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DOCKET NO. 50442

**PETITION OF MM WALDEN POND
LLC TO AMEND HIGH POINT
WATER SUPPLY CORPORATION'S
WATER CERTIFICATE OF
CONVENIENCE AND NECESSITY IN
KAUFMAN COUNTY BY EXPEDITED
RELEASE**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

**COMMISSION STAFF'S RESPONSE TO MM WALDEN POND, LLC AND HIGH
POINT WATER SUPPLY CORPRATION**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Staff's Response to MM Walden Pond, LLC and High Point Water Supply Corporation. In support thereof, Staff shows the following.

I. BACKGROUND

On January 13, 2020, MM Walden Pond, LLC (Walden Pond) filed a petition for expedited release of the portion of its 214-acre tract that lies within the boundaries of the High Point Water Supply Corporation's (High Point) water Certificate of Convenience and Necessity (CCN) No. 10841, in Kaufman County. This petition was filed under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(l). Walden Pond asserts that the tract of land is at least 25 acres, is not receiving water service, and is located in Kaufman County, which is a qualifying county.

On February 24, 2020, High Point filed a motion to dismiss, asserting that it is entitled to protection under 7 U.S.C. § 1926(b) because it is federally indebted. On March 19, 2020, Walden Pond filed its response to High Points motion to dismiss and Staff's motion to abate and High Point filed its response to Staff's motion to abate.

On March 5, 2020 the Administrative Law Judge (ALJ) issued Order No. 3 which gave Staff until March 26, 2020 to file a response to High Point's response and motion to dismiss and Walden Pond's response. This pleading is therefore timely filed.

II. STAFF'S RESPONSE TO HIGH POINT

Hight Point responded to Staff's motion to abate stating that "High Point is not opposed to the ALJ granting Commission Staff's motion to abate this proceeding by an order consistent with the discussion and decision of the Commissioners at the November 14, 2019, open meeting concerning Docket No. 48801."¹ Staff agrees with High Point that this proceeding should be abated pending the decision of the United States Court of Appeals for the Fifth Circuit (5th Circuit) in *Crystal Clear Special Utility District v. Walker*.²

III. STAFF'S RESPONSE TO WALDEN POND

A. Commission Holding

In Docket No. 48801 the ALJ's issued a proposal for decision (PFD) that addressed expedited release and federal preemption because of federal indebtedness.³ The PFD was never adopted because the parties withdrew their petition before the Commission could make a decision on it.⁴ In that PFD the ALJ discussed the effect of *Crystal Clear Special Utility District v. Walker* on expedited releases at the Commission:

"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;⁵ 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 High Point Water Supply Corporation's Response to Commission Staff's Motion to Abate and Motion to Require Electronic Service (High Point's Response to Staff) at 2.

² *Crystal Clear Special Utility District v. Walker, D'Andrea, Botkin, et. al.*, No. 19-50556 (5th Cir. Filed June 18, 2019).

³ *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*, Docket No. 48801, Proposal for Decision (Nov. 20, 2019).

⁴ Docket No. 48801, T.J. Bradshaw Construction, LTD's Withdrawal of Petition.

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

(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.^{6,7}

Walden Pond argues that Docket No. 48801 and federal preemption does not apply in this case because High Point is not providing service to the area Walden Pond is requesting release from.⁸ They argue this is because 7 U.S.C § 1926 only provided a federally indebted water utility protection "when the utility can demonstrate that it has 'provided or made service available.'⁹"

B. Texas Supreme Court Applicability

Staff disagrees with Walden Pond on three fronts regarding 7 U.S.C § 1926(b) not being met by High Point. First, Walden Pond cites the Texas Supreme Court decision in *Penrod Drilling Corp. v Williams* in which the court stated that Texas courts are obligated to follow only higher Texas courts and the US Supreme Court in cases that involve the issue of preemption.¹⁰ Staff is not requesting this docket be abated pending any state court case, instead Staff is requesting this case be abated pending a 5th Circuit appeal of *Crystal Clear Special Utility District v. Walker*. A Texas Supreme Court case is not binding on the 5th Circuit nor is any decision made by the Texas Supreme Court binding on any federal court. This issue is one of a federally indebted utility and

⁶ *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 (5th Cir. June 18, 2019).

⁷ Docket No. 48801, Proposal for Decision at 2.

⁸ MM Walden Pond LLC's Response to High Point Water Supply Corporation's Response and Motion to Dismiss and Commission Staff's Motion to Abate (Walden Pond's Response to Staff and High Point) at 2-3.

⁹ Walden Pond's Response to Staff and High Point at 2.

¹⁰ *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam); Walden Pond's Response to Staff and High Point at 3-4.

thus Staff's position is that the decision of the 5th Circuit is necessary in order to proceed with processing expedited release dockets where the utility is federally indebted.

C. Adequate Service under *North Alamo* Standard

Next, Staff disagrees with Walden Pond on its interpretation of when a CCN holder has provided or made service available to a property under 7 U.S.C § 1926(b). High Point's position is that the 5th Circuit decision in *North Alamo Water Supply Corp. v. City of San Juan* is binding in this case.¹¹ In that case the 5th Circuit stated that "[t]he service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment."¹² Further, the court in *North Alamo* held that "a Utility's state law duty to provide service is the legal equivalent to the Utility's "making service available" under § 1926(b).¹³ Since Texas falls within the 5th Circuit's federal appellate jurisdiction, *North Alamo* is binding precedent for federal district courts in interpreting 7 U.S.C § 1926(b).

Walden Pond argues that state appellate court precedent should govern over federal precedent.¹⁴ They cite to *Creedmoor-Maha Water Supply Corp v Tex. Comm'n on Env'tl. Quality*, a Texas 3rd Court of Appeals case as precedential in this case. The 3rd Court of Appeals held that the ordinary meanings of provided or made service available "denote[s] actual provision of service or physical capacity and readiness to provide service, not merely a legal right or duty to do so."¹⁵ Thus, Walden Pond argues the Commission should use Texas appellate court precedent and not 5th Circuit precedent when analyzing whether service has been provided under 7 U.S.C § 1926(b).

Staff requested abatement of this case to allow the 5th Circuit to resolve the interpretation of 7 U.S.C § 1926(b). Staff's position is that the 5th Circuit decision as to whether *North Alamo* or *Creedmore-Maha Water Supply Corp*, as *North Alamo* controls what constitutes providing or making service available under 7 U.S.C § 1926(b) is necessary before this docket can proceed.

¹¹ See *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996).

¹² *Id.* at 915.

¹³ *Id.* at 916.

¹⁴ Walden Pond's Response to Staff and High Point at 3.

¹⁵ *Creedmoor-Maha Water Supply Corp v Tex. Comm'n on Env'tl. Quality*, 307 S.W.3d 505, 522 (Tex. App. Austin).

High Point holds CCN No. 10841 and there has been no evidence presented by Walden Pond or High Point that they do not meet the standard for providing service under *North Alamo*. Thus, this docket should be abated pending the 5th Circuit's decision in *Crystal Clear Special Utility District*.

D. Adequate Service under *Creedmore-Maha* Standard

If the standard set out in *Creedmoor-Maha Water Supply Corp* is applied, as Walden Pond has urged the Commission to do, there is still evidence that High Point has provided or made service available to the area from which Walden Pond seeks expedited release. High Point in their Response and Motion to Dismiss Exhibits "C" and "D" provided evidence that there was a "5/8" x 3/4" water meter (#382)" currently serving the property.¹⁶ Walden Pond claims that "Meter #382 referenced by High Point is surrounded by the Property... but *not part* of the Property for which Petitioner seeks decertification."¹⁷ Whether the property is receiving service from that meter or not, there has been evidence presented that service is being provided even under the stricter *Creedmoor-Maha Water Supply Corp* standard which Walden Pond has urged the Commission to follow. Thus, even under this standard High Point meets the requirements of 7 U.S.C § 1926(b) and falls under the protections of 7 U.S.C § 1926.

IV. STAFF'S RESPONSE

Staff respectfully requests that this docket be abated pending the 5th Circuit's decision in *Crystal Clear Special Utility District v. Walker* to establish precedent for how the Commission should address petition's for expedited release from utilities that are federally indebted under 7 U.S.C § 1926.

V. CONCLUSION

For the reasons detailed above, Staff respectfully requests that this proceeding be abated pending the 5th Circuit's decision in *Crystal Clear Special Utility District v. Walker*.

¹⁶ High Point Water Supply Corporation's Response and Motion to Dismiss MM Walden Pond, LLC's Petition to Amend High Point Water Supply Corporation's Certificate of Convenience and Necessity in Kaufman County by Expedited Release (High Point Response and Motion to Dismiss) at 3; Exhibit "C"; Exhibit "D".

¹⁷ Walden Pond's Response to Staff and High Point at 4.

Dated: March 26, 2020

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on March 26, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Robert Dakota Parish
Robert Dakota Parish