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DOCKET NO. 51044

PETITION OF FCS LANCASTER, LTD.	§	PUBLIC UTILITY COMMISSION
TO AMEND ROCKETT SPECIAL	§	
UTILITY DISTRICT'S CERTIFICATE	§	OF TEXAS
OF CONVENIENCE AND NECESSITY	§	
IN DALLAS COUNTY BY EXPEDITED	§	
RELEASE	§	

COMMISSION STAFF'S RESPONSE TO ORDER NO. 4

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this response. Staff recommends that the supplemental motion to dismiss be denied. In support thereof, Staff would show the following:

I. BACKGROUND

On July 13, 2020, FCS Lancaster, LTD (FCS Lancaster) filed a petition to amend Rockett Special Utility District's (Rockett) water certificate of convenience and necessity (CCN) in Dallas County by streamlined expedited release pursuant to Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.254(h). FCS Lancaster seeks the release of two tracts of land, the first approximately 35 acres and the second approximately 121 acres, within the boundaries of Rockett's water CCN No. 10099.

On August 13, 2020, Staff filed a motion to abate until pending federal litigation that could impact this proceeding is resolved. On October 7, 2020, Rockett filed a supplemental motion to dismiss. On October 7, 2020, Order No. 4 was filed, requiring Staff to file a response to that motion by October 27, 2020. This pleading, therefore, is timely filed.

II. RESPONSE

Staff recommends that Rockett's supplemental motion to dismiss be denied because Rockett has failed to show that FCS Lancaster's property is receiving water service. Rockett contends that FCS Lancaster's request for water service for the property at issue is sufficient to demonstrate that FCS Lancaster is receiving water service as contemplated by TWC § 13.2541. Under that statute, the owner of a tract of land that is not receiving water service may petition for streamlined expedited release. Although, "receiving" is not defined by statute, courts have used the plain meaning of "receiving," and interpreted it to mean "taking possession or delivery of" or

“knowingly accepting” water services.¹ Although Rockett has demonstrated that FCS Lancaster has requested water service for the property, Rockett has failed to demonstrate that the property has actually received water service.

Texas courts and this Commission have contemplated what acts performed or what facilities committed would demonstrate that a property was receiving service. In *Texas General Land Office v. Crystal Clear Water Supply Corp.*, the court made the distinction between the broad scope of TWC § 13.002 of a utility “providing” water service and the narrower construction in TWC § 13.254(a-5) of a property “receiving” water service.² In the narrow construction, the court found that the specific property must be receiving the qualifying service in order to meet the statutory requirements.³

Here, Rockett has provided request letters from FCS Lancaster and an application for water service signed by FCS Lancaster.⁴ Rockett reasons that it, “is evident from Petitioner’s request to receive water service from Rockett, through submission of its Application for Water Service, that Rockett is currently providing water service to the Property through Rockett’s existing waterlines and facilities and Petitioner is requesting such current water service.” Staff can find no precedent in federal or Texas courts to support the proposition that a request for service equates to the specific property actually receiving service, nor is Staff aware of any Commission precedent to support such a claim. Moreover, Rockett does not cite to any precedential case or Commission order to support its interpretation of TWC § 13.2541.

As a procedural matter, it should be noted that FCS Lancaster’s request and application are dated September 28 and 30, 2020—two and a half months after the petition for streamlined expedited release was filed. If FCS Lancaster now intends to receive water service from Rockett for the property in question, then the appropriate step would be for FCS Lancaster to withdraw the petition, and not for the petition to be dismissed on Rockett’s motion.

¹ *Johnson Cty. Special Util. Dist. v. Pub. Util. Comm’n*, No. 03-17-00160-CV, 2018 WL 2170259, at * 8 (Tex. App.-Austin May 11, 2018, pet. denied) (mem. op.) (interpreting TWC § 13.2541’s predecessor statute, § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the Water Code, *See* Tex. S.B. 2272, 86th Leg., R.S. (2019)).

² *Tex. General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex. App.—Austin 2014, pet. denied).

³ *Id.*

⁴ Rockett Special Utility District’s Supplemental Motion to Dismiss at Attachment 1 (Oct. 7, 2020).

Rockett also claims that the property is receiving service through “Rockett's existing and future waterlines and facilities and related performance, actions, and commitment and use thereof.” These existing lines and facilities consist of:

- A 1½” and a 2” water line north of the property;
- A 2” water line near the southeast corner of the property;
- 2½”, 4”, and 6” water lines east of the property;
- A 1½” and a 6” water line south of the property;
- Water Plant No. 4, which serves the greater area and Rockett intends to expand the pumping capacity of; and
- Proposed 8” and 12” water lines “to service existing and proposed customers in the area.”⁵

None of these facilities are located on or run through the property in question, and the mere fact that they exist or that Rockett plans to construct them is not sufficient to meet the standard for receiving water service established by the court in *Crystal Clear*. In *Crystal Clear*, the CCN holder demonstrated that water lines and facilities existed near the property in question, much like Rockett’s lines and facilities.⁶ The court looked to whether those lines or facilities were constructed for the purpose of providing water to the specific property in question. Finding that the facilities were constructed to serve the greater area, and not the particular property, the court determined that the facilities were not committed to the particular tract of land, and therefore, the property in question was not receiving service.⁷ In the absence of a showing that the property in question is receiving water service, Staff requests that Rockett’s supplemental motion to dismiss be denied.

III. CONCLUSION

Staff respectfully requests the issuance of an order consistent with the foregoing response.

⁵ Rockett Special Utility District’s Response to the Petition and Motion to Dismiss at 5-6 and Exhibit D (Aug. 21, 2020).

⁶ *Crystal Clear*, 449 S.W.3d at 140.

⁷ *Id.*

Dated: October 27, 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 October 27, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Creighton R. McMurray
Creighton R. McMurray