



Control Number: 49863



Item Number: 27

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DOCKET NO. 49863

**PETITION OF ALAMO MISSION LLC §
TO AMEND ROCKETT SPECIAL §
UTILITY DISTRICT'S WATER §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY IN ELLIS COUNTY §
BY EXPEDITED RELEASE §**

**PUBLIC UTILITY COMMISSION
OF TEXAS**
2019 OCT 29 PM 2:56
PUBLIC UTILITY COMMISSION
OF TEXAS

**ALAMO MISSION LLC'S RESPONSE TO
ROCKETT SUD'S SURREPLY AND TO STAFF'S RESPONSE TO ORDER NO. 4**

COMES NOW Alamo Mission LLC ("Petitioner") and files this Response to Rockett Special Utility District's ("Rockett") Surreply to the Petitioner's Reply filed with the Public Utility Commission of Texas on October 11, 2019, and to Commission Staff's Response to Order No. 4, also filed on October 11, 2019. This Response is timely filed pursuant to Order No. 6, which granted Petitioner's Motion for Extension of Time and set the due date for Petitioner's responses as October 29, 2019.

I. OVERVIEW

Petitioner filed a Petition for Streamlined Expedited Release, seeking to decertify approximately 167 acres of real property in Ellis County (the "Property") from Rockett's CCN No. 10099. The Petition satisfies all requirements of Texas Water Code § 13.254 and 16 Texas Administrative Code § 24.245(l), and Staff has recommended its approval.

Rockett continues to oppose the Petition, but its arguments fail to undermine the sufficiency of the Petition or the Commission's jurisdiction to act. In Rockett's initial response to the Petition, it argued that Rockett "continues to provide water service to the Property through a

5/8" x 3/4" water meter."¹ Petitioner's Reply established that Rockett's contentions regarding its alleged service were false.²

Rockett then argued for the first time in a Supplement to its Response that the Petition should be dismissed because Rockett had recently (but only after the Petition was filed) incurred federal debt, and that 7 U.S.C. § 1926(b) preemption applies to this case. Petitioner's subsequent Reply also demonstrated the errors of Rockett's preemption argument. The federal district court decision on which Rockett relies applies *on its face only* to the parties and proceedings in that action.³ It does not govern the Commission's determination or process here.

Now, in its Surreply, Rockett continues to promote its preemption argument, contending that the Commission may not even consider the Petition because Rockett provided service in the past, it is allegedly capable of providing service in the future, and the Property is located within Rockett's CCN area. In support of its newly proposed position, Rockett continues to rely on non-binding federal district court authority and offers a one-sided and incomplete description of the negotiation process, arguing that it did not have the necessary information to fully evaluate whether it could make future improvements to its system to enable it—again, in the future—to provide the requested water to the Property.

Notably, although Rockett now contends that there is a water valve on the Property that required only a "simple turn" to activate water flow,⁴ Rockett's Surreply still does not controvert

¹ Rockett Special Utility District's Response and Objection to Petition for Expedited Release at 2 (Sept. 24, 2019). ("Rockett's Response").

² See, e.g., Alamo Mission LLC's Reply to Rockett SUD's Response to Petition for Expedited Release and Motion to Strike at 3-7 (Oct. 2, 2019). ("Petitioner's Reply").

³ *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777, at *2 (W.D. Tex. Mar. 27, 2019) ("[T]he PUC, its officers, employees, and agents are permanently enjoined from enforcing in any manner the 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 (Final Order).") (attached as Exhibit 1).

⁴ Rockett SUD's Surreply to Petitioner's Reply at 2-3 (Oct. 11, 2019). ("Rockett's Surreply").

its own General Manager's unequivocal statement that Rockett "does not currently have available water supply necessary to serve the Project and will not be capable of procuring additional water supply in the requested timeline."⁵

Rockett continues to fail to address head-on binding Texas precedent regarding § 1926(b). As discussed in detail in Petitioner's Reply to Rockett's Response, the Petition satisfies all applicable legal requirements. Thus the Petition should be approved.

II. FEDERAL DEBT ISSUE

Despite Commission Staff's initial recommendation that the Commission approve the Petition, Staff has now raised concerns that Rockett's recently acquired, federally guaranteed loans may implicate preemption concerns under § 1926(b). Specifically, Staff filed an updated recommendation in its Response to Order No. 4, filed on October 11, 2019, continuing to recommend that the Petition be approved, but also stating that it was "reluctant to recommend to the Commission a position that could run afoul of orders from a federal court." Staff therefore suggested as an alternative to approving the Petition, that the Commission could abate the proceeding "until the courts resolve this issue." Because Rockett is not entitled to § 1926(b) protection, and because the Commission's state-required fact-finding is entitled to proceed, abatement is not warranted. The Commission should adopt Staff's initial and primary recommendation and approve the Petition.

A. Section 1926(b) Preemption Does Not Apply Because Rockett Has Not—and Has Admitted That It Cannot—Provide the Service Requested by Petitioner.

As Petitioner explained in its Reply, 7 U.S.C. § 1926(b) preemption applies only when a utility with federal debt can demonstrate that it has "provided or made [service] available" to a

⁵ Rockett's Surreply at Exhibit D.

particular property.⁶ To make that showing, the utility must prove both a legal right or duty to serve a particular area and the “present” physical ability to do so—meaning that the water utility has sufficient infrastructure and water quantity to meet the needs of the requested service.⁷ Because Rockett’s own evidence and argument conclusively demonstrate that it does not have the “present” physical ability to serve Petitioner’s project, the Commission should reject Rockett’s preemption argument.

The Third Court of Appeals’s decision in *Creedmoor-Maha Water Supply Corp. v. Texas Commission on Environmental Quality* sets the standard the Commission must use to evaluate whether Rockett is entitled to § 1926(b) protection. *Creedmoor-Maha* arose under facts very similar to those presented in the Petition. The property owner, land developer Carma Easton, Inc., desired to build a large master-planned community requiring large amounts of water, and moved for expedited release under Water Code § 13.254.⁸ Carma asserted—and, like here it was uncontested—that Creedmoor-Maha did not have the water capacity to serve Carma’s development needs.⁹ The Commission approved the decertification petition.¹⁰

On appeal, Creedmoor-Maha, like Rockett, asserted that the Third Court of Appeals was bound by the Fifth Circuit’s decision in *North Alamo Water Supply Corp. v. City of San Juan* regarding the application and scope of § 1926(b) preemption.¹¹ The Third Court disagreed. In evaluating the proper authority to guide its decision, the Third Court noted that “[t]he ultimate

⁶ *Creedmoor-Maha Water Supply Corp. v. Tex. Comm’n on Envtl. Quality*, 307 S.W.3d 505, 522-23 (Tex. App.—Austin 2010, no pet.).

⁷ *Id.*

⁸ *Id.* at 510-11.

⁹ *Id.* at 512.

¹⁰ *Id.*

¹¹ *Id.* at 518-19 (citing *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam)).

touchstone in every preemption case' is the intent and purpose of Congress as discerned primarily from the language of the statutory provision and the context of its enactment, and then through 'the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'"¹² To make that determination, the Third Court noted that it was "*obligated* to follow only higher Texas courts and the United States Supreme Court."¹³ Absent such binding authority, the Third Court concluded, it was required to "independently determine the applicable federal rule of decision," drawing not only from the Fifth Circuit but from "any other federal or state court to that end."¹⁴

The Third Court then provided a detailed and exhaustive explanation of the state of the law concerning the scope of § 1926(b) preemption. After fully evaluating *North Alamo* and many of the cases cited here by Rockett, the court concluded that (1) the sole fact that property is included in a utility's CCN is insufficient to invoke § 1926(b) preemption; and (2) a utility must demonstrate that it is "either presently [] serving the area or *at least presently ha[s] the physical means to do so*."¹⁵ In other words, the ability to provide service *in the future* does not pass muster under *Creedmoor-Maha*. The utility must demonstrate a "present" ability to meet the needs of the requested service.

The record in this matter conclusively demonstrates that Rockett cannot presently provide the water necessary to serve the needs of Petitioner. In the words of its own general manager, Rockett *does not have the water*. In an email communication with Petitioner's water consultant, Rockett General Manager Kay Phillips stated:

¹² *Id.* at 521 (citing *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998)).

¹³ *Id.* (citing *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam)).

¹⁴ *Id.* at 521-22.

¹⁵ *Creedmoor-Maha*, 307 S.W.3d at 522 (emphasis added).

[T]he District does not currently have available water supply necessary to serve the Project and will not be capable of procuring additional water supply in the requested timeline. The District jointly owns a water treatment plant with the City of Waxahachie (the “Plant”), and the District is currently utilizing 100% of the District’s portion of the Plant’s capacity. Additional water supply is not available to the District from the Plant, and the District does not have any existing water service or water pipelines that can provide service to the Project site as requested.¹⁶

Rockett attempts to show in its Surreply that it is capable of providing *some* unknown level of water in the future asserting that there is a valve on the Property that just needs to be turned on, and that Petitioner’s allegedly deficient application somehow prevented Rockett from adequately assessing the Petitioner’s needs.¹⁷ But regardless of whether the water meter on the property may be easily activated and regardless how deficient Rockett contends Petitioner’s application was, Rockett *does not have the water to serve the project*. Much like the water utility in *Creedmoor-Maha*, who asserted that it stood “ready willing and able to serve” the property at issue, yet did not have the water supply to meet the demands of the project, Rockett cannot demonstrate that it has “provided or made service available” to the property.¹⁸

In spite of the Third Court’s decision in *Creedmoor-Maha*, and its own admission that it lacks sufficient water supply for the project, Rockett contends that it is entitled to § 1926(b) preemption under one of two theories. First, Rockett argues that the Fifth Circuit’s decision in *North Alamo* controls and “deems” a finding that Rockett has made service available for Petitioner’s project solely because the Property is within Rockett’s CCN.¹⁹ Second, and

¹⁶ Rockett’s Surreply at Ex. D.

¹⁷ Rockett’s Surreply at 2-3, 6-9.

¹⁸ *Creedmoor-Maha*, 307 S.W.3d at 522-23; *See also Santa La Hill, Inc. v. Koch Dev. Corp.*, No. 3:07-cv-00100-RLY-WGH, 2008 WL 140808, at *5 (S.D. Ind. Jan. 11, 2008) (concluding that a water district was not making service available, and was thus not entitled to § 1926(b) protection because, “[e]ven if [the district] had the infrastructure in place, [the district] [did] not have access to an adequate water supply to fulfill” the water applicant’s needs).

¹⁹ Rockett’s Surreply at 5.

alternatively, Rockett submits that under other federal precedent it is entitled to § 1926(b) preemption because it “had facilities within sufficient proximity from which service could have [been] provided within a reasonable time.”²⁰ The Third Court rejected both of Rockett’s proposed tests in *Creedmoor-Maha*. The court adopted “the majority view of the federal circuit courts” to conclude that to establish § 1926(b) preemption, a water utility must plead and ultimately prove that “it either presently was serving the area or at least presently had the physical means to do so.”²¹ A “bald assertion” that a water utility “stands ready and willing and able to serve . . . under the court’s holding in *North Alamo*” is insufficient, as is an unspecified promise to provide adequate water supply in the future.²²

Rockett cannot and has not demonstrated that it has the present ability to meet the project’s water needs. To the contrary, it plainly and unequivocally admitted that it cannot. In other words, Rockett is not “providing or making service available” to the Property. Accordingly, Rockett is not entitled to § 1926(b) preemption. The Commission should follow the binding precedent issued by the Third Court of Appeals and grant the petition.

B. Abatement of This Docket Is Not Warranted.

Commission Staff’s concern that the district court’s order in *Crystal Clear Special Utility District v. Walker* may impede the Commission’s authority in this separate matter is unwarranted. Rockett has conclusively demonstrated that it cannot provide the water needed by Petitioner. By statutory definition, therefore, it is not entitled to preemption, and there is no reason to defer to *Walker*. Its outcome will have no impact here.

²⁰ Rockett’s Surreply at 5-9 (citing e.g. *Moongate Water Co. v. Butterfield Park Mut. Domestic Water Ass’n*, 291 F.3d 1262, 1268 (10th Cir. 2002)).

²¹ *Creedmoor-Maha*, 307 S.W.3d at 522-23 (collecting cases).

²² *Id.*

But even if *Walker*'s ultimate resolution may become relevant, an on-going federal appeal does not supplant the Commission's statutory obligation to fulfil its *state-mandated* role as the fact finder in a separate decertification proceeding. The Commission should go forward with its proceedings.

First, the district court's order in *Walker* does not have the broad, far-reaching impact argued by Rockett.²³ The order, by its terms, binds only the parties *to that proceeding*. The order states: "[T]he PUC, its officers, employees, and agents are permanently enjoined from enforcing in any manner *the 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."²⁴ Thus the order does not prevent the Commission from acting on a different decertification petition. Nor could it. Section 1926(b) preemption is fact specific, protecting *only* those federally indebted utilities that are providing or making service available to property at issue. Because, as explained, Rockett cannot show itself entitled to § 1926(b) preemption (indeed, it has proven that it is not so entitled) *Walker* is not only *not binding* in this separate case, it is entirely factually distinguishable.

Second, to the extent the *Walker* order may be read to facially preempt the application of § 13.254(a-6), it still does not "preempt" the Commission from making the §13.254(a-5) inquiry in the first place. As the Commission is aware, § 13.254(a-5) authorizes expedited decertification proceedings when property is not "receiving" water service, and § 13.254(a-6) directs the Commission not to consider whether a utility has outstanding federal loans in determining whether property is "receiving" water service."²⁵ In other words, the Texas Legislature has directed that

²³ *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777, at *2 (W.D. Tex. Mar. 27, 2019).

²⁴ Exhibit 1.

²⁵ Tex. Water Code § 13.254(a-5); *id.* § 13.254(a-6).

the question whether property is “receiving” water service is a separate factual inquiry that the Commission is vested with the authority to make—regardless whether the utility has federal debt. Any issues concerning a utility’s federal debt can and should be resolved by the state district court in subsequent review proceedings. Certainly, a federal court cannot “preempt” a state agency from conducting the fact finding necessary to the ultimate legal question whether property is “receiving” water service under state law.

To suggest otherwise raises the “difficult federalism question” acknowledged by the Fifth Circuit in *North Alamo*.²⁶ Critically, the Commission (or its predecessor agency, the Texas Natural Resource Conservation Commission) was not a party to the proceedings in *North Alamo*.²⁷ Rather, the dispute was between a rural water utility and the city of San Juan.²⁸ In affirming the district court’s injunction ordering the City not to provide water service to the utility’s customers, the Fifth Circuit noted that the district court’s injunction neither applied nor limited the Commission’s powers to regulate or redraw the certificated area.²⁹ As explained by the Fifth Circuit, an injunction purporting to control a state agency in such a manner “would create a considerably more difficult federalism question: Namely, [whether] § 1926(b) also preclude[s] a state regulatory agency from modifying the service area of a federally indebted utility.”³⁰ The Fifth Circuit did not answer that question—but left it “for another day.”³¹

North Alamo carefully avoided preempting the Commission from carrying out its state function, and the Fifth Circuit has not altered its position in this regard post *North Alamo*.

²⁶ 90 F.3d at 917 n.27.

²⁷ *Id.* at 913-14.

²⁸ *Id.*

²⁹ *Id.* at 917 n.27.

³⁰ *Id.*

³¹ *Id.*

Therefore, the Commission is not impeded from carrying out its fact-finding obligations under § 13.254(a-5) in this docket.

Third, as a practical matter, deferring a decision on the Petition until *Walker* is resolved would result in a long and indefinite delay in these expedited decertification proceedings under Texas Water Code § 13.254(a-5)(c). The Fifth Circuit has abated its consideration of *Walker* while the court considers yet another case: *Green Valley Special Utility District v City of Schertz*, No. 18-51092. Briefing was only recently completed in that case. Oral argument, should one be held in *Green Valley*, will likely not be scheduled for months, and a decision from the Fifth Circuit would then not be expected for yet several more months after that. But § 13.254(a-5)(c) states that the Commission “shall grant” a petition “not later than the 60th day after the date the landowner files the petition.”³² The Commission should not abate the proceedings.

III. PETITIONER’S PROVISION OF INFORMATION

Rockett contends for the first time in its Surreply that Petitioner did not provide adequate information to Rockett to enable Rockett to evaluate improvements required to serve Petitioner.³³ As explained by Stephanie Sunico, project manager for Stantec, Inc., the company engaged by Petitioner, and its affiliate, to provide due diligence services in support of land development efforts relevant to the Petition, Petitioner provided sufficient information to enable Rockett to come to a reasoned determination that it could not meet the water needs of the Bonnet Project.³⁴ Specifically, at the direction of Rockett’s General Manager, Petitioner submitted an application for non-standard water utility service and an application fee.³⁵ Ms Sunico understood, based on direction from

³² Tex. Water Code § 13.254(a-5).

³³ Rockett’s Surreply at 6-10.

³⁴ Affidavit of Stephanie Sunico, attached hereto as *Exhibit 2*.

³⁵ *Id.*

Rockett's staff, that Rockett would use the information in the application to perform a hydraulic study necessary (and paid for by the fee) to determine Rockett's ability to support the project.

The application set forth water volumes and timing information required by the project, but left some aspects of the application incomplete due to the confidential nature of the project.³⁶ At the conclusion of several conversations about the application between Ms Sunico and Rockett's Development Coordinator, Morgan Massey, Ms. Sunico understood that the application was sufficient to enable Rockett's engineer to undertake the hydraulic study.³⁷ Rockett accepted the application (and cashed the application fee check).³⁸ No Rockett personnel requested additional information or details concerning the project's water needs.³⁹

After several phone calls and emails between Ms. Sunico and Ms. Massey, and finally a phone call with Ms. Phillips, Ms. Sunico finally learned that Rockett could not serve the project because it did not have sufficient water.⁴⁰ At that point, the process of procuring water from Rockett stopped.⁴¹

IV. CONCLUSION

Rockett is *not* providing service to the Property, and does not have sufficient water to supply the needs of Petitioner's project in the timeframe requested by the project. Because Rockett has not provided or made service available to the Property, § 1926(b) preemption does not apply and does not preclude the Commission from considering the Petition. Petitioner has fully satisfied

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

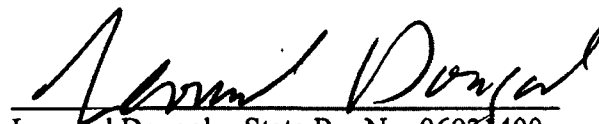
⁴⁰ *Id.*

⁴¹ *Id.*

the criteria found at Water Code § 13.254(a-5) for decertification from Rockett's CCN, and
Petitioner is entitled to the streamlined expedited release of the Property.

Respectfully submitted,

JACKSON WALKER L.L.P.

A handwritten signature in black ink, appearing to read "Leonard Dougal", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October 2019, a true and correct copy of the foregoing document was served on the individuals listed below by hand delivery, email, facsimile or First Class Mail.

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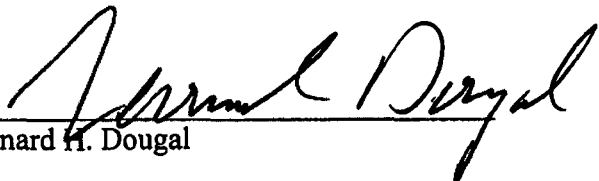

Leonard H. Dougal

EXHIBIT 1

2019 WL 2453777

Only the Westlaw citation is currently available.

United States District Court,
W.D. Texas, Austin Division.

CRYSTAL CLEAR SPECIAL
UTILITY DISTRICT, Plaintiff,

v.

Deann T. WALKER, Arthur C. D'Andrea, and Shelly
Botkin in Their Official Capacities as Commissioners
of the Public Utility Commission of Texas; and
Las Colinas San Marcos Phase I, LLC, Defendants.

CAUSE NO. 1:17-CV-254-LY

Signed 03/27/2019

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ORDER ON REPORT AND RECOMMENDATION

LEE YEAKEL, UNITED STATES DISTRICT JUDGE

*1 Before the court in the above-styled and numbered cause are Defendant Las Colinas's Rule 12(c) Motion for Judgment on the Pleadings on First Amendment Grounds filed March 1, 2108 (Dkt. No. 58), Plaintiff's Response to Defendant Las Colinas's Rule 12(c) Motion for Judgment filed March 15, 2018 (Dkt. No. 64), Defendant Las Colinas's Reply in Support of Rule 12(c) Motion for Judgment on the Pleadings on First Amendment Grounds filed March 22, 2018 (Dkt. No. 65), Plaintiff's Opening Brief on the Proper Scope of Relief filed June 8, 2018 (Dkt. No. 71), State Officials' Response Brief

Regarding the Proper Scope of Relief filed July 13, 2018 (Dkt. No. 72), Defendant Las Colinas's Response Brief Regarding the Proper Scope of Relief filed July 13, 2018 (Dkt. No. 73), and Plaintiff's Reply Brief on the Proper Scope of Relief filed July 27, 2018 (Dkt. No. 74).

The motions were referred to United States Magistrate Judge Andrew Austin on April 9, 2018, for findings and recommendations. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72; Loc. R. W. D. Tex. Appx. C, R. 1(d). The magistrate judge signed a report and recommendation on November 29, 2018 (Dkt. No. 75), recommending that this court enter judgment in favor of Crystal Clear Special Utility District for declaratory relief and permanent injunctive relief. Specifically, the magistrate judge recommends that the court make the following declarations:

(1) PUC Officials' 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) Tex. Water Code § 13.254(a-6) is preempted by 7 U.S.C. § 1926 and is void.

(3) To the extent that Tex. Water Code § 13.254(a-5) directs PUC Officials 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.

The magistrate also recommends that the court enjoin the Commissioners of the Public Utility Commission of Texas, in their official capacities, as follows:

(1) The PUC, its officers, employees, and agents are permanently enjoined from enforcing in any manner the 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 (Final Order).

The magistrate judge also recommends denying Las Colinas' Motion for Judgment on the Pleadings as moot. Finally, because the complaint includes the names of previous public-

utility commissioners, the magistrate judge ordered the clerk to terminate two previous commissioner defendants and add Shelly Botkin, a current commissioner.

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within fourteen days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Las Colinas, the State Officials, and Crystal Clear Special Utility District timely filed objections on December 15, 2018 (Dkt. Nos. 76, 77, 79).

*2 In light of the objections, the court has undertaken a *de novo* review of the motion, response, reply, briefing, objections, applicable law, and entire record in the cause. The State Officials ask this court to clarify the extent to which Section 13.254(a-6) of the Texas Water Code is preempted. The magistrate judge recommends declaring the entirety of Section 13.254(a-6) void; however, Crystal Clear only challenged one portion of Section 13.254(a-6). This objection by the State Officials should be **SUSTAINED** and this court **NOW MODIFIES** the report and recommendation and concludes that only the following portion of the Texas Water Code Section 13.254(a-6) is preempted: "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." Tex. Water Code § 13.254(a-6). The remainder of the objections do not raise any issues that were not adequately addressed in the report and recommendation. Therefore, finding no error, the court will accept and adopt the report and recommendation as modified for substantially the reasons stated therein.

IT IS THEREFORE ORDERED that Las Colinas's objections to the report and recommendation are **OVERRULED**.

IT IS FURTHER ORDERED that the State Officials' objections to the report and recommendation are

SUSTAINED in part as identified previously. In all other respects the objections are **OVERRULED**.

IT IS FURTHER ORDERED that Crystal Clear Special Utility District's objections to the report and recommendation are **OVERRULED**.

IT IS FURTHER ORDERED that the report and recommendation of the magistrate judge filed November 29, 2018 (Dkt. No. 75) is **ACCEPTED AND ADOPTED** by the court as **MODIFIED** below:

The court **ORDERS AND DECLARES**:

(1) PUC Officials' 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 PUC Officials 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.

IT IS FURTHER ORDERED that the PUC, its officers, employees, and agents are permanently enjoined from enforcing in any manner the 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 (Final Order).

IT IS FURTHER ORDERED that Defendant Las Colinas's Rule 12(c) Motion for Judgment on the Pleadings on First Amendment Grounds filed March 1, 2108 (Dkt. No. 58) is **DENIED** as moot.

All Citations

Slip Copy, 2019 WL 2453777

EXHIBIT 2

DOCKET NO. 49863

PETITION OF ALAMO MISSION LLC	§	PUBLIC UTILITY COMMISSION
TO AMEND ROCKETT SPECIAL	§	
UTILITY DISTRICT'S WATER	§	OF TEXAS
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY IN ELLIS COUNTY	§	
BY EXPEDITED RELEASE	§	

AFFIDAVIT OF STEPHANIE SUNICO

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

Stephanie Sunico, having been duly sworn by the undersigned authority, does state under oath the following:

1. My name is Stephanie Sunico. I am over the age of 18 and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and they are true and correct.
2. I work as a Senior Environmental Scientist and Project Manager for Stantec, Inc., a company which has been engaged by the project developer ("Developer"), an affiliate of Alamo Mission LLC, the Petitioner in this docket, to provide due diligence services in support of land development efforts which included the evaluation of available utility services. My business address is 5049 Edwards Ranch Road, Fort Worth Texas 76109-4133.
3. I am familiar with the property that is the subject of the Petition in this docket (the "Property"), and I worked with the Developer and later Alamo Mission LLC ("Alamo Mission") to evaluate the Property with respect to its suitability to support the requirements set forth by the Developer. The Property is planned to be used for a high-technology data center project, sometimes called "Project Bonnet," "Bonnet," or just the "Project."
4. The Project requires a significant amount of water of consistent quality for its operations. As part of our evaluation of the Project, the analysis of the available water supply and quality was required.
5. My first involvement on this Project with Rockett Special Utility District ("Rockett") was a conference call with Developer's staff, the Stantec project team, City of Red Oak staff, and Rockett staff on September 28, 2018 to discuss the water supply needs of the Project and to better understand Rockett's facilities, water rates, water supply and ability to serve the Project. The call surrounded the existing and planned infrastructure that could

potentially support the Project. Rockett staff stated that it had plans for a new 16" inch water line from the nearby McKenna Pump Station to the Property based upon previously planned water requirements which included a planned residential development. The change in land use for Project Bonnet represented a potential significant change in water demand. Rockett staff also discussed that a new 24" line would likely be required to support increased demands over what the proposed 16" line was capable of supporting. Rockett staff indicated that they had no plans in place to construct the 24" line at the time of the meeting. Rockett staff also indicated that they would have to purchase additional water from the City of Red Oak to supply the water demands of the Project. Rockett staff also indicated that they did not have any rate schedule in place for industrial users, only residential and commercial users. Rockett staff directed all other questions about rates to information on their website. The call lasted about 25 minutes.

6. On February 26, 2019, I participated in an in-person meeting with Rockett where we discussed Project requirements and Rockett's capacities in more detail. At this meeting, staff from the Developer, Stantec staff, and Rockett staff attended a meeting at the Rockett conference room in Waxahachie, Texas. Additional Stantec staff joined by conference call. In this meeting, I requested confirmation of the contracted water amounts Rockett had in place and asked for copies of the water supply contracts. Ms. Kay Phillips, Rockett's General Manager, indicated that she felt that these items "were not pertinent" and that submission of a "Application for Non-Standard Water Utility Service" and application fee would allow Rockett to contract with their outside engineer who would conduct a hydraulic study to model the Project requirements and determine whether they would be able to support the water requirements of the Project as well as provide detail to the Developer about what infrastructure would be needed to be built and the non-standard water rates. She stated the hydraulic study would take 2 weeks for completion.
7. Based upon information from the in-person meeting, I assisted in the preparation of the Application for Non-Standard Water Utility Service for the Project ("Application"), using the form provided by Rockett. The water volumes and timing information set forth on the Application accurately reflect the needs of the Project.
8. I attempted to hand-deliver the Application to Morgan Massey, Rockett's Development Coordinator, on April 22, 2019 at the Rockett SUD office in Waxahachie, Texas. I met Morgan in the foyer of the Rockett SUD office and provided her with the application. Ms. Massey reviewed the application and indicated that she understood that the Project design plans were still incomplete given where the Project was in the development process but confirmed that there was sufficient information for the engineer to perform the hydraulic study. Due to the competitive nature of Alamo Mission's business, the water volumes and project timing were sensitive competitive information, and the company made a claim of confidentiality regarding the Application. Ms. Massey reviewed the application package and then excused herself to her office. Upon her return she stated that because of the confidentiality statement, Rockett was unable to accept the application. Ms. Massey stated that Rockett's lawyer had advised her not to accept the application. From what I understand, after subsequent conversations between Rockett's legal counsel and the Developer's outside counsel it was agreed that the application could

be accepted. Prior to leaving on April 22nd, I mentioned to Ms. Massey that I would attempt to resubmit the application on April 24th. However, when I returned to Rockett on the 24th neither Ms. Massey nor Ms. Phillips was available to receive the application. I emailed Ms. Massey to setup a time on April 25th or 26th to submit the application. Rockett ultimately accepted the Application on April 26, 2019.

9. The Application included a check for \$3,000 for the application fee from Alamo Mission's land consultant Allegro Realty Advisors. Rockett accepted the application fee and cashed the check. Attached hereto as Attachment "A" is a true and correct copy of the check and Rockett's receipt.
10. I understood the application fee was to pay the costs for Rockett's engineer to perform an engineering evaluation of the feasibility to provide water service to the applicant's project, which is often called a "hydraulic study." The Rockett Application confirms this with the statement on page 2 that provides: *"This fee covers administrative, legal and engineering costs associated with an investigation of the District's ability to provide service to the applicant's project."*
11. In my discussions with Ms. Massey during the time of the Application submittal, the amount of information submitted in the Application, while incomplete, was sufficient to support the hydraulic study which Rockett indicated was required to determine Rockett's ability to support the Project. I had multiple communications with Ms. Massey regarding the Application in subsequent weeks and I did not receive any request from any Rockett personnel for additional information or detail concerning the Project's water supply needs.
12. On May 10, 2019, I contacted Ms. Massey, Rockett's Development Coordinator, by email to check on the status of the engineering study being performed by Rockett's engineer. Ms. Massey advised that she had a scheduled phone call with Rockett's engineer on May 13, 2019. I did not hear back from Ms. Massey, so I contacted her again by email on May 14, 2019 about the status and Ms. Massey responded "We are discussing all of our options. We will be putting something in writing and getting it to you hopefully tomorrow."
13. No written response was received following the May 14, 2019 correspondence. Despite our best efforts, Rockett never provided a copy of the hydraulic study or any written response to the Application. other than the single email from Kay Phillips, discussed below.
14. On May 22, 2019, I followed-up with an email to Ms. Massey, and then a phone call with her. During the call, Ms. Massey advised me that, to serve the Project, Rockett would need to increase their "water rights" and make facility improvements in excess of \$20,000,000 which they felt was not a viable option to provide service. She characterized the likely actual costs of facility improvements as "astronomical." I asked Ms. Massey what the process would be to secure the additional "water rights", and she stated that she did not know but Ms. Phillips would. Ms. Massey mentioned that alternatively, Rockett

might purchase water from the City of Red Oak and then Rockett might use that water to supply the Project. Ms. Massey then offered a call with Kay Phillips on May 28, 2019 to further discuss the options.

15. I attempted to schedule the call for May 28, 2019, but Ms. Massey never confirmed it. I followed up on May 28th by email but did not receive a response from Ms. Massey until May 30th, when she requested a list of questions that we would want answered by Rockett.
16. On June 3, 2019, I sent Ms. Massey the list of questions. The questions focused on the two options that had been raised by Rockett: Option 1 being an engineering solution and increasing Rockett's "water rights" (the cost of which Ms. Massey had described as "astronomical"), and Option 2 being the purchase of "water rights" by Rockett from the City of Red Oak.
17. On June 4, 2019, I spoke to Kay Phillips by telephone. She had received my email questions and was prepared to respond. She flatly stated that Rockett does not have the "water rights" available to provide water to the Project in the quantities and time frame requested by Alamo Mission. She noted that in the past, it had taken eleven years to secure additional "water rights", though she felt that the process might be shorter now. She stated that because Rockett does not have the "water rights" to support the Project, it would not make sense to "phase-in" a purchase of "water rights", given the lengthy time required to secure additional "water rights". She stated that, in any case, 100% of the costs associated with the purchase of "water rights" would be on Alamo Mission. We additionally discussed the water treatment plant that Rockett co-owns with the City of Waxahachie and whether it might be a source of supply to the Project. She again stated that there was no water available from that supply for the Project, as Rockett is currently utilizing 100% of its capacity in the Plant, and additional supply is not available. She also stated that there is no existing Rockett transmission line that is capable of supporting the requested supply of water for the Project. She stated that Alamo Mission would be required to build all of the new transmission lines for such service, and she specifically noted that the Highway 342 corridor, which is the shortest path from the water treatment plant to the Project, is heavily congested and she believed it was unlikely that Alamo Mission would be able to secure sufficient rights-of-way for constructing such a new transmission line. Finally, she stated that providing water to the Project was not just a financial and engineering challenge but also a geographic obstacle and there would be no way that Rockett could supply the requested water service by the 2021 deadline needed by Alamo Mission.
18. Following the June 4, 2019 call, and after not receiving any written report or study from Rockett, I followed up with an email on June 20, 2019 to Kay Phillips so as to memorialize the June 4, 2019 discussion, as it was important for Alamo Mission to confirm the details. Having received no response, I called and left a voicemail for Kay Phillips on June 26, 2019 and followed up with an email with respect to my email on June 20, 2019. A true and correct copy of the email correspondence between me and Kay Phillips, wherein she made it clear that Rockett did not have the water supply necessary

to serve the Project, is attached hereto as Attachment "B". In this communication, rather than affirming my summary of our June 4, 2019 conversation, Ms. Phillips provided her own summary of Rockett's inability to support the Project's water needs.

19. I am aware that Rockett has asserted in a pleading in this docket that water service could be provided to the Project site "within one hour or less." Rockett staff never mentioned any ability to provide service to the Project site on such an expedited schedule. Given the many months of interaction I had with Rockett's representatives, that statement is inconsistent with the true complexity of providing actual retail water service to a tract of land. The true process requires many more steps and months of time, including applying for non-standard service, having an engineering study performed, and working through the details of a non-standard service agreement. Once the email response was received from Ms. Phillips clearly indicating that the "District does not currently have available water supply necessary to serve the Project and will not be capable of procuring additional water supply in the requested timeline", the process of procuring water from Rockett SUD stopped.

FURTHER AFFIANT SAYETH NOT.

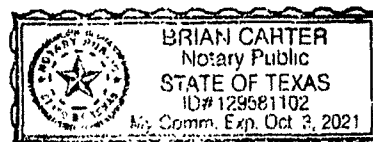
SIGNED this 29 day of October, 2019.

Stephanie Sunico

STEPHANIE SUNICO

SWORN TO AND SUBSCRIBED BEFORE ME by STEPHANIE SUNICO on October 29, 2019.

Brian Carter
Notary Public, State of Texas



ATTACHMENT “A”

ALLEGRO REALTY ADVISORS
1938 EUCLID AVE, STE 200
CLEVELAND, OH 44115

PNC BANK, N.A.
6-12/410

8642

4/18/2019

**PAY
TO THE
ORDER OF**

Rockett Special Utility District

\$ **3,000.00

Three Thousand and 00/100*****

DOLLARS

**Rockett Special Utility District
128 Alton Adams Drive
Waxahachie, TX 75165**


AUTHORIZED SIGNATURE

MEMO Project Bonnet

SECURITY FEATURES INCLUDED. DETAILS ON BACK

⑈008642⑈ ⑆041000124⑆4221490216⑈

ALLEGRO REALTY ADVISORS
Rockett Special Utility District

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Project Bonnet

4/18/2019

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3,000.00

PNC BANK - CASH C Project Bonnet

3,000.00

ROCKETT S.U.D.

REC#: 02371913 4/30/2019 2:26 PM
OPER: JLD TERM: 010
REF#: 8642

TRAN: 8.0000 HYDRAULIC ANALYSIS
NSA-PROJECT BUNNET
100-3021
HYDRAULIC ANALYSIS 3,000.00CR

TENDERED: 3,000.00 CHECK
APPLIED: 3,000.00-

CHANGE: 0.00

ATTACHMENT “B”

From: Kay Phillips
To: Sunico, Stephanie
Subject: RE: Project Bonnet Follow Up
Date: Wednesday, June 26, 2019 4:08:38 PM

Hi Stephanie,

According to the analysis of the District's consulting engineer, it has been determined the District does not currently have available water supply necessary to serve the Project and will not be capable of procuring additional water supply in the requested timeline. The District jointly owns a water treatment plant with the City of Waxahachie (the "Plant"), and the District is currently utilizing 100% of the District's portion of the Plant's capacity. Additional water supply is not available to the District from the Plant, and the District does not have any existing water service or water pipelines that can provide service to the Project site as requested. It is correct that the District does not have any outstanding federal debt currently.

Thank you,

Kay Phillips
General Manager
Rockett Special Utility District
PO Box 40, Red Oak, Texas 75154
126 Alton Adams Dr, Waxahachie, Tx 75165
(972) 617-3524 X 112
(469) 517-0989 Fax

From: Sunico, Stephanie <Stephanie.Sunico@stantec.com>
Sent: Wednesday, June 26, 2019 12:28 PM
To: Kay Phillips <kphillips@rockettwater.com>
Cc: Bradd Hout <BHout@allegrorealty.com>
Subject: RE: Project Bonnet Follow Up

Hi Kay

Just wanted to follow up on my call today. Could you let me know if the email below accurately describes the current situation with respect to the ability of Rockett to support Project Bonnet? I wanted to make sure I have accurately captured our phone conversations.

Stephanie Sunico
Senior Environmental Scientist

Direct: 817.203.0738
Mobile: 817.846.0880
Stephanie.Sunico@stantec.com

Stantec
5049 Edwards Ranch Road
Fort Worth, Texas 76109



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From: Sunico, Stephanie
Sent: Thursday, June 20, 2019 10:26 AM
To: kphillips@rockettwater.com
Cc: Bradd Hout <BHout@allegrorealty.com>
Subject: Project Bonnet Follow Up

Hi Kay,

I wanted to follow-up with you and make sure we are on the same page. Based on my conversation with you on June 4, I am requesting your confirmation of the below information from Rockett Special Utility District in relation to the application for retail water service submitted by Alamo Mission and accepted by Rockett on April 26, 2019.

Rockett does not currently have available the water supply necessary to serve the Project as requested, and does not think it is capable of procuring additional water supply in the requested timeline. In addition, Rockett is currently utilizing 100% of its portion of the capacity of the Water Treatment Plant co-owned with the City of Waxahachie, and additional water supply is not available from this Plant. As such, Rockett cannot serve the Alamo Mission project as requested. Rockett does not have any existing water service or water pipelines that can provide service to the Project site. Also, Rockett does not currently have any outstanding federal debt.

Thank you in advance for your response!

Stephanie Sunico
Senior Environmental Scientist

Direct: 817.203.0738
Mobile: 817.846.0880
Stephanie.Sunico@stantec.com

Stantec
5049 Edwards Ranch Road
Fort Worth, Texas 76109



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