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## *Public Utility Commission of Texas*

**TO:** Stephen Journeay  
Commission Counsel  
  
All Parties of Record

**FROM:** Mayson Pearson **MP**  
Administrative Law Judge

**RE:** Docket No. 48801 – *Petition of T.J. Bradshaw Construction, Ltd. to Amend Jonah Special Utility District's Certificates of Convenience and Necessity In Williamson County By Expedited Release*

**DATE:** October 17, 2019

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this memo, the parties to this proceeding are being served with the PFD.

Please place this docket on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadline for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

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**DOCKET NO. 48801**

<b>PETITION OF T.J. BRADSHAW</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>CONSTRUCTION, LTD. TO AMEND</b>	<b>§</b>	
<b>JONAH SPECIAL UTILITY</b>	<b>§</b>	<b>OF TEXAS</b>
<b>DISTRICT'S CERTIFICATES OF</b>	<b>§</b>	
<b>CONVENIENCE AND NECESSITY IN</b>	<b>§</b>	
<b>WILLIAMSON COUNTY BY</b>	<b>§</b>	
<b>EXPEDITED RELEASE</b>	<b>§</b>	

**PROPOSAL FOR DECISION**

This Proposal for Decision (PFD) recommends that the Commission dismiss the application of T.J. Bradshaw Construction, Ltd. to amend Jonah Special Utility District's certificate of convenience and necessity (CCN) in Williamson County by expedited release due to the preemption of federal law.

**I. Background**

On October 18, 2018, T.J. Bradshaw filed a petition with the Commission for expedited release from Jonah SUD's water certificate of CCN number 10970 and sewer CCN number 21053<sup>1</sup> under Texas Water Code (TWC) § 13.254(a-5) and 16 Texas Administrative Code (TAC) § 24.245(l). In support of its petition, T.J. Bradshaw provided an affidavit from Troy Bradshaw, partner in T.J. Bradshaw, certifying that the applicant is the sole owner of the 256.33-acre tract for which expedited release is sought, and that the tract is more than 25 contiguous acres, not receiving water service, and located entirely within Williamson County.<sup>2</sup>

On November 16, 2018, Jonah SUD filed a motion to intervene. In Order No. 3 issued on November 27, 2019, the administrative law judge (ALJ) granted Jonah SUD's motion to intervene. On December 7, 2018, Jonah SUD filed its response to the petition arguing, among other things, that decertification of any portion of its service area would be a violation of 7 United States Code (U.S.C.) § 1926(b).<sup>3</sup> In support of its argument, Jonah SUD included an affidavit from Bill Brown,

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<sup>1</sup> On December 18, 2018, Commission Staff clarified that T.J. Bradshaw's property does not overlap with the sewer CCN area for Jonah SUD, and there was no need for the requested release from Jonah SUD's sewer CCN.

<sup>2</sup> Petition of T.J. Bradshaw Construction, Ltd. To Amend Jonah Special Utility District's Certificates of Convenience and Necessity in Williamson County by Expedited Release, at 4.

<sup>3</sup> Jonah Water SUD's Response to Petition for Expedited Release, at 2.

General Manager of Jonah SUD, certifying that the district has an outstanding loan issued by the United States Department of Agriculture Rural Development Division (USDA) in 1998, Case Number 51-046-0741773048.<sup>4</sup> On December 18, 2018, Commission Staff recommended the approval of the expedited release from the water CCN.

On March 27, 2019, the United States District Court for the Western District of Texas issued its final judgment in *Crystal Clear Special Utility District v. Walker*, Cause No. AU-17-CV-254-LY (W.D. Tex.). This judgment is currently on appeal to the United States Court of Appeals for the Fifth Circuit;<sup>5</sup> however, because the court has not issued its final judgment on appeal, this proposal for decision is based on the judgment of the district court. In its judgment, the district court ordered and declared:

(1) Public Utility Commission's Final Order of September 28, 2016, in the matter titled Tex. Pub. Util. Comm'n, *Petition of Las Colinas San Marcos Phase I LLC*, Docket No. 46148 was entered in violation of 7 U.S.C. § 1926(b) and is void.

(2) 7 U.S.C. § 1926 preempts and voids the following section of Tex. Water Code § 13.254(a-6): "The utility commission 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."

(3) To the extent that Tex. Water Code § 13.254(a-5) directs the Public Utility Commission to grant a petition for decertification that meets the requirements of that provision without regard to whether the utility holding the certification is federally indebted and otherwise entitled to the protections of 7 U.S.C. § 1926(b), the statute is preempted and is void.<sup>6</sup>

In response to the judgment in *Crystal Clear*, the ALJ in the present docket issued Order No. 4 on May 24, 2019, requesting additional information from Jonah SUD regarding its federal loan. On June 7, 2019, Jonah SUD filed, along with the requested loan documentation, a motion to dismiss requesting that the Commission dismiss the petition on two grounds: (1) federal preemption by 7 U.S.C. § 1926; and (2) lack of subject matter jurisdiction based on the Commission's failure to act on the petition within 60 days of its filing as indicated by TWC § 13.254(a-6).

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<sup>4</sup> *Id.*, at 7.

<sup>5</sup> *Crystal Clear Special Utility District v. Walker, D'Andrea, Botkin, et.al.*, No. 19-50556 (5<sup>th</sup> Cir. filed June 18, 2019).

<sup>6</sup> *Crystal Clear Special Utility District v. Walker, D'Andrea, Botkin, et.al.*, No. 1-17-CV-254-LY (W.D. Tex. March 27, 2019), *appeal docketed*, 19-50556 (5<sup>th</sup> Cir. June 18, 2019).

On July 12, 2019, Commission Staff filed its response to Jonah SUD's motion to dismiss. Commission Staff agreed<sup>7</sup> that the Commission cannot interfere with Jonah SUD's exclusive right to provide service to T.J. Bradshaw under § 1926(b), but disagreed with Jonah SUD's subject matter jurisdiction argument noting that Jonah SUD provided no legal basis for its assertions.<sup>8</sup> On July 26, 2019, Jonah SUD filed a reply to Commission Staff's response, again requesting that the Commission dismiss the petition because Texas Water Code § 13.254(a-6) is preempted by federal law.<sup>9</sup>

## II. Analysis

### A. 7 U.S.C. § 1926

The USDA's water and sewer utility loan program is governed by 7 U.S.C. § 1926. Section 1926 provides protection for loan holders under subsection (b) which states:

The service provided or made available through any such association [i.e. a utility that provides water or sewer service and has an outstanding federal loan] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Congress enacted the protections of 7 U.S.C. § 1926(b) for two primary purposes, "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations . . . by protecting them from the expansion of nearby cities and towns."<sup>10</sup>

According to the court in *Crystal Clear*, in order to be eligible for protection under 7 U.S.C. § 1926(b), Jonah SUD must establish, "(1) that it is an association as defined in Section 1926, (2) that the association has an outstanding qualifying federal loan, and (3) that the utility provided

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<sup>7</sup> Commission Staff's response stated, "Staff disagrees with the District's assertion that §13.254(a-5) is preempted by federal law." However, based on a full reading of the text, the ALJ construes "disagrees" to be a typographical error.

<sup>8</sup> Reply to Commission Staff's Response to Jonah's Motion to Dismiss, at 2.

<sup>9</sup> Jonah Water SUD's Reply to Commission Staff's Response to Jonah's Motion to Dismiss, at 1.

<sup>10</sup> *Green Valley Special Utility District v. Walker*, 315 F. Supp.3d 992, 1001 (W.D. Tex 2018) (quoting *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915-16 (5th Cir. 1996)).

or made water service available.”<sup>11</sup> Under 7 U.S.C. § 1926, an association includes, “corporations not operated for profit, . . . , and public and quasi-public agencies.”<sup>12</sup> Special utility districts are political subdivisions established under Texas Water Code chapter 65. As a special utility district, Jonah SUD has established that it is an association under 7 U.S.C. § 1926.

Jonah SUD has also established that it has an outstanding qualifying loan. In support of its position, Jonah SUD included an affidavit from Bill Brown, General Manager of Jonah SUD, certifying that it has an outstanding loan issued by the United States Department of Agriculture Rural Development Division in 1998, Case Number 51-046-0741773048. According to the affidavit, the original loan amount was \$1,053,000, and Jonah SUD continues to make payments under the loan. In addition to the affidavit, on June 7, 2019, Jonah SUD filed its promissory note and security agreement dated April 9, 1998, confirming the stated loan amount of \$1,053,000. The affidavit and loan documents are sufficient to establish that Jonah SUD has an outstanding qualifying federal loan.

Jonah SUD also satisfies the third criteria, that it has provided or made water service available. “Fifth Circuit case law is clear that ‘provided or made available’ is satisfied if an association has a legal duty to provide service to the property at issue under Texas law, *i.e.*, it has a certificate of convenience and necessity that includes the relevant parcel.”<sup>13</sup> Jonah SUD has a legal duty to provide service to T.J. Bradshaw’s tract which is located entirely within its water CCN number 10970.

Under the standard set out in *Crystal Clear*, after determining that Jonah SUD is eligible for protection under 7 U.S.C. § 1926(b), the Commission must determine whether granting the petition would violate the terms of § 1926(b) by curtailing the service provided or made available by Jonah SUD. Unlike the petitioner in *Crystal Clear*, T.J. Bradshaw does not specify the reason for its request or name the utility that would provide service to the tract after the requested release. However, it can be presumed that it will not remain service-less in perpetuity. Even without a named preferred service provider, “[t]here is . . . preemption of any local or state law that purports

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<sup>11</sup> *Crystal Clear Special Utility District v. Marquez*, 316 F. Supp. 3d at 969 (W.D. Tex 2018), *appeal docketed*, 19-50556 (5<sup>th</sup> Cir. June 18, 2019).

<sup>12</sup> 7 U.S.C. § 1926(b).

<sup>13</sup> *Crystal Clear*, 316 F. Supp. 3d at 971.

to take away from an indebted rural water association *any territory* for which the association is entitled to invoke the protection of § 1926 (b).”<sup>14</sup> Removing any service area that Jonah SUD may potentially serve while they are federally indebted would be curtailing the service made available by Jonah SUD. The Commission’s approval of T.J. Bradshaw’s petition to remove its 256.33-acre tract from Jonah’s water CCN number 10970 would curtail the service provided or made available by Jonah SUD. According to the precedent set in *Crystal Clear*, the Commission’s authority to grant T.J. Bradshaw’s petition is preempted by 7 USC § 1926(b).

### **B. Subject Matter Jurisdiction**

Because the ALJ is recommending that the motion to dismiss be granted on the grounds of federal preemption, it is unnecessary to discuss dismissal on the grounds of lack of subject matter jurisdiction.

For these reasons, the ALJ concludes that, under 16 TAC § 22.181(d)(11), the petition of T.J. Bradshaw should be dismissed.

### **III. Findings of Fact**

The ALJ makes the following findings of fact.

1. T.J Bradshaw owns a tract of land in Williamson County that is approximately 256.33 acres.
2. Jonah SUD is a political subdivision of the State of Texas operating under TWC chapter 65 and holding water CCN number 10970.
3. On October 18, 2018, T.J. Bradshaw filed a petition for the expedited release of the 256.33- acre tract in Williamson County from Jonah SUD’s water CCN number 10970.
4. T.J Bradshaw provided an affidavit from Troy Bradshaw, partner in T.J. Bradshaw, certifying that the company is the sole owner of the 256.33-acre tract, and that the tract is more than 25 contiguous acres, not receiving water service, and located entirely within Williamson County.

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<sup>14</sup> *Crystal Clear*, 316 F. Supp. 3d at 973 (quoting *Pittsburg Cty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 716 (10th Cir. 2004)) (emphasis added).

5. The entirety of T.J Bradshaw's 256.33-acre tract is located within Jonah SUD's water CCN number 10970.
6. On November 16, 2018, Jonah SUD filed a motion to intervene.
7. In Order No. 3 issued on November 27, 2019, the ALJ granted Jonah SUD's motion to intervene.
8. On December 7, 2018, Jonah SUD filed its response to the petition.
9. Jonah SUD included in its motion to intervene and its response to the petition an affidavit from Bill Brown, General Manager of Jonah SUD, certifying that it has an outstanding loan issued by the United States Department of Agriculture Rural Development Division in 1998, Case Number 51-046-0741773048.
10. On December 18, 2018, Commission Staff recommended the approval of the expedited release from the water CCN.
11. On December 21, 2018, Commission Staff filed an amended recommendation on final disposition reaffirming their recommendation and providing a corrected map.
12. On March 27, 2019, the United States District Court for the Western District of Texas issued its final judgment in *Crystal Clear* declaring, among other things, that 7 U.S.C. § 1926 preempts and voids the section of TWC § 13.254(a-6) that reads, "The utility commission 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." In addition, the court held that U.S.C. § 1926 preempts and voids TWC § 13.254(a-5) to the extent it directs the Commission to grant a petition for decertification that meets the requirements of that provision without regard to whether the utility holding the certification is federally indebted and otherwise entitled to the protections of 7 U.S.C. § 1926(b).
13. In Order No. 4 issued on May 24, 2019, the ALJ requested additional information from Jonah SUD regarding its federal loan.
14. On June 7, 2019, Jonah SUD filed a motion to dismiss requesting that the Commission dismiss the petition on two grounds: (1) federal preemption by 7 U.S.C. § 1926, and (2) lack of subject matter jurisdiction based on the Commission's failure to act on the petition within 60 days of its filing as indicated by TWC § 13.254(a-6).



15. On June 7, 2019, Jonah SUD provided copies of its USDA loan promissory note and security agreement, dated April 9, 1998.
16. On July 12, 2019, Commission Staff filed its response to Jonah SUD's motion to dismiss in which it conceded that T.J. Bradshaw's petition was preempted by federal law.
17. On July 26, 2019, Jonah SUD filed a response to Commission Staff's response requesting that the Commission dismiss the petition because TWC § 13.254(a-6) is preempted by federal law.

#### IV. Conclusions of Law

The ALJ makes the following conclusions of law.

1. The Commission has jurisdiction over this matter under TWC §§ 13.041 and 13.241.
2. Under 16 TAC § 22.181(c), no hearing was held in this matter, and none is necessary, because the facts are established as a matter of law by the administrative record, of which the ALJ takes official notice.
3. The Commission may dismiss a proceeding with or without prejudice for, among other reasons: "other good cause shown" (16 TAC § 22.181(d)(11)).
4. Under 16 TAC § 22.181(f)(2), dismissal of a case for reasons other than 16 TAC § 22.181(g)(1) or (2) requires preparation of a proposal for decision.
5. Jonah SUD is an association under 7 USC § 1926.
6. Jonah SUD is federally-indebted under 7 USC § 1926(b).
7. Jonah SUD has "provided or made service available" under 7 USC § 1926(b).
8. According to the precedent set in *Crystal Clear*, Jonah SUD is entitled to the protections of 7 USC § 1926(b).
9. According to the precedent set in *Crystal Clear*, the following section of TWC §13.254(a- 6): "The utility commission 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," is preempted by 7 U.S.C. §1926 and void.

10. According to the precedent set in *Crystal Clear*, TWC § 13.254(a-5) is preempted and void to the extent that it directs the Commission to grant a petition for decertification that meets the requirements of the provision without regard to whether the utility holding the certification is federally indebted and otherwise entitled to the protections of 7 USC § 1926(b).
11. According to the precedent set in *Crystal Clear*, the Commission's approval of T.J. Bradshaw's petition would curtail the service provided or made available by Jonah SUD.
12. According to the precedent set in *Crystal Clear*, the Commission's authority to grant T.J. Bradshaw's petition is preempted by 7 USC § 1926(b).
13. Because the Commission is preempted by federal law from granting the petition, according to the precedent set in *Crystal Clear*, dismissal of this proceeding is warranted under 16 TAC § 22.181(d)(11).

#### V. Ordering Paragraphs

The ALJ proposes the following ordering paragraphs.

1. The application is dismissed due to federal preemption.
2. All other motions, requests for entry of specific findings of fact, conclusions of law, and ordering paragraphs, and any other requests for general or specific relief, if not expressly granted herein, are denied.

Signed at Austin, Texas the 17<sup>th</sup> day of October 2019.

PUBLIC UTILITY COMMISSION OF TEXAS



MAYSON PEARSON

ADMINISTRATIVE LAW JUDGE