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**PETITION BY SIG MAGNOLIA LP § BEFORE THE**  
**FOR EXPEDITED RELEASE §**  
**FROM WATER CCN NO. 11052 § PUBLIC UTILITY COMMISSION**  
**HELD BY DOBBIN PLANTERSVILLE §**  
**WATER SUPPLY CORPORATION § OF TEXAS**

**SIG MAGNOLIA LP’S RESPONSE TO  
DOBBIN PLANTERSVILLE WATER SUPPLY CORPORATION’S  
MOTION FOR REHEARING**

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, SIG Magnolia LP (“SIG Magnolia”) and files this, its response to the Dobbin Plantersville Water Supply Corporation’s (“Dobbin Plantersville”) Motion for Rehearing (the “Motion for Rehearing”). SIG Magnolia disagrees with Dobbin Plantersville’s Motion for Rehearing and urges the Public Utility Commission (the “Commission” or “PUC”) to overrule the Motion.<sup>1</sup> The Commission issued the Order granting SIG Magnolia’s Petition for Expedited Release from Water Certificate of Convenience and Necessity (“CCN”) No. 11052 held by Dobbin Plantersville (the “Petition”), which released the property in question in this matter, on January 31, 2022. This response is filed within 40 days of that date and is therefore timely. *See* 16 T.A.C. § 22.264; Tex. Gov’t Code § 2001.146(b).

**I. Dobbin Plantersville Presents No New Support for its Claims of Error**

Dobbin Plantersville’s Motion for Rehearing fails to identify any error made by the Commission that would necessitate a rehearing. Rather, it rehashes previously asserted claims that the PUC has already considered and rejected. Dobbin Plantersville simply disagrees with the Commission’s Order. In its Motion for Rehearing, Dobbin Plantersville presents no new

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<sup>1</sup> On March 2, 2022, the Commission Advising states that no Commissioner had voted to add the Motion for Rehearing to an agenda. This response is filed to preserve SIG Magnolia’s position regarding the motion.

arguments, statements of fact, or legal theories, nor does it present any support for a claim of error on the part of the Commission in adopting the Order. Therefore, there is no justification for a rehearing of this case.

On March 2, 2022, the PUC staff filed a Commission Advising that indicated no Commissioner voted to add the Motion for Rehearing to an open meeting agenda.

## **II. Legal Authority**

The purpose of a motion for rehearing, in the administrative context, is to allow the agency to correct its own errors. *See United Savings Assoc. of Texas v. Vandygriff*, 594 S.W.2d 163, (Tex. Civ. App.—Austin, 1980, writ ref'd n.r.e.). A motion for rehearing must include a “concise statement of each allegation of error.” 30 TEX. ADMIN. CODE § 80.272(b)(4). The Texas Supreme Court has held that a motion for rehearing must be sufficiently definite to apprise the regulatory agency of the error claimed and to allow the agency an opportunity to correct the error or to prepare to defend it on appeal. *Suburban Utility Co. v. Public Utility Comm'n of Texas*, 652 S. W.2d 358, 365 (Tex. 1983).

## **III. The Commission properly concluded that SIG Magnolia’s application meets the requirements for expedited decertification, and therefore the motion for rehearing should be denied.**

In its Motion for Rehearing, Dobbin Plantersville seeks modification of the Order’s Findings of Fact Numbers 13, 22, 23, 25, 26, 27, and 28, proposes the addition of findings 30 and 31, modification of Conclusions of Law 12, 13, and 14, the deletion of Numbers 15 through 18, and addition of conclusion 19. Finally, Dobbin Plantersville requests the wholesale replacement of the Ordering Paragraphs with a new paragraph that completely reverses the Order by denying SIG Magnolia’s Petition.

Dobbin Plantersville claims in its Motion for Rehearing that it has committed facilities to provide service to SIG Magnolia’s release property. This is unsupported by the evidence in the record. Under the controlling state law standard, Dobbin Plantersville has not demonstrated that it has “facilities committed to providing service to the *particular* [SIG Magnolia] tract . . . .” *See General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 133 (Tex. App.–Austin, 2014, pet. denied), and Dobbin Plantersville does not allege that it has made such commitments to serve the SIG Magnolia tract. Moreover, Dobbin Plantersville’s proposed changes to the findings and conclusions are self-serving and reflect an attempt to induce the Commission to make certain unsupported findings that might bolster its legal position in the federal lawsuit it has filed against the Commissioners, the Commission, and SIG Magnolia. *See Dobbin Plantersville Water Supply Corp. v. Lake, et al.*, No. 1:21-CV-00612-RP (W.D. Texas, filed July 13, 2021). For these reasons, Dobbin Plantersville’s Motion for Rehearing should be denied.

**A. Background**

SIG Magnolia owns approximately 665.8 acres of land in Montgomery County, Texas, that is the subject of SIG Magnolia’s Petition for streamlined expedited release. SIG Magnolia intends to develop a residential development on the property that will ultimately include 1500 homes. *See* Affidavit of Juanita Orsak attached to SIG Magnolia LP’s Response to Dobbin Plantersville’s Motion to Dismiss and Response. Because the SIG Magnolia development will be a dense development, the water system must be capable of providing fire flows in addition to potable water service to the connections.

**B. State law provides for the expedited release of a tract from a CCN if it is not receiving water or sewer service.**

Texas Water Code § 13.2541 provides that an owner of a tract of land that is 25 acres or larger and located in certain counties, including Montgomery County, may petition for, and is entitled to, expedited release of that tract from a certificated area if the tract is “not receiving water or sewer service.” Tex. Water Code § 13.2541(b); *see also General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 133 (Tex. App.–Austin 2014, pet. denied) (citing to Water Code § 13.254 (a-5), now § 13.2451). In the instant proceeding, there is no dispute that SIG Magnolia is the owner of at least 25 acres and that the tract is in Montgomery County, a qualifying county. The only question is whether the property is receiving water service from Dobbin Plantersville as that term is defined by the statute and state law interpreting it.

The Austin Court of Appeals has articulated the relevant standard in its review of challenges to PUC decisions on what constitutes “receiving service.” The question is not whether Dobbin Plantersville “was *providing* water service to customers within the certificated area . . . but whether the Decertified Property was *receiving* water service . . . .” *Johnson County Special Utility District v. Public Utility Commission of Texas*, No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App. – Austin May 11, 2018, pet. denied) (mem. op.) at \*8 (citing *Crystal Clear Water*). The determination of whether a tract of land is receiving service is a “fact-based inquiry requiring the Commission to consider whether the [utility] has facilities or lines committed to providing water *to the particular tract* . . . in furtherance of its obligation to provide water to that tract pursuant to its CCN.” *Crystal Clear Water*, 449 S.W. 3d at 140 (emphasis in original); *Mountain Peak Special Utility District v. Public Utility Commission of Texas*, No. 03-16-00796-CV; 2017 WL 507834 (Tex. App. – Austin, Nov. 2, 2017, pet. denied) (mem. Op.) at \*5.

Thus, the relevant standard for “receiving service” considers:

- That the mere existence of water lines or facilities on or near a tract does not necessarily mean that the tract is receiving water service;
- Whether water facilities or lines are committed to serving *the particular property* or used to provide water to that tract;
- Whether the entity to be decertified performed any act or supplied anything to *the particular property* related to providing water.

*Johnson County Special Utility District* at \*8. This standard requires the CCN holder to have taken specific actions to provide water service to the *particular* tract – not merely that it has facilities nearby the tract that were not constructed for the specific purpose of serving the particular tract. None of the facts presented by Dobbin Plantersville in its Motion for Rehearing are new. Dobbin Plantersville has not demonstrated that the SIG Magnolia property is receiving water service from Dobbin Plantersville.

**C. The record evidence demonstrates SIG Magnolia’s property is not receiving water service from Dobbin Plantersville under the applicable state law standard.**

Dobbin Plantersville urges in its Motion for Rehearing that it has existing facilities near the SIG Magnolia property. However, under the principles described above, this does not mean the SIG Magnolia release tract is receiving water service from Dobbin Plantersville for the purposes of Texas Water Code § 13.2541. The water facilities specified by Dobbin Plantersville – Water Plant No. 9, and the 6-inch and 8-inch water lines it describes – are not located on the SIG Magnolia tract, are not currently serving the SIG Magnolia tract, nor are they committed to serving the SIG Magnolia tract with water in the future. These facilities provide water service to Dobbin Plantersville customers not located on the SIG Magnolia tract.

Nothing in the record demonstrates that Dobbin Plantersville has committed facilities or made other contractual commitments to provide potable water service to SIG Magnolia’s property or to provide water pressures sufficient to meet fire protection needs. The mere fact that Dobbin

Plantersville has existing facilities near the SIG Magnolia property does not mean the SIG Magnolia tract is receiving water service from Dobbin Plantersville. The existing water lines near the property are not committed to serving the SIG Magnolia tract, and the SIG Magnolia tract is not receiving water service from those lines. The 6-inch water line along FM 1486 provides water service to Dobbin Plantersville customers not located on the SIG Magnolia tract and, based on SIG Magnolia's understanding from its conversation with the general manager of Dobbin Plantersville in January 2021, that the 6-inch water line only has capacity to serve an additional 15-20 connections. *See* Affidavit of Juanita Orsak. The water line does not have capacity to serve the over 1500 connections expected in the SIG Magnolia development, and the line does not have the capacity to provide the SIG Magnolia development with fire flow. *See* Affidavit of Ryan Wade, attached to SIG Magnolia LP's Response to Dobbin Plantersville's Motion to Dismiss.

There are no other Dobbin Plantersville water facilities committed to serving this particular property and Dobbin Plantersville has not performed any act or supplied anything to *the particular property* related to providing water service. Dobbin Plantersville mischaracterizes that Water Plant No. 9 and other facilities within the High Meadows Estates subdivision are *committed* to serving the SIG Magnolia tract. SIG Magnolia has no request for service with Dobbin Plantersville and has no contractual, either verbal or written, arrangement whereby Dobbin Plantersville has committed to constructing facilities, including Water Plant No. 9, to serve the SIG Magnolia tract. *See* Affidavit of Juanita Orsak. The general manager of Dobbin Plantersville admitted in her affidavit that these facilities are not committed to providing water service to the SIG Magnolia property: "Plans were underway for a new water plant that would supply demand *in the area and the surrounding area.*" *See* Paragraph 3 in Affidavit of Janie Legge, Exhibit B to Dobbin Plantersville's Response. This admission demonstrates that the new water plant is not committed

to serving the *particular* SIG Magnolia tract. Similarly, during the January 14, 2021 meeting, Dobbin Plantersville told SIG Magnolia that Water Plant No. 9 was being constructed to serve High Meadows. *See* Affidavit of Juanita Orsak. Additionally, it appears that as of March 26, 2021, Dobbin Plantersville was uncertain as to its ability to serve SIG Magnolia, as the general manager stated in her March 26, 2021 email to Ms. Orsak, “We will have our Engineer review them and at that point will respond to you with the ability to serve or not.” *See* Affidavit of Juanita Orsak, Attachment 4. This statement is inconsistent with Dobbin Plantersville’s claim that facilities are committed to serving the SIG Magnolia tract.

Moreover, Water Plant No. 9 could not be committed to serving the particular SIG Magnolia tract, as its construction was approved in November 2020 *before* SIG Magnolia representatives met with Dobbin Plantersville in January of 2021. In November 2020, Dobbin Plantersville had no information on the development of the SIG Magnolia tract, or when and how it would be developed. It is difficult to believe that Dobbin Plantersville would authorize the expenditure of money to construct facilities *committed* to a development for which Dobbin Plantersville had no knowledge of in November 2020.

It is also disingenuous to suggest that Dobbin Plantersville was making these plans and investments to serve the SIG Magnolia because the SIG Magnolia tract was originally part of the High Meadows tract. The SIG Magnolia tract was separated and sold to an investment company over ten years ago, thereby ending any connection to the High Meadow tract. There were no agreements or other commitments that were part of the SIG Magnolia property when SIG Magnolia acquired the property. *See* Affidavit of Juanita Orsak. Any “planning” done by Dobbin Plantersville would have been done without having received a request for service, and more importantly, without knowing how or when the SIG Magnolia property would be developed. It



seems imprudent to make “planning” decisions for serving a piece of property without this information.

Moreover, Water Plant No. 9 and the other water lines within the High Meadows subdivision are not sufficiently sized to provide potable water service and fire flows to the over 1500 connections that are ultimately planned for the SIG Magnolia development. *See* Affidavit of Ryan Wade attached to SIG Magnolia LP’s Response to Dobbin Plantersville’s Motion to Dismiss and Response. Had these facilities been “committed” to providing water service to the SIG Magnolia property, they would have been sized to provide potable water service and fire flows to the development.

It should also be noted that SIG Magnolia intends to develop its property from west to east. Water Plant No. 9 is located almost two miles southeast of the western portion of the SIG Magnolia property, and there are several hills and creeks that must be crossed to reach the western part of the property. To move water from Water Plant No. 9 to the western portion of the SIG Magnolia property would require a significant investment in water infrastructure to serve the development. *See* Affidavit of Ryan Wade. This indicates that the facilities are not committed to serving the SIG Magnolia tract. Otherwise, the development plan for the SIG Magnolia property would have been considered as part of the location of Water Plant No. 9. These facilities are instead intended to provide water service to the High Meadow Estates development, which platted the location of the plant site. *See* Affidavit of Juanita Orsak.

The record evidence does not support the modifications and additions to the Order’s Findings of Fact, Conclusions of Law, and Ordering Paragraphs. Therefore, the Commission properly concluded that the Petition meets the requirements for expedited decertification, and the Motion for Rehearing should be denied.

**IV. Federal law does not prevent the Commission from granting SIG Magnolia's Petition.**

In its Motion for Rehearing, Dobbin Plantersville requests a modified Finding of Fact 13 and the addition of new Findings of Fact 30 and 31, an entirely new Ordering Paragraph denying the Petition, and a modified Conclusion of Law 19. The basis for these requested changes to the Order is its erroneous position that the PUC is precluded from considering or granting SIG Magnolia's Petition based on the federal grounds for relief asserted in its concurrent federal lawsuit filed in the United States District Court for the Western District of Texas. The PUC properly determined that it cannot deny SIG Magnolia's Petition based on the federal grounds that Dobbin Plantersville has asserted in that court.

The Commission did not err in denying Dobbin Plantersville's Motion to Take Official Notice of the Pending 7 USC §1926(b) Federal Lawsuit, nor did the Commission err in denying Dobbin Plantersville's Motion to Dismiss. Dobbin Plantersville's argument that this administrative proceeding is preempted by federal law ignores the fact that the PUC is a state agency, not a court. In contrast to common law courts, state agencies rarely, if ever, have the power to decide state or federal constitutional claims. *See City of Dallas v. Stewart*, 361 S.W.3d 542, 579 (Tex. 2012) (agencies lack authority to decide takings claims); *Turner v. City of Carrollton Civil Serv. Comm'n*, 884 S.W.2d 889, 894 (Tex. App.—Amarillo 1994, no writ) (municipal agency lacked authority to decide Equal Protection claim). Therefore, state agencies such as the PUC do not have the power to declare the state statutes that they are charged with enforcing preempted pursuant to the Supremacy Clause of the United States Constitution. *Cf Dallas Cent. Appraisal Dist. v. Hamilton*, No. 05-99-0149-CV, 2000 WL 1048537, \*8 (Tex. App.—Dallas July 31, 2000, pet. disp'd w.o.j) ("We know of no authority, and appellants cite to none, which would allow an administrative agency to ignore its statutory duty because administrators believe the statute to be

unconstitutional.”). Furthermore, a state agency has only those powers delegated to it by the Legislature. *See Kawasaki Motors Corp., U.S.A. v. Tex. Motor Vehicle Comm'n*, 855 S.W.2d 792, 797 (Tex. App.—Austin 1993, no writ). Where the Legislature has expressly forbidden an agency to act, the agency has no ability to ignore that statutory prohibition. Dobbin Plantersville’s pleadings in this proceeding do not address this doctrine of administrative law, and thus do not demonstrate how the PUC might have the authority to invalidate a state law and exercise powers not granted to it under state law.

PUC therefore must follow state law, which is clear on this point. Texas Water Code § 13.254(d)(1) provides that the PUC “may not deny a petition based on the fact that a certificate holder is a borrower under a federal loan program.” Thus, the PUC may not deny SIG Magnolia’s decertification Petition based on any purported Dobbin Plantersville loan under 7 U.S.C. § 1926(b). Even if Dobbin Plantersville’s argument that SIG Magnolia’s Petition is preempted by federal law were to correct – and to be clear, it is not, because Dobbin Plantersville is not making service available to SIG Magnolia under the federal standard adopted by the Fifth Circuit – the PUC, as a state agency, could not grant relief based on that argument. Dobbin Plantersville’s Motion fails to address the question of PUC’s authority to disregard a Texas statute in favor of its interpretation of federal law. As a result, PUC should deny Dobbin Plantersville’s Motion for Rehearing and the relief it requests therein.

## **V. Conclusion**

For the reasons set forth above, SIG Magnolia requests that the Commission deny the Motion for Rehearing because Dobbin Plantersville has failed to assert any allegations of error which would support a rehearing of this matter. The Commission should deny the Motion because it does not set forth any proper procedural, substantive, or evidentiary grounds upon which to base

a rehearing. The Commission acted within its statutory authority and discretion and within all applicable constitutional and statutory provisions.

Respectfully submitted,

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BY: *Emily W. Rogers*  
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**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served on all parties of record via email on March 8, 2022, in accordance with the requirements of 16 Tex. Admin. Code § 22.74 and PUC Order No. 2 in Docket No. 50664.

*Emily W. Rogers*  
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