted

association (Altoga/North Collin). *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996). Princeton concedes in the Princeton CCN Application that Altoga is currently making water service available within its territory. (See #2, p. 3 of the Princeton CCN Application.) No water applicant has been denied water service by Altoga/North Collin. There can be no dispute that Altoga/North Collin each are indebted to the USDA. As a result, both decertification and dual certification by Princeton of Altoga's certificated water service territory are prohibited by federal law.

6. Because Altoga/North Collin qualify for 7 U.S.C. § 1926(b) territorial protection, state and local laws are preempted by federal law. To the extent that a local or state action limits or curtails the services provided or made available by a protected water association, the local or state act is invalid. See *Pittsburg Cty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 715–16 (10th Cir. 2004) Princeton, by virtue of the Princeton CCN Application, seeks to take service territory away from Altoga/North Collin, which is strictly forbidden under federal law. Princeton cannot rely on or use state law or administrative regulations that may function to disturb or alter the rights of Altoga/North Collin to be the exclusive water service provider or providers within the area covered by Altoga's CCN.

7. The acquisition of facilities from a federally indebted water supply corporation are governed by federal regulations. Any acquisition of Altoga's service territory by Princeton would require USDA's consent. ("[7 U.S.C. § 1926(b)] does not prevent the municipality from purchasing facilities from the district, if done pursuant to [USDA's] regulations." *Glenpool Util. Servs. Auth. v. Creek Cty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988) (Emphasis added.)) See also *City of Coll. Station v. U.S.*

*Dep't. of Agric.*, 395 F. Supp. 2d 495, 515 (S.D. Tex. 2005). (“Once 1926(b) protection is in place, the TCEQ cannot grant any CCNs without the approval of the USDA. See 7 C.F.R. §§ 1951.226 & 1951.232.”) Princeton has not sought nor obtained USDA approval for the acquisition of any facilities or legal rights belonging to Altoga and/or North Collin, and may proceed with the Application only if and when it secures such consent.

8. If Princeton seeks to prosecute the Princeton CCN Application without prior USDA consent, Altoga and North Collin will seek to permanently enjoin Princeton from taking any actions in violation of 1926(b), including prosecuting the Princeton CCN Application. Since Princeton may be enjoined from prosecuting the Princeton CCN Application, and since PUC’s authority to act upon the Princeton CCN Application would be preempted by federal law, the PUC should not declare the Princeton CCN Application administratively complete, or otherwise process the Application, at this time. Any other action would potentially result in an enormous waste of time and resources for an administrative proceeding that is preempted by federal law.

#### **“ENGLAND RESERVATION”**

9. Altoga and North Collin hereby submit an “England Reservation,” reserving all of their federal rights and remedies under pursuant to 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983, and their entitlement to have such rights and remedies resolved/adjudicated in a federal forum in accord with *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1964).

Despite these uncertainties arising from application of Windsor– which decision, we repeat, does not require that federal claims be actually litigated in the state courts – a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by

making on the state record the ‘reservation to the disposition of the entire case by the state courts’ that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved.

*England*, pp. 421-422.

10. An England Reservation is appropriate when federal rights are potentially implicated by a state court or administrative agency proceeding. Altoga and North Collin are indebted to the United States Department of Agriculture and enjoy the territorial protection of 7 U.S.C. § 1926(b) (enforceable pursuant to 42 U.S.C. § 1983), which precludes Princeton from taking any action in furtherance of an effort to replace Altoga/North Collin as the water service provider within Altoga’s certificated water service territory, or to provide or sell water within Altoga’s CCN, or to disturb or interfere with the legal right of Altoga/North Collin to be the exclusive water service provider within Altoga’s/North Collin’s service territory under federal law.

11. Altoga/North Collin maintain that their state law right to provide water service within the Altoga CCN territory may not be altered, curtailed or limited by any state court or administrative proceeding, because local and state law is preempted by 7 U.S.C. § 1926(b). By filing this notice, Altoga/North Collin are not admitting themselves to the jurisdiction of the administrative agency nor conceding that the Public Utility Commission has jurisdiction to determine any federal law issues, or any fact issues



which might relate to Altoga's and/or North Collin's federal rights, including but not limited to any determination of whether or not Altoga and/or North Collin has made water service available as that term has been construed and interpreted under federal law. Princeton's Application is itself a violation of Altoga's and/or North Collin's federal rights under 7 U.S.C. § 1926(b). See *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir. 1987) ("*Bear Creek*").

### **CONCLUSION**

The Princeton CCN Application fails to identify whether Princeton seeks decertification or dual certification of Altoga. Customers and adjacent utilities cannot determine the potential impact of the Application without such clarification, and the applicable statutes and rules that govern consideration of the Application depend on such clarification. The Application should not be declared administratively complete until such clarification is made.


Altoga and North Collin SUD support PUC Staff's Motion to Abate this proceeding due to the pendency of PUC's consideration of the STM Application under Docket No. 46452. A final decision under such docket will determine the holder of certificated service territory rights for the service area that is the subject of the Princeton CCN Application. After a final decision is rendered in Docket No. 46452, then the PUC may consider the merits of Princeton's CCN Application as it relates to such holder, provided such consideration is not otherwise precluded by federal law.

Federal law prohibits Princeton from securing decertification or dual certification of Altoga's certificated water service territory without USDA's consent. If Princeton seeks to continue prosecution of the CCN Application without securing the prior consent of USDA,

then Altoga and North Collin SUD will file a lawsuit in federal district court to prohibit Princeton from prosecuting the Princeton CCN Application or taking any other action encroaching upon Altoga's and/or North Collin's certificated service territory rights.

For all of the reasons set forth herein, Altoga and North Collin SUD request that the Public Utility Commission not deem the Princeton CCN Application to be administratively complete and further request that processing of the Princeton CCN Application be abated until: (i) PUC renders a final decision on the STM Application in Docket No. 46452; and (ii) Princeton secures the prior written consent of USDA for acquisition of the Altoga/N. Collin SUD service territory.

Respectfully submitted,

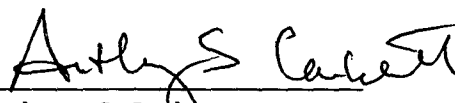
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### CERTIFICATE OF SERVICE

"I, Anthony S. Corbett, legal counsel to North Collin Special Utility District and Altoga Water Supply Corporation certify that a copy of this document was served on all parties of record in this proceeding on March 7, 2017 by facsimile and/or electronic mail.

  
Anthony S. Corbett

### MAILING LIST

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