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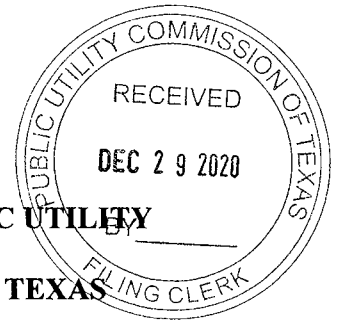
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**DOCKET NO. 51249**

**PETITION OF CROOK ROSE, INC. TO §  
AMEND LINDALE RURAL WATER §  
SUPPLY CORPORATION'S §  
CERTIFICATE OF CONVENIENCE §  
AND NECESSITY IN SMITH COUNTY §  
BE EXPEDITED RELEASE §**

**BEFORE THE PUBLIC UTILITY  
COMMISSION OF TEXAS**



**LRWSC'S RESPONSE TO COMMISSION STAFF'S  
AMENDED RECOMMENDATION**

Lindale Rural Water Supply Corporation (LRWSC or Intervenor) files this Response to Commission Staff's (Staff) Amended Recommendation to approve Crook Rose, Inc.'s (Applicant) Petition for streamlined expedited release (SER) pursuant to Texas Water Code § 13.2541 (Petition) that initiated this docket. In support, LRWSC shows as follows.

**I. PROCEDURAL BACKGROUND**

On September 3, 2020, Applicant submitted its Petition for SER from LRWSC's water CCN No. 10758 service area for a 69.197-acre tract of land in Smith County, Texas (Property). The Petition was deemed administratively complete on October 6, 2020.<sup>1</sup> Intervenor timely filed a response to the Petition on November 5, 2020.<sup>2</sup> Staff filed a recommendation to deny the Petition on November 19, 2020.<sup>3</sup> Applicant filed a reply to both Intervenor and Staff on November 30, 2020.<sup>4</sup> On December 18, 2020, Staff filed an amended recommendation to grant the SER Petition except for LRWSC's facilities.<sup>5</sup> The Commission was closed most of last week, and this response is timely filed.<sup>6</sup> Intervenor objects to Staff's new position and requests Petition denial in toto.

<sup>1</sup> Order No. 2 Finding Petition Administratively Complete and Notice Sufficient and Establishing Procedural Schedule (Oct. 6, 2020).

<sup>2</sup> Lindale Rural Water Supply Corporation's Response to Petition (Nov. 5, 2020).

<sup>3</sup> Commission Staff's Recommendation on Final Disposition (Nov. 19, 2020).

<sup>4</sup> Crook Rose Reply to Responses filed by Lindale Rural Water Supply Corporation and Commission Staff (Nov. 30, 2020).

<sup>5</sup> Commission Staff's Amended Recommendation on Final Disposition (Dec. 18, 2020).

<sup>6</sup> 16 TAC § 22.78(a).

## II. ARGUMENTS AND AUTHORITIES

There are two primary bases for Staff's new recommendation. First, Staff recommends the Commission grant the release of land requested, but leave LRWSC's water facilities within the Property certificated based on a new Commission interim decision.<sup>7</sup> Second, Staff misrelies on new federal court decisions in 7 U.S.C. § 1926(b) cases to conclude that the Commission should disregard federal CCN protection for LRWSC's service territory per Texas Water Code (TWC) § 13.2541(d). LRWSC objects to both recommendations.

### A. Leaving Facilities Certificated, but Not Land

The Commission's new approach upon which Staff relies has several problems. First, TWC § 13.2541 poses a simple question for the Commission to answer: is the tract receiving water or sewer service or not?<sup>8</sup> The "tract" is the 25 acres or more that also provides a petitioner with eligibility to seek a streamlined expedited release (SER) of CCN territory.<sup>9</sup> The Commission rules define "tract of land" as an area of land that has common ownership.<sup>10</sup> As recognized by *Crystal Clear*, presence of facilities within a tract of land can be deemed "service" under the TWC definition.<sup>11</sup> While discussing that "the term 'service' as defined in Chapter 13 is very broad and appears intentionally so," and that "[i]t includes facilities and lines as well as acts performed and anything furnished or supplied," *Crystal Clear* also indicated a line installed to serve a property could be "committed" to serve a tract even if not operative.<sup>12</sup> LRWSC submits that a charged

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<sup>7</sup> See *Petition of Imperial Heights, Ltd. to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Harris County by Expedited Release*, Docket No. 51114, Order (Dec. 17, 2020).

<sup>8</sup> TWC § 13.2541(b).

<sup>9</sup> *Id.*

<sup>10</sup> 16 TAC § 24.3(38). TWC § 13.002(1-a) defines "landowner," "owner of a tract of land," and "owners of each tract of land," as "multiple owners of a single deeded tract of land as shown on the appraisal roll of the appraisal district established for each county in which the property is located." See also 16 TAC § 24.3(18) and 24.245(7) (defining "Landowner").

<sup>11</sup> See *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140-141 (Tex. App.—Austin 2014, pet. denied); see also TWC § 13.002(21) (defining "Service"); see also 16 TAC § 24.3(33) (same definition).

<sup>12</sup> *Id.*

water main line such as that present within the Property is clearly located there to serve it even if it can be used to serve other parts of LRWSC's CCN area. Most Texas water and wastewater system facilities are not built to serve a single tract to the exclusion of all others. That would be a very anti-regionalization approach to water and wastewater service planning in contradiction to Legislative preference.<sup>13</sup>

While LRWSC agrees that the Commission cannot remove facilities within a Property from a retail public utility's CCN under the TWC § 13.2541 SER process, LRWSC fails to see how the land within the Property can be separately removed from a CCN despite the presence of those facilities through SER. Those facilities remain committed to the tract upon which they are built. The Petitioner failed to even mention the presence of those facilities when it filed the Petition, and Petitioner has not requested partial relief different from that it originally sought. Under § 13.2541(b), the tract is receiving water service and cannot be removed.

LRWSC notes that the Commission's new approach, if continued, leaves much ambiguity about the location of LRWSC's water lines for notice purposes. If the Property is removed, LRWSC anticipates the standard Commission SER ordering provision requiring a county recording in compliance with TWC § 13.257(r). A map that simply identifies by parenthetical that "Water Facilities in Area Released Remain Certificated" provides zero notice to anyone about where those lines are located and could lead to future operational problems for LRWSC. It is also unclear if the easement within which the lines are located would remain certificated or not. This ambiguity will carry into the PUC's CCN map viewer and beyond.

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<sup>13</sup> See, e.g., TWC § 13.241(d) (requiring consideration of regionalization or consolidation in granting new CCNs that require new construction); TWC § 13.246(c)(3) (requiring the Commission to consider the effect of granting a CCN "on any retail public utility of the same kind already serving the proximate area") and (c)(5) (requiring consideration of "the feasibility of obtaining service from an adjacent retail public utility"); Texas Health & Safety Code § 341.0315(b) ("the commission [i.e., TCEQ] shall encourage and promote the development and use of regional and areawide drinking water supply systems."). Various other Texas statutes and regulations, including Commission and TCEQ rules, promote regionalized services.

TCEQ moved away from “facilities only” or “facilities plus 200” CCNs many years ago. Using polygon shaped CCN areas allows retail public utilities to plan for service within those designated areas, and the public to know where they are located. LRWSC has obtained federal financing and undertaken service planning in reliance on its certificated service territory. The Commission’s new approach indicates a willingness to return to TCEQ’s abandoned format of CCN regulation without considering all ramifications of same, including whether it comports with statutory CCN requirements or the Commission’s current mapping rule, and without the benefit of stakeholder input in a rulemaking project.<sup>14</sup> LRWSC urges the Commission to follow its policy expressed earlier this year in other cases where facilities present within a tract were recognized as the basis to deny SER petitions.<sup>15</sup>

#### **B. Commission Must Recognize Federal Debt Protection**

Staff cites two recent federal decisions for the proposition that LRWSC’s claim of 7 U.S.C. § 1926(b) protection should be considered moot and disregarded because of the state law language found at TWC § 13.2541(d).<sup>16</sup> Respectfully, LRWSC’s federal constitutional rights and interest in 7 U.S.C. § 1926(b) protection are not and cannot be mooted by a conflicting state law provision. Neither of the decisions Staff cites stand for that proposition. The Commission should instead apply the new Fifth Circuit 7 U.S.C. § 1926(b) protection test to deny the Petition if the Commission is considering granting the Petition even in part as Staff now recommends.

In the *Green Valley* decision Staff cites, the Fifth Circuit set forth a new “physical capabilities” test for when 7 U.S.C. § 1926(b) protection applies. That test requires a federally

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<sup>14</sup> TWC § 13.244(d) and 16 TAC § 24.257 (both requiring mapping for CCN service areas).

<sup>15</sup> *Petition of Clay Road 628 Development, LP to Amend T&W Water Service Company’s Certificate of Convenience and Necessity in Montgomery County by Expedited Release*, Docket No. 50261, Order Denying Streamlined Expedited Release at 2-4 (Apr. 29, 2020); *Petition of the Sanctuary Texas, LLC to Amend Aqua Texas, Inc.’s Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 50405, Order (Oct. 16, 2020).

<sup>16</sup> Commission Staff’s Amended Recommendation on Final Disposition at 3 (Dec. 18, 2020) (citing TWC 13.2541(d), *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam), and *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 and 478 (5th Cir. Aug. 7, 2020) (en banc)).

indebted CCN-holding retail public utility to “show it has: (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made and (2) the legal right to provide service. A utility cannot satisfy that test if it has no nearby infrastructure. But ‘pipes in the ground’ is a colloquial shorthand, and not a strict requirement.”<sup>17</sup> The Fifth Circuit did not reach the preemption issue in *Green Valley* because it found: (1) the Commission Schertz Order at issue specifically relied on TWC § 13.255 which does not include language concerning federal debt protection, and the SER statutes (*i.e.*, § 13.254(a-1) or TWC § 13.2541(d)) that include such language were not specifically at issue; and (2) a separate Commission GVDC Order that was part of the appeal and did involve the SER statute was settled and deemed moot.<sup>18</sup> But the Fifth Circuit also remanded the case for further consideration of the new test in the TWC § 13.255 context.<sup>19</sup> The Western District court then applied the test to case-specific facts not present here and determined the “physical capabilities” prong was not met.<sup>20</sup> But its decision to dismiss *Green Valley*’s preemption claim without prejudice was per the Fifth Circuit’s direction described above.<sup>21</sup> Green Valley recently filed a motion for new trial seeking the opportunity to present facts showing it meets the new 7 U.S.C. § 1926(b) protection test, and the case remains pending.<sup>22</sup>

In the *Crystal Clear* decision Staff cites, the Fifth Circuit vacated the Western District court’s earlier decision that the TWC SER statute was preempted by 7 U.S.C. § 1926(b) and remanded the case because of the new test announced in its *Green Valley* decision but expressed no opinion on how issues in the case should be resolved on remand.<sup>23</sup> Thus, no decision on the

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<sup>17</sup> *Green Valley*, 969 F.3d at 477.

<sup>18</sup> *Green Valley*, 969 F.3d at 468-70.

<sup>19</sup> *Green Valley Special Util. Dist. v. City of Schertz*, No. 18-51092 (5th Cir. Sept. 17, 2020)

<sup>20</sup> Order, Cause No. 1:17-CV-819-RP; *Green Valley Special Util. Dist. v. Marquez, et al.*; in the United States District Court, Western District of Texas, Austin Division (W.D. Tex., Nov. 23, 2020)

<sup>21</sup> Compare *id.* with *Green Valley*, 969 F.3d at 468-70.

<sup>22</sup> Plaintiff’s Motion for New Trial and to Alter Judgment, Cause No. 1:17-CV-819-RP; *Green Valley Special Util. Dist. v. Marquez, et al.*; in the United States District Court, Western District of Texas, Austin Division (W.D. Tex., Dec. 21, 2020)

<sup>23</sup> *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (*per curiam*).

merits was rendered and there is no current order on remand as there is in *Green Valley*. That case remains pending too.

Other federal courts have reached the conclusion that curtailment of a utility's service area cannot occur where federal protection applies.<sup>24</sup> That concept is based on the federal supremacy clause of the United States Constitution.<sup>25</sup> Thus, it should not matter what the TWC says on this issue because it conflicts with federal law. The Commission should apply federal law and not force LRWSC to seek relief in federal court to enforce federal constitutional rights. As discussed, while the federal litigation in both cases Staff cites remains pending and unresolved, the concept of federal 7 U.S.C. § 1926(b) protection for CCN holders remains a live issue for cases where the new test is met. Federal service area protection for LRWSC and those similarly situated is plainly not a "moot" issue and is of significant concern. LRWSC is entitled to federal protection under the new Fifth Circuit test based on the presence of its facilities described in LRWSC's previous filings and recognized in Staff's memorandum.<sup>26</sup> Further, LRWSC notes that it has not yet received *any* request for service from Petitioner and has not even been given the opportunity to respond as contemplated by the new "physical capabilities" test.<sup>27</sup> Petitioner has presented no evidence of its precise development plan in this docket.<sup>28</sup> Thus, the Commission should presume LRWSC is capable of reasonably responding to a service request for the Property and deny the Petition.

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<sup>24</sup> See *Jennings Water, Inc. v. City of N. Vernon*, 682 F. Supp. 421, 427 (S.D. Ind. 1988) (enjoining curtailment "during the term of a loan"), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

<sup>25</sup> *Id.* (citing U.S. Const. art. VI, cl. 2 (supremacy clause)).

<sup>26</sup> Lindale Rural Water Supply Corporation's Response to Petition (Nov. 5, 2020), Lindale Rural Water Supply Corporation's Supplemental Response to Petition (Dec. 7, 2020), and Commission Staff's Recommendation on Final Disposition (Nov. 19, 2020).

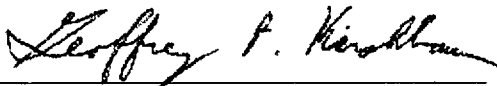
<sup>27</sup> *Green Valley*, 969 F.3d at 477.

<sup>28</sup> See Petition (Sep. 3, 2020) (omitting any Property development plan information) and Crook Rose Reply to Responses filed by Lindale Rural Water Supply Corporation and Commission Staff at Exhibit A, Affidavit of Rea Boudreaux, ¶ 9 (Nov. 30, 2020) (indicating familiarity with landowner's planned use of the Property while omitting that information).

### III. CONCLUSION AND PRAYER

For all the reasons discussed herein, Intervenor Lindale Rural Water Supply Corporation respectfully requests that the Honorable Administrative Law Judge and the Commission deny or dismiss the Petition because the Property receives water service from Intervenor and LRWSC's CCN service area that includes the Property is protected from decertification by 7 U.S.C. § 1926(b). Alternatively, if the Commission grants the SER Petition over LRWSC's objections, LRWSC demands just and adequate compensation pursuant to TWC § 13.254(d) and (g), TWC § 13.2541(f)-(j), and 16 TAC § 24.245(i)-(j).

Respectfully submitted,

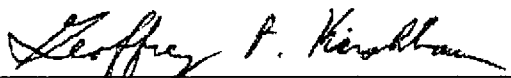
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### CERTIFICATE OF SERVICE

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 December 29, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

  
Geoffrey P. Kirshbaum