



Filing Receipt

Received - 2021-11-22 12:37:48 PM
Control Number - 52090
ItemNumber - 54

PUC DOCKET NO. 52090

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
MOTION FOR REHEARING**

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, Redbird Development, LLC (“Redbird”) and files this, its response to the Dobbin Plantersville Water Supply Corporation’s (“Dobbin Plantersville”) Motion for Rehearing (the “Motion for Rehearing”). Redbird disagrees with Dobbin Plantersville’s Motion for Rehearing and urges the Public Utility Commission (the “Commission” or “PUC”) to overrule the Motion. The Commission issued the Order granting Redbird’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 October 12, 2021. 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 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.

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 Redbird’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 14, 22, 23, 26, 27, and 30, and proposes the addition of findings 31 and 32. It also requests the amendment of Conclusions of Law 9, 10, and 11, and the deletion of Numbers 13 and 14. Finally, Dobbin Plantersville requests the wholesale replacement of the Ordering Paragraphs with a new paragraph that completely reverses the Order by denying Redbird’s Petition.

Dobbin Plantersville claims in its Motion for Rehearing that it has committed facilities to provide service to Redbird’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* [Redbird] 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 Redbird 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 Redbird. *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

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 develop a 575 home residential development on the property. *See* Affidavit of Perry Senn attached to Redbird Development, LLC’s Supplemental Response to Dobbin Plantersville Water Supply Corporation’s Motion to Dismiss. 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.

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 Redbird

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 release 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 that were not constructed for the specific purpose of serving the particular tract.¹ None of the facts presented by Dobbin Plantersville in its Motion for Rehearing are new. Dobbin Plantersville has not demonstrated that the Redbird property is receiving water service from Dobbin Plantersville.

C. The record evidence demonstrates Redbird'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 Redbird property. However, under the principles described above, this does not mean the Redbird 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. 4, and the 6-inch and 4-inch water lines along Spring Branch Road – are not located on the Redbird tract, are not currently serving the Redbird tract, nor are they committed to serving the Redbird tract with water in the future. These facilities provide water service to Dobbin Plantersville customers not located on the Redbird tract. And, as Dobbin Plantersville states, those facilities only have the capacity to serve approximately 100 additional connections. *See* Page 4 of Dobbin Plantersville's Response to Redbird's Petition. Further, in proposing that it could conceivably build a new water plant "to serve the entire SER property with both potable water and fire flow," Dobbin Plantersville admits the new construction (at Redbird's cost) would be required to serve the property. *Id.* The existing plants and water lines do not have capacity to serve the 575

¹ Dobbin Plantersville cites to Docket No. 51352, Petition of Carnegie Development, LLC to Amend James A. Dyche DBA Crest Water Company Certificate of Convenience and Necessity in Johnson County by Expedited Release for the proposition that the Commissioners have defined what is meant by having "committed" facilities to provide water service to a particular tract. The Commissioners' discussion made it clear that the CCN holder must have made "tangible commitments." The goal of the Commission is to ensure that landowners are not "locked up in a captive market," and that they can obtain reliable service in a timely manner. *See* Item 34 of the PUC's May 21, 2021 Regular Meeting.

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.

Nothing in the record demonstrates that Dobbin Plantersville has committed facilities or made other contractual commitments to provide potable water service to the 575 connections at Redbird's property or to provide water pressures sufficient to meet fire protection needs. As noted in Perry Senn's Affidavit, Redbird has not requested service from Dobbin Plantersville because Redbird has already ascertained that Dobbin Plantersville cannot provide the required service, and there are no contractual commitments, verbal or written, whereby Dobbin Plantersville has committed to constructing facilities to serve the Redbird tract. *See* Affidavit of Perry Senn attached to Redbird Development, LLC's Supplemental Response to Dobbin Plantersville Water Supply Corporation's Motion to Dismiss.

Dobbin Plantersville mischaracterizes that Water Plant No. 4, Water Plant No. 9, and the other described facilities are "committed" to serving the Redbird tract. This is not true. As previously noted, Redbird has no request for service with Dobbin Plantersville and has no contractual, either verbal or written, arrangement whereby Dobbin Plantersville has committed any facilities, including Water Plants No. 4 or No. 9, to serve the Redbird tract. The former general manager of Dobbin Plantersville admitted 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 to Redbird's Petition. This admission demonstrates that the described system plan and upgrades are not committed to provide water service to the *particular* Redbird tract.

Further, because Redbird only acquired the release tract recently, any planning or investments done by Dobbin Plantersville would have been done without having received a request for service, without any agreement or other commitment, 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 contention 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 to Redbird’s Petition. 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. Redbird, at its own cost, would be required to make substantial improvements to the Dobbin Plantersville’s system for it to be able to provide those services at some indeterminate time in the distant future. 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.

The record evidence does not support the modifications 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 Redbird’s Petition.

In its Motion for Rehearing, Dobbin Plantersville requests a modified Finding of Fact 14 and the addition of new Findings of Fact 31 and 32, an entirely new Ordering Paragraph denying the Petition, a modified Conclusion of Law 9, and reconsideration of its Motion to Abate this

proceeding. The basis for these requested changes to the Order is its erroneous position that the PUC is precluded from considering or granting Redbird'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 Redbird's Petition based on the federal grounds that Dobbin Plantersville has asserted in that court.

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. dism'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 Redbird’s decertification Petition based on any purported Dobbin Plantersville loan under 7 U.S.C. § 1926(b). Even if Dobbin Plantersville’s argument that Redbird’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 Redbird 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 under federal law.

V. Conclusion

For the reasons set forth above, Redbird 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,

Emily W. Rogers
State Bar No. 24002863
erogers@bickerstaff.com

Joshua D. Katz
State Bar No. 24044985
jkatz@bickerstaff.com

Kimberly G. Kelley
State Bar No. 24086651
kkelley@bickerstaff.com

Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

BY: *Emily W. Rogers*
Emily W. Rogers

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record via email on November 22, 2021, in accordance with the requirements of 16 Tex. Admin. Code § 22.74 and PUC Order No. 2 in Docket No. 50664.

Emily W. Rogers
Emily W. Rogers