



Control Number: 52090



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PUC DOCKET NO. 52090

2021 JUL -7 PM 4:57

PETITION BY REDBIRD	§	BEFORE THE
DEVELOPMENT, LLC FOR	§	
EXPEDITED RELEASE	§	
FROM WATER CCN NO. 11052	§	PUBLIC UTILITY COMMISSION
HELD BY DOBBIN PLANTERSVILLE	§	
WATER SUPPLY CORPORATION	§	OF TEXAS

REDBIRD DEVELOPMENT, LLC'S RESPONSE TO DOBBIN PLANTERSVILLE WATER SUPPLY CORPORATION'S RESPONSE TO REDBIRD DEVELOPMENT, LLC'S PETITION FOR STREAMLINED EXPEDITED RELEASE AND MOTION TO DISMISS

COMES NOW, Redbird Development LLC's ("Redbird" or "Petitioner") and files Response to Dobbin Plantersville Water Supply Corporation's ("Dobbin Plantersville") Response to Redbird Development LLC's Petition for Streamlined Expedited Release and Motion to Dismiss and would show the following:

I. BACKGROUND

Redbird owns approximately 388.5 acres of land in Montgomery County, Texas that is the subject of Redbird's petition for streamlined expedited release. Redbird intends to development a 575 home residential development on the property. See Redbird's Response to Staff's First Request for Information. Because the Redbird development will be a dense development, the water system must be capable of providing fire flows in addition to potable water service to the 575 connections. Based on conversations with Dobbin Plantersville, and other information, Redbird concluded that Dobbin Plantersville did not have the facilities needed to provide potable water service and fire flows to its development.

II. ARGUMENTS AND AUTHORITIES

A. The Redbird property is not receiving water service from Dobbin Plantersville Water Supply Corporation.

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 Redbird is the owner of at least 25 acres and that the tract is in Montgomery County, a qualifying county. Here the issue is whether Redbird’s property to be decertified is receiving water service from Dobbin Plantersville.

The Austin Court of Appeals in its review of challenges to PUC decisions on what constitutes “receiving service” has articulated the relevant inquiry when upholding decertification. The Court frames the question that should be before the Commission to be not whether the utility, in this case 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.

The appropriate inquiry focuses on:

- The mere existence of water lines or facilities on or near a tract does not necessarily mean that the tract is receiving water service.
- Are there water facilities or lines committed to serving *the particular property* or used to provide water to that tract?
- Has 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. None of the facts presented by Dobbin Plantersville demonstrate that the Redbird property is receiving water service from Dobbin Plantersville.

To start, the mere fact that Dobbin Plantersville has existing facilities near the Redbird property does not mean the Redbird tract is receiving water service from Dobbin Plantersville. Neither Water Plant No. 4 nor the 6-inch and 4-inch water lines along Spring Branch Road are committed to serving the Redbird tract and the Redbird tract is not receiving water from Water Plant No. 4 nor the 6-inch water and 4-inch water lines. They provide water service to Dobbin Plantersville customers not located on the Redbird tract. Dobbin Plantersville states that it only has the capacity to serve approximately 100 additional connections. *See* Page 4 of Dobbin Plantersville’s Response. Further, in proposing that it could build a new water plant “to serve the entire SER property with both potable water and fire flow,” Dobbin Plantersville admits the new construction would be required to serve the property. *Id.* The existing plants and water lines do not have capacity to serve the 575 connections expected in the Redbird development, and the existing plants and lines do not have the capacity to provide the Redbird development with fire flow.

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. 4, Water Plant No. 9, and the other described facilities are committed to serving the Redbird tract. Redbird 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 Plants No. 4 or No. 9, to serve the Redbird tract. The general manager of Dobbin Plantersville admits in her affidavit that these facilities are not committed to providing water service to the Redbird property specifically: “The plan included water system planning for the area including the SER Property.” See Paragraph 5 in Affidavit of Janie Legge, Exhibit B to Dobbin Plantersville’s Response. This admission demonstrates that the described system plan and upgrades are not committed to serving the *particular* Redbird tract.

Further, it is disingenuous to suggest that Dobbin Plantersville was making plans and investments to serve the Redbird property. The property was purchased only recently. See Deed attached as Exhibit C to Redbird’s Petition. There were no agreements or other commitments that were part of the Redbird property when Redbird acquired the property. 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 Redbird property would be developed. It seems imprudent to make “planning” decisions for serving a piece of property without this information.

Moreover, Dobbin Plantersville’s statement that it could expand or build a new water plant with the capacity to serve the *entire* Redbird development is inconsistent with its assertion that it has facilities committed to and has performed acts or supplied water to the particular tract. See Page 4 of Dobbin Plantersville’s Response. Water Plant No. 4 and No. 9 and Dobbin Plantersville’s water lines are not sufficiently sized to provide potable water service and fire flows to the 575

connections that are planned for the Redbird development. Had these facilities been “committed” to providing water service to the Redbird property, they would have been sized to provide potable water service and fire flows to the development.

For all of these stated reasons, Redbird is not receiving water service from Dobbin Plantersville.

B. The Redbird’s petition for expedited release is not preempted by 7 U.S.C. § 1926(b)

Dobbin Plantersville incorrectly argues that the Commission is preempted by 7 U.S.C. section 1926(b) from adhering to and performing its duties clearly laid out in Texas Water Code section 13.2541. There is no direct conflict between the federal and state law that would give rise to a preemption issue. The existence of a federally guaranteed loan does not prohibit the Commission from properly amending a certified area. Further, the Petitioner is not receiving water service from Dobbin Plantersville nor has it been provided or made available. Accordingly, Dobbin Plantersville’s motion to dismiss on the basis that it enjoys protection under Title 7 United States Code section 1926(b) must be denied.

i. Though the language in 7 USC § 1926(b) does not conflict with Tex. Water Code § 13.2541(b), the Commission cannot make a preemption determination.

Nothing in the text of section 1926(b) expressly preempts or conflicts with Water Code section 13.2541(d).¹ Further, the plain text of section 1926(b) applies to curtailment by municipal

¹ Section 1926(b) reads in full:

(b) Curtailment or limitation of service prohibited: The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 USC § 1926(b). There is a presumption against preemption, unless there is a “clear and manifest purpose of Congress” within the text to preempt a state’s regulatory authority. *See generally, Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). When there is more than one possible interpretation, courts accept the interpretation that disfavors preemption. *Id.*

corporations and public bodies. Redbird is a private landowner and limited liability corporation, not a municipality or public body. Regardless, the Commission cannot make a preemption determination and must process Redbird's petition in accordance with Chapter 13 of the Texas Water Code.² The Commission is bound by Texas Water Code section 13.2541(d), which states that the "utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program."³ Because section 1926(b) does not impair the Commission's mandate to release the property in question from Dobbin Plantersville's CCN, the existence of Dobbin Plantersville's current USDA and CoBank loans and loan applications are immaterial.

ii. No binding precedent exists that Tex. Water Code § 13.2541(d) is preempted by 7 USC § 1926(b) pursuant to the Supremacy Clause

Dobbin Plantersville's claim of protection under 7 U.S.C. § 1926(b) is unsupported by law. Although a federal district court in *Crystal Clear v. Marquez* had previously held that 7 U.S.C. section 1926(b) preempted Texas Water Code section 13.2541 (formerly, sections 13.254(a-5) and (a-6)), Dobbin Plantersville also correctly points out that that decision has been vacated by the Fifth Circuit.⁴ A vacated ruling is no longer valid law.

But Dobbin Plantersville, even after recognizing the Fifth Circuit's vacation, nevertheless attempts to assert that the Commission is bound by courts in other circuits – with no binding authority over Texas – that allegedly have held a Texas Water Code provision has been preempted. That is not the case. The Tenth Circuit case⁵ cited by Dobbin Plantersville is distinguishable both

² A court, not an agency, must make a constitutional determination. *See Cent Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex 1997) ("Where, as here, the final agency order is challenged in the trial court on the ground that the underlying statute is unconstitutional, the agency lacks the authority to decide that issue.")

³ Tex. Water Code § 13 2541(d).

⁴ *See Order, Crystal Clear Spec. Utility District v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020 (per curium)).

⁵ *Rural Water Sewer & Solid Waste Mgmt., Dist No 1 v City of Guthrie*, 344 Fed. Appx. 462 (10th Cir.2009)

factually and on the basis that the Tenth Circuit was not considering the Texas statute in question. The more than a decade old case that examined an *Oklahoma* law and Oklahoma *municipality* has no bearing on a *Texas* law or a Texas *limited liability corporation*.⁶ Regardless, the recent Fifth Circuit decision in *Green Valley Special Utility District v City of Schertz* specifically dismissed Green Valley SUD's preemption claim for *this* statute and determined that the court lacked jurisdiction to consider such a claim.⁷ It is by no means settled that the existing law is preempted.

The fact remains that no court with binding authority over the Commission has ruled on the preemption question raised by Dobbin Plantersville. As such, there is no Supremacy Clause issue. The PUC must comply with the valid state law section 13.2541(d), which clearly states that the Commission may not take Dobbin Plantersville's federally indebted status into consideration.

iii. 7 U.S.C. § 1926(b) could not protect the property in question because service has not been provided or made available to Redbird.

Setting aside the preemption issue, the mere existence of a loan is not enough. Section 1926(b) requires that a rural water association asserting protection show: (1) qualifying federal indebtedness; and (2) that service has been provided or made available. *See* 7 U.S.C. § 1926(b). In *Green Valley SUD v. Schertz*, the Fifth Circuit held that whether a service has been "provided or made available" depends upon a "physical capability" test, which requires the service provider to have (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. *See Green Valley Special Utility District v. City of Schertz, Texas*, 969 F.3d. 460 (5th. Cir. 2020) (overturning the Fifth Circuit's

⁶ The decision does in fact conform with the Commission's argued position in *Green Valley Spec. Utility District v. City of Schertz* that section 1926(b) applies to local governments, but not to the regulatory authority of an arm of the state, like the Commission. *See* Br For Appellant Pub. Utility Comm'n *et al.*, at 30-31, *Green Valley Spec Utility District v. City of Schertz*, 2019 WL 2250158 (5th Cir. 2019).

⁷ *See Green Valley Special Util Dist. v. City of Schertz*, 969 F.3d 460, 411 and 478 (5th Cir. Aug. 7, 2020) (en banc).

1996 decision in *North Alamo Water Supply Corporation v. City of San Juan*). Here, Dobbin Plantersville does not have adequate facilities to provide service to the area. As detailed above in Section II.A, the Redbird property is not receiving water service from Dobbin Plantersville Water Supply Corporation and Dobbin Plantersville's facilities do not have the capacity to serve the Redbird's development with potable water service and fire flows.

iv. The Commission does not lack jurisdiction over this matter.

Dobbin Plantersville's argument that the PUC lacks jurisdiction over this matter due to federal courts' original jurisdiction over this matter is incorrect. The Public Utility Commission has exclusive jurisdiction over streamlined expedited releases initiated by a landowner. *See* Texas Water Code § 13.2541. Federal courts do not have jurisdiction over streamlined expedited releases under section 13.2541. Dobbin Plantersville has not filed a 7 U.S.C. § 1926(b) lawsuit in a federal court on this matter. Jurisdiction over this matter – a section 13.2541 streamlined expedited release initiated by a landowner – clearly rests with the Public Utility Commission. *See* Texas Water Code § 13.2541.

Additionally, Dobbin Plantersville's argument is circular. If the Commission were to dismiss this matter, the area in question would not be removed from the CCN; thus, there would be no alleged section 1926(b) controversy over which a federal court could exercise its jurisdiction. Further, without a current federal proceeding, there is no federal court exercising jurisdiction, and therefore this suit does not affect judicial economy.

III. CONCLUSION AND PRAYER

Wherefore, the Petitioner respectfully requests that the Commission deny Dobbin Plantersville's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Response to Dobbin Plantersville Water Supply Response to Redbird's Petition for Streamlined Expedited Release and Motion to Dismiss was provided to all parties of record via electronic mail or regular mail on July 7, 2021, in accordance with the Order Suspending Rules, issued in Project No 50664.

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